IN THE COURT OF APPEAL AT KISUMU

(CORAM: ASIKE-MAKHANDIA, OMONDI & MUCHELULE, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 49 OF 2018

BETWEEN

ZAKAYO WASWA.....APPELLANT/APPLICANT

AND

MILETUS CHARLES NYONGESA.....RESPONDENT

(Being an application for review setting aside the judgment of this Court ***(Kiage, Mumbi Ngugi & Tuiyott, JJA.)*** *dated 23rd June 2023*

in

HCCC No. 43 OF 2001)

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RULING OF THE COURT

1. The background of this application is that, the appellant/applicant, Zakayo Waswa, challenged the decision of the High Court at Bungoma (Makunya, J.) which found that his claim that the respondent, Miletus Charles Nyongesa, had fraudulently acquired land parcels Nos. West Bukusu/North Mateka/77 (measuring 2.8. hectares) and West Bukusu/North Mateka/85 (measuring 0.6 hectares) had not been established. The High Court had also found that the cause of action had arisen in 1987, and therefore the claim was time barred. The suit was struck out.

2. The appellant was aggrieved and appealed to this Court.

3. This Court (Kiage, Mumbi Ngugi, & Tuiyott, JJ.A.) heard the appeal, and found that the suit was not time-barred. On the question whether the suit properties had been fraudulently transferred to the respondent herein, the court found that fraud had been established and issued the following orders:-

> ***"In the end my considered view of the appeal is that it should partly succeed. I would therefore set aside the learned Judge's orders and substitute therefor these orders;***
>
> ***a) A declaration that the registration of the respondent as proprietor of land parcel number West Bukusu/North Mateka/77 was fraudulently done and unlawfully obtained and the appellant is still the rightful and lawful owner of the same.***
>
> ***b) The respondent does transfer parcel number West Bukusu/North Mateka/77 to the appellant, failing which the Deputy Registrar of the Court be authorised and empowered to execute all documents necessary to transfer and restore the said parcel to the appellant.***
>
> ***c) The appellant shall have the costs of this appeal and of the suit at the High Court.***
>
> ***As Mumbi Ngugi and Tuiyott, JJ.A agree, it is so ordered."***

4. It is notable that the High Court decision was rendered on 22nd February 2018, the appeal was heard on 9th March 2022 and was determined on 23rd June 2023. During the hearing of the appeal, the appellant/applicant was represented by

learned

counsel Mr. C. Akhaabi who had filed written submissions. The respondent was absent, as was his advocate learned counsel Mr. Kituyi who had not filed written submissions.

5. By way of motion dated 7th September 2023, pursuant to **Rule 102(2)** of the **Court of Appeal Rules** and **section 3A** and **3B** of the **Appellate Jurisdiction Act**, the respondent sought an order for the stay of execution of this Court's ruling delivered on 23rd June 2023, and an order that the judgment be set aside and the appeal be reheard. He complained that on the day of the hearing of the appeal, he was absent as was his advocate and that no written submissions had been filed on his behalf. The reason for his absence was that he had not been served with any hearing notice, and therefore he did not know that the appeal was coming up for hearing. He became aware of the judgment on 11th August 2023, and therefore this application had been brought without delay.

6. His further case was that, his advocate had informed him that he had not been invited to attend the case management session and was not therefore aware of the directions in relation to the filing of written submissions.

7. The respondent got his then advocate, learned counsel Mr. Kituyi, to swear an affidavit to support the application. It is evident that his law firm was served through their email to attend case management, and that it was served with the

hearing notice for the hearing of the appeal. Learned counsel stated that, although there is evidence of service, he was not aware of either. The record states that he attended case management, but he stated that he did not.

8. Finally, the respondent requests that the mistakes of his counsel should not be visited on him.

9. The motion was opposed. According to the appellant, it was evident that the respondent's advocate was served with the hearing notice, therefore there isn't any sufficient reason why he should be indulged. In any case, the application has been overtaken by events as the judgment had since been executed. Learned counsel for the appellant further pointed out that, the respondent's advocate had been served with hearing notice at the stage of case management and at the stage of the hearing of the appeal. In each case, his email address had been used. The email address by the Court's registry corresponds with the email address supplied by learned counsel Mr. Kituyi in his pleadings, it was urged. It cannot therefore be said that learned counsel did not receive the emails.

10. When we listened to counsel Mr. Onyango who now represents the respondent, admitted the email used to serve learned counsel Mr. Kituyi was the correct one, but that the court record was incorrect when it stated that learned counsel Mr. Kituyi was present for the case management. If he was not present, it was

argued, he did not become aware of the direction on the filing and submissions.

11. We have considered the application, the rival affidavits and the submissions of either side.

12. In ***Benjoh Amalgamated Limited -vs- Kenya Commercial Bank Limited [2014] eKLR***, this Court was dealing with the question whether it had power to review its decision. It stated as follows:-

> ***"The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose***

13. The decision in ***Benjoh Amalgamated Limited*** *(*supra) was followed in ***Standard Chartered Financial Services Ltd & Another -vs- Manchester Outfitters (Suiting Division) Ltd & 2 Others [2017]eKLR*** in which the Court reiterated that it had residual jurisdiction to review its decisions in exceptional

circumstances. In the case, the Court set aside its judgment on the basis that it was made without jurisdiction. Further that, there was the likelihood of bias as one of the Judges had had contact with one of the parties.

14. Lastly, in the Supreme Court decision of ***Fredrick Otieno Outa -vs- Jared Odoyo Okeyo & 3 Others [2017] eKLR***, identified the exceptional circumstances where the court, in exercise of its inherent powers, may, upon application by a party, or on its own motion, review any of its own judgments, rulings or orders to meet the ends of justice. The circumstances were limited to:-

a) where the judgment, ruling or order, was obtained by fraud or deceit;

b) where the judgment, ruling or order was a nullity, such as when the Court itself was not competent;

c) where the court was misled into giving judgment, ruling or order under a mistaken belief that the parties had consented thereto; and

d) where the judgment, ruling or order was rendered on the basis of repealed law, or as a result of, a deliberately concealed statutory provision.

15. In the current application, the respondent seeks review of the judgment on the ground that counsel then on record was not aware of the case management session that was before the Deputy Registrar of this Court, and thus was not able to file written submissions in the appeal. Secondly, that despite

the

registry having used the correct email address to send out the hearing notice with a reminder to file written submissions, the previous counsel asserted that he had not been in receipt of the emails from the Court.

16. It is our considered view that, the registry did all that was required by the law to invite the respondent's counsel for case management and for the hearing of the appeal. We accept the court record that the learned counsel attended the case management and therefore was aware that he was required to file written submissions, which he failed to do. It is on record that he was reminded by email to file written submissions. He failed to heed. He was emailed the hearing notice. He did not attend the hearing. His is a clear case of professional misconduct. The respondent has recourse elsewhere.

17. The respondent was as early as 2018 aware of the appeal. It looks like it took him over 4 years to find from his then counsel what had become of the appeal. That was not an action of a vigilant and/or a prudent litigant. The exceptional inherent power donated to this Court to review its judgment, ruling or order is not meant to help such counsel or litigant. We find that the finality principle to have conclusiveness to the land dispute between the appellant and the respondent would serve the interests of justice in this case.

18. In the final analysis, we find no merit in the application which we dismiss with costs to the respondent.

Dated and delivered at Kisumu this 24th day of October 2025

ASIKE-MAKHANDIA

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...
JUDGE OF APPEAL

H.A. OMONDI

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...
JUDGE OF APPEAL

A.O. MUCHELULE

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...
JUDGE OF APPEAL

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

SIGNED

DEPUTY

REGISTRAR