Case Number:	Civil Appeal 230 of 2004
Date Delivered:	25 Mar 2011
Case Class:	Civil
Court:	Court of Appeal at Eldoret
Case Action:	Judgment
Judge:	Riaga Samuel Cornelius Omolo, Samuel Elikana Ondari Bosire, Alnashir Ramazanali Magan Visram
Citation:	Mulembe Farm Limited & another v John B. Masika & 3 others [2011] eKLR
Advocates:	-
Case Summary:	***Civil practice and procedure – review*** *– appeal against dismissal of an application for review – where the application sought to review the High Court's decision of distributing the suit land – grounds that the High Court used the wrong yardstick in distribution – factors the court should consider in determining an application for review – where the High Court took steps to fault the previous High Court's criteria of distribution – whether the High Court exceeded its jurisdiction – whether the appeal had merit – Civil Procedure Act (Cap 21) sections 3A,80, Civil Procedure Rules Order 44 rules 1 & 2.*

Court Division:	Civil
History Magistrates:	-
County:	Uasin Gishu
Docket Number:	-
History Docket Number:	29 OF 1997
Case Outcome:	Appeal Dismissed
History County:	Uasin Gishu
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OMOLO, BOSIRE & VISRAM JJ.A)

CIVIL APPEAL No. 230 OF 2004

BETWEEN

MULEMBE FARM LIMITED .....1ST APPELLANT

SIMEON MUSUNGU .....2ND APPELLANT

AND

JOHN B. MASIKA .....1ST RESPONDENT

WANYAMA BIKETI ..... 2ND RESPONDENT

SIMEON MASIKA .....3RD RESPONDENT

YOHANA MULAMA .....4TH RESPONDENT

(Appeal from the decision and ruling of the High Court of Kenya at Eldoret (Nambuye J.) dated 18th November 2002

in

KITALE H.C.C.C. NO. 29 OF 1997

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JUDGMENT OF THE COURT

By their plaint dated 4th March 1978, **John B. Masika** (*1st respondent*) **Wanyama Biketi** (*2nd Respondent*), **Simeon Masika** (*3rd respondent*) and **Yohana Mulama** (*4th respondent*), brought action against **Mulembe Farm Limited** (*1st appellant*) and **Simeon Musungu** (*2nd respondent*) seeking, on the main a declaration that the alleged forcible encroachment into their respective portions of land known as L.R. No. 9082/1, Trans Nzoia District of Rift Valley Province, was null and void and that the respondents were the rightful beneficiaries thereof. They also prayed for an order of injunction restraining the appellants from, in effect, interfering with their occupation of those portions.

The appellants in a joint written statement of defence denied that they encroached on the respondents' respective portions, and averred that if there was any encroachment it was a lawful act of sharing the aforesaid property among those entitled to it.

At the close of pleadings the hearing of the case commenced before the late Mbaya J. who after taking evidence of five witnesses left the station and later Tunoi J. (as he then was) by consent of the parties continued the hearing from where the late Mbaya J. left. What emerged from the evidence was that the suit land was originally registered in the name of Kasawai Estates Ltd. About 16 people came together and agreed to jointly lease the land and use it for agricultural purposes. Later however, they expressed an intention of purchasing the land. The price was discussed and agreed at Kshs.190,000/= which the group raised through contributions. It was agreed that each acre would cost Kshs.335/=. The total acreage of the land was 568 acres.

The contributions by the members of that group were unequal. Each member made payment according to his ability. It was common ground that the payment of the purchase price was completed in early *1977*. It is however clear from the evidence that the land was purchased in the name of the 1st appellant which was incorporated on or about *14th July 1964*, with all the 16 people as shareholders. Along the way the company had difficulties paying for the land and also debts it had incurred through seasonal loans, and the purchase of a tractor on credit. Following those problems the directors of the company who included the 2nd appellant invited other people to become shareholders on payment of agreed sums of money. The move increased the shareholders to 19. It is also in evidence that some shareholders secretly sold their shares to other people. Following the increase of shareholders a dispute arose as to how much land each shareholder would be allotted. That is what precipitated the respondent's suit, and also another civil suit, to wit, **Eldoret High Court Civil Case No. 2 of 1983**. The plaintiffs in that other suit were different from the respondents. The named defendant was the 1st appellant. That suit was compromised on terms that each of the seven plaintiffs in the suit as also the remaining shareholders would receive designated acreages of land. A consent letter dated *25th January 1983,* was filed signed by the seven plaintiffs and three directors of the 1st appellant who included the 2nd appellant.

At the hearing of the respondents' suit there was no mention of **Eldoret High Court Case No.2 of**

1983. Consequently Tunoi J. in his judgment did not make any mention of the case.

Apart from the issue of acreage, there was a dispute at the hearing as to how the outstanding debts of the 1st appellant would be paid. The appellant's case was that the debts needed to be proportionately shared among all shareholders and the same be treated as being part of their respective contributions towards the purchase of the land in dispute. The respondents on the other hand contended that since the price per acre had been agreed upon before the land was bought, that would be the yardstick for determining each shareholder's entitlement to the land.

In his judgment Tunoi J. found as fact that the respondents had respectively contributed Kshs.8,375, Kshs.10,240/= Kshs.14,216/= and Kshs.6,840/= and on the basis of Kshs.340/= as the price per acre, they would each respectively get 4; 18; 7 and 4 acres. It is not clear how he arrived at the figure Kshs.340/= as the evidence was clear that the price per acre was Kshs.335; which was arrived at by dividing the purchase price of Kshs.190,000 by the entire acreage of the farm, which as stated earlier, was 568 acres.

The learned Judge disbelieved the 2nd appellant and in effect held that he, the 2nd appellant had acted fraudulently against unsuspecting shareholders and by doing so he abused his position as chairman of the first appellant. The learned Judge was of the view that the debts which the company allegedly incurred were infact incurred by him for his own benefit as it was not clear to him for example, for whose benefit a tractor was bought as no evidence was adduced as to its whereabouts. He was suspicious of the alleged purchase of a tractor as no bank accounts or statements were produced to authenticate the purchase, and whatever documents were produced were crudely doctored by the 2nd appellant with a view to deceiving the court. The learned Judge therefore rejected them. The learned Judge's judgment was delivered on *9th October, 1996* although it bears the date *4th October 1996*. Both appellants were dissatisfied with it, but they did not appeal against it. Nor did they take any steps to challenge it until over two years later, when they took out a motion under **Order XLIV rules 1** and **2** of the Civil Procedure Rules and **Sections 3A** and **80** of the Civil Procedure Actpraying that the judgment dated 4th October, 1996, be reviewed:

(a) With a view to working out the acreage for each shareholder of the suit land.

(b) With a view to taking into account payment of debts *" in terms of the memorandum of Articles of Association*" of the 1st appellant.

(c) To avoid conflict with the orders made by the High Court in Eldoret High Court Civil Case No. 2 of 1983.

(d) With a view to harmonizing it with orders which had been made in Kitale High Court Civil Application No. 37 of 1997.

The 2nd appellant swore the affidavit in support of that motion. In it he deposes that the judgment aforesaid, was delivered in his absence, the said judgment is not capable of being given effect on the ground according to members' contributions; that members' contributions need to include payments made towards liabilities of the 1st appellant incurred between *24th April 1974*, and *28th January 1977*, as the payment of those liabilities was the responsibility of all members including the respondents; that the total liabilities amounted to Kshs.147,170/= which all members had agreed to pay by signing the company's register; that the yardstick the trial Judge arrived at had the effect of denying other members of a share of the land; that the yardstick agreed upon by all shareholders was Kshs.335/=; that each member's share was determined in **Eldoret High Court Civil Case No. 2 of 1983** and that none of the members of the company appealed against that decision; that the respondents had sold their portions of land to non-shareholders long before the judgment which was sought to be reviewed, and those who bought their shares did not meet membership requirements of the 1st appellant; that the land had not been transferred from the name of its original owner and for that reason further expenditure would be entailed for doing so.

In a replying affidavit sworn by Simeon Masika Wamukota four main issues were raised in response to the motion namely, that there was a similar earlier motion on the same terms which was still pending, the question of liabilities was considered in the judgment which was sought to be reviewed and the same were rejected; no explanation had been given as to why **Eldoret High Court Civil Case No. 2 of 1983** was not raised at the trial, and the appellants did not explain why they did not prefer an appeal against the decision.

Nambuye J. heard the motion. In her view, except the issue of the yardstick, the motion did not meet the threshold stipulated under the review provisions for granting a review. All the grounds relied upon, she said, were matters which were either dealt with by the trial Judge or that they were such as were within the appellants' knowledge and could have but were not raised at the trial. And as for the yardstick, she was of the view that the trial judge erroneously relied on a yardstick of Kshs.340/=. She treated it as a mathematical error, did a calculation herself using the yardsticks of Kshs.335/=, Kshs.334 and Kshs.340/= and came to the conclusion that the most appropriate one was either Kshs.334/= or Kshs.335/=. In the end she reviewed the yardstick but did not find it necessary to review the respondents' respective acreages, probably because applying either Kshs.334 or Kshs.335/= per acre would give about the same acreage. Consequently she confirmed the trial Judge's judgment on that score, and dismissed the review application; and thus provoked this appeal.

Counsel for the parties addressed us on three combined grounds out of the 18 which are in the memorandum of appeal, and those are:

(a) "The learned judge having been made aware by both counsel of the existence of Eldoret High Court Civil Case No. 2 of 1983 and she having considered the plaint for the suit erred in law and fact in saying that the final orders therein were not annexed so she could confirm the issue of the cost of an acre which had no dispute".

(b) "The learned judge having found two possible yardsticks for the cost of an acre in this case erred in law in leaning on the inconsistent yardstick other that constituent which yardstick could not be translated on the ground".

(c) The learned judge erred in fact in finding that the 1st appellant's liabilities were to be borne by both appellants alone and not the respondents which finding affected the entire shares of the appellant.

We note that the manner in which the appellants framed their grounds of appeal were reminiscent of grounds which challenge the correctness of a judgment on appeal. The appeal before us is against a ruling on a review application, and the factors which guide the court on a review application are set out in the relevant provisions on review. Nambuye J. had cognizance of those factors, because she set them out in her ruling. Those factors are, firstly, that an applicant must show that there exist new and important matter or evidence which after exercise of due diligence were not within his knowledge or could not be produced at the time the decree or order was made. Secondly, and in the alternative, that there is some mistake or error apparent on the face of the record. Thirdly, and in the alternative, for any other sufficient reason.

The learned Judge then considered each aspect and came to the conclusion, quite properly so, in our view, that both appellants did not satisfy her on any of the three aspects. In this appeal, Mr. Kraido for both appellants submitted that his clients were relying on "any *other sufficient",* reason in seeking review. In his submission he emphasized the fact that the decision of Tunoi J. could not be translated on the ground, and also that a wrong yardstick was arrived at by the trial judge and therefore review should have been allowed so that the decision of the court could be given effect on the ground.

Whether or not a decision or order should be reviewed is a matter within a judge's own discretion. For an applicant to succeed he must place material before the court to show any one or a combination of the three factors which we earlier set out. The appellants did not satisfy that condition. The power of review is not the same as the power exercisable on appeal. That is why the jurisdiction of the court in review is circumscribed. The court in a review is called upon to exercise a discretion in a situation where, if the power is not exercised injustice or hardship will result and is invoked to help a party who is shown to have taken all essential steps in a matter but because of factors beyond his control he was not able to avail all relevant material or evidence, or that an error or mistake occurred.

The applicants waited for over two years before they took out a motion seeking review. The matters they raised were neither new nor such that by exercise of due diligence they would not have had access to

them at or before the time the judgment regarding which a review was sought, was pronounced. For instance regarding Eldoret *High Court Civil Case No. 2 of 1983*, the 1st appellant was a party and the 2nd appellant was one of the three directors who signed a consent on the 1st appellant's behalf. They did not involve the respondents in that litigation. It would appear the case was handled behind the backs of the respondents. That is why Nambuye, J. thought that that issue was not a relevant factor in a review application.

Likewise concerning the liabilities of the 1st appellant, the issue was raised at the trial and was rejected by the trial judge. That being the case it is not a factor one can properly bring within the ambit of the review jurisdiction. It was neither a new matter nor a matter which could be termed as a mistake on the face of the record because it is not. Nor, is it a matter which could be classified "*as any other sufficient reason".*

The learned judge was right when she held that the grounds which the appellants relied upon for seeking review were appropriate for an appeal; and we cannot but affirm her decision on that aspect.

As regards her decision regarding the yardstick, the learned Judge was of the view that Tunoi, J. was in error when he applied the price of Kshs.340/= per acre as the yardstick. That obviously was not an error on the face of the record. One needed to consider the evidence before coming to the conclusion that the trial judge erred. Clearly Nambuye, J. exceeded her jurisdiction when she took steps to correct that error more so because the correction did not alter Tunoi J.'s final decision.

Before we pen off, there is one issue which was raised in the memorandum of appeal regarding delay in giving a ruling in the application. Nambuye, J. reserved her ruling on *24th July, 2001* with a direction that it would be delivered on *20th September, 2001*. It was not, however, delivered until *18th November, 2002*, slightly over one year since it was reserved. The judgment itself was reserved on *22nd September, 1995,* to be delivered on *29th September, 1995*. It was not delivered then. It was adjourned to *4th October, 1996*. It was not delivered on that day as well. Tunoi J. prepared it and it was delivered on *9th October, 1996* by a different judge on his behalf

The appellants complain that the delay in delivering both the judgment and the ruling occasioned a serious failure of justice. We note that the judgment was not delivered after 7 years as alleged by the appellants. It remained undelivered for about a year and the delay appears explainable. Apparently the trial judge went on transfer and it was not possible to prepare the judgment with promptitude. That would appear to be the same with the delay in delivering the ruling appealed from. The appellants did not point out to us how the delay prejudiced them. We say no more on that matter.

In the result, we are satisfied that this appeal has no merit and it is accordingly dismissed with costs.

Dated and delivered at Eldoret this 25th day of March, 2011.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR