Muroki Estates Limited v Mengo Farm Limited (Civil Application E344 of 2021) [2024] KECA 1101 (KLR) (19 August 2024) (Ruling)

Neutral citation: [2024] KECA 1101 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E344 OF 2021

DK MUSINGA, MSA MAKHANDIA & M NGUGI, JJA

AUGUST 19, 2024

BETWEEN

MUROKI ESTATES LIMITED ..... APPLICANT

AND

MENGO FARM LIMITED ..... RESPONDENT

((Being an application for setting aside in total the Judgment and Order made by this Court (M'Inoti, Murgor & Kantai, JJ.A.) on 24th July 2020 in Civil Appeal No. 63 of 2011))

RULING

1. By an application dated 24th September 2021 brought under Article 25 (c), 50, 10, 159 and 259 of the *Constitution*, Section 3 of the *Judicature Act*, section 3 of the *Appellate Jurisdiction Act* and rule 1 (2) of the *Rules* of this Court, the applicant seeks an order to set aside this Court's judgment dated 24th July 2020 in Civil Appeal No. 63 of 2011, *Muroki Estates Limited vs. Mengo Farm Limited*. The applicant also asks the Court to give directions on the hearing of the application for reinstatement dated 8th October 2019.

2. A brief background of this application is necessary to put it in context. The parties were involved in a dispute over the ownership and possession of a parcel of land known as LR No. 11437 situate in Trans Nzoia, (hereinafter referred to as "the suit property"). Following a chequered history of litigation before various courts over the suit property, the High Court (Sitati, J.) on 17th February 2011 in Nairobi HCCC No. 534 of 2005 issued orders directing the eviction of members of the applicant from the suit property.

3. Being dissatisfied with that decision, the applicant instructed Risper Arunga & Co. Advocates to lodge an appeal. The said Advocates filed an appeal before this Court, to wit, Civil Appeal No. 63 of 2011. When the appeal came up for hearing on 28th October 2015, the Court (Visram, Warsame & J.

Mohammed, JJA) invoked the provisions of rule 102 of the *Rules* of this Court, 2010 and dismissed the appeal for non-attendance.

4. Sometime in the year 2019 the applicant instructed Mitey & Associates Advocates to take over the conduct of the matter on its behalf. The advocates filed a Notice of Change of Advocates dated 8th October 2019. They also filed an application dated 8th October 2019 seeking orders for the reinstatement of the appeal.

5. The applicant set out a chronology of events which took place after the filing of the application for reinstatement. We summarize the said events as hereunder:

   i. On 19th November 2019 the applicant's advocate received a Hearing Notice from the Court indicating that the application dated 8th October 2019 would be heard on 5th December 2019.

   ii. On 29th November 2019 the applicant's advocates received email communication from the Registrar of this Court informing them that the application had been taken out of the cause list for 5th December 2019 owing to inadequate number of judges.

   iii. The Registrar of this Court sent to the parties a Hearing Notice dated 24th February 2020 which indicated that hearing of the application would take place on 6th April 2020.

   iv. On 22nd July 2020, the applicant's advocate received email communication from the Registrar's office communicating the date for delivery of a ruling on the application. The subject of the said email read as follows: "Delivery of Ruling: Civil Appeal (Application) No. 63 of 2011: *Muroki Estates Limited vs. Mengo Farm Limited*".

   It read in part:

   > " I have been directed to inform you that Ruling on this application shall be delivered on Friday 24th July 2020 at 9.00am or soon thereafter via e-mail by the Duty Judge due to the current Covid-19 pandemic. This therefore, serves as notice."

   v. On 24th July 2020, this Court (M'Inoti, Murgor & Kantai, JJA) delivered Judgment in Civil Appeal No. 63 of 2011. The appeal was dismissed with costs.

6. In her affidavit in support of this application, Ngetich C. Sharon, an advocate in the firm of Mitey & Associates Advocates, deposes that she perused the Court file upon delivery of the judgment. The findings were as follows: that the record of appeal was filed on 30th March 2011; an application seeking to have the appeal struck out for failure by the appellant to include necessary pleadings was withdrawn and the appellant sought leave to file a supplementary record of appeal, which was granted; the appellant and the respondent filed their written submissions in respect of the main appeal on 9th July 2015 and 23rd July 2015 respectively; on 28th October 2015, this Court issued an order dismissing the appeal for non-attendance; on 9th October 2019 Mitey & Associates Advocates filed a notice of change of advocates and an application to reinstate the appeal; there is a cause list in the court file indicating that the matter was scheduled for hearing of the application on 13th May 2020 but the applicant's advocate was not served with a hearing Notice; the matter was listed for a ruling on the application on 24th July 2020 but instead the Court delivered a judgment dismissing the appeal; there are no handwritten or typed proceedings of the Court from 28th October 2015 when the appeal was dismissed for non-attendance to 24th July 2020 when judgment was delivered.

7. The applicant contended that this Court never dealt with the application for reinstatement of the appeal despite service of hearing notices for the said application. As such, he contended that the said appeal was never reinstated to warrant delivery of judgment on 24th July 2020.

8. In the circumstances, this Court was urged to exercise its residual jurisdiction and set aside the judgment delivered on 24th July 2020 so as to allow the application for reinstatement to be heard and determined on its merits.

9. The respondent opposed the application by way of a replying affidavit sworn by Abdikadir Ahmed Sheikh, its director. To start with, the respondent challenged the validity and competence of the Notice of Change of Advocates filed by Mitey & Associates Advocates. It is contended that in so far as the said notice purports to replace M/s Risper Arunga & Co. Advocates, who had ceased to be on record for the applicant and was replaced by M/s Zablon Mokua & Co. Advocates, the said notice is fatally defective. The participation of Mitey & Associates Advocates in the appeal proceedings was also challenged on the grounds that their notice of change of advocates was not served upon M/s Zablon Mokua & Co. Advocates as per the requirement under rule 23 (1) of the *Rules* of this Court.

10. On the merits of the application, it was argued that the application was filed more than one year from when judgment was delivered; that the inordinate delay had not been explained; and that the application for reinstatement was brought more than four years from the date the appeal was dismissed for non-attendance, which demonstrates that the appellant has been negligent, lethargic and disinterested in the matter.

11. As to whether this Court can grant an order to set aside the judgment dated 24th July 2020, it was averred that there is no provision for setting aside the Court's orders, and that the only possible provision available is the one for review of judgments, and that having failed to invoke the available provision, then the application is not maintainable.

12. The respondent further averred that the applicant had not demonstrated any prejudice that it has suffered by the delivery of a final judgment on the entire appeal; that in delivering its judgment, this Court considered the record of appeal as well as the written submissions that had been filed by the parties; and that the applicant had not alleged that this Court failed to consider the record of appeal and the submissions on record in arriving at the impugned judgment. Therefore, the appeal having been considered on its merits, the respondent averred that it would a complete waste of time and judicial resources for this Court to hear the application for reinstatement, then deliver a ruling thereon, and if successful, set the appeal down for hearing, and then finally deliver a judgment all over again.

13. At the hearing hereof, learned counsel Ms. Mburu appeared for the applicant while learned counsel Ms. Akello was present for the respondent. Highlighting the applicant's written submissions dated 22nd April 2024, counsel urged us to exercise our discretion and set aside the judgment delivered on 24th July 2020. According to the applicant, there are no limits or restrictions on the judges' exercise of discretion in setting aside a judgment, except that if we were to vary the judgment, we do so on such terms as may be just, the main concern being to do justice to the parties. See *Stephen Wanyee Roki vs. K-Rep Bank Limited & 2 others* [2018] eKLR and *Times U Savings and Credit Co-Operative Society Limited vs. Njuki & Another* (Civil Appeal E033 of 2021) [2022] KEHC 3012 (KLR).

14. The applicant urged the Court to consider the provisions of Article 25 of the *Constitution* which provides that the right to a fair trial is one of the fundamental rights that shall not be limited, and that same principle is reiterated in Article 50 and 159 (2) (d) of the *Constitution*.

15. On her part, Ms. Akello contended that the available remedy to the applicant under the *Rules* of this Court was to seek for review of the judgment, and that in the absence of a review application, this Court, upon delivery of the said judgment, became functus officio.

16. Counsel further submitted that there was inordinate delay in bringing the instant application as well as the application for reinstatement, and that as per the decision of this Court in *Cecilia Wanja Waweru vs. Jackson Wainaina Muiruri & another* (2014) eKLR, whether or not a party is guilty of inordinate delay depends on the circumstances of the case.

17. We have considered the application, the respective submissions as well as the applicable law. It is not disputed that this Court (Visram, Warsame & J. Mohammed, JJA) dismissed Civil Appeal No. 63 of 2019 on 28th October 2015 for non-attendance. Thereafter, the applicant instructed Mitey & Associates Advocates who filed an application dated 8th October 2019 seeking reinstatement of the appeal. A perusal of the hearing notices dated 11th November 2019 and 13th February 2020 which were served by this Court upon the applicant's advocate reveal that it was indeed the application which was, on both occasions, coming up for hearing. The applicant alleges that it was not served with the hearing notice for 13th May 2020 when its application was scheduled for hearing, and pursuant to which date the Registrar's office vide an email dated 22nd July 2020 informed the parties that a ruling on the application would be delivered on email by the Duty Judge on 24th July 2020. Instead, this Court on 24th July 2020 delivered judgment in respect of the appeal, which the applicant now seeks to have set aside.

18. The applicant urges this Court to exercise its residual jurisdiction and set aside the impugned judgment. In countering this prayer, the respondent contends that the relief available to the applicant upon delivery of the impugned judgment was to seek for review of the judgment, and therefore the instant application in so far as it seeks the setting aside of the impugned judgment is not maintainable. The issue that we must determine from the outset therefore is whether the applicant has properly moved this Court for grant of the orders sought.

19. This Court in *Speaker of the National Assembly vs. Karume* [1992] KECA 42 (KLR), held that where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. We believe that this decision could have influenced the respondent in urging us to find that the avenue available to the applicant was to apply for a review of the judgment and not to apply for its setting aside.

20. The *Rules* of this Court do not provide expressly for the circumstances under which a party can apply to set aside a judgment of this Court. Similarly, the *Rules* do not expressly provide for review of a judgment of this Court. Rule 37, which is often invoked by parties in seeking review of the Court's judgment, mistakenly so, deals with the correction of a clerical or arithmetical mistake in any judgment of the Court by the Court on its own motion or on the application of any interested person so as to give effect to the intention of the Court when the judgment was given. The Rule, commonly known as the 'Slip Rule,' therefore provides a limited avenue for correction of simple errors in order to give effect to the intention of the judges as manifested in the substance of the decision. The applicant in this case is not seeking correction of any clerical or arithmetical mistake in the judgment but the setting aside of the entire judgment. In the absence of express provisions under the *Rules* of this Court providing for the setting aside of a judgment of this Court, the instant application has no legs to stand on.

21. However, in bringing this application, the applicant invokes the residual jurisdiction of this Court. Whether this Court has jurisdiction to set aside and/or review its own judgments is a well- trodden path. See *Jasbir Singh Rai and 2 Others vs. Tarlochan Singh Rai and 4 Others* [2007] eKLR, *Benjoh*

Amalgamated Limited & Muiri Coffee Estate Limited vs. Kenya Commercial Bank Limited, [2014] eKLR and *Standard Chartered Financial Services Limited & 2 others vs. Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited & 2 others* [2016] eKLR.

22. In *Benjoh Amalgamated Limited* (*supra*), this Court, after analyzing various decisions, held as follows regarding its residual powers:

> " 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 decisions are not appealable (to the Supreme Court)."

23. A court of law will exercise its inherent power to make orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. While considering the extent of the inherent powers of the court, this Court observed as follows in *Power & Lighting Company Limited vs. Benzene Holdings Limited t/a Wyco Paints* [2016] eKLR:

"The extent of inherent powers of the court was eloquently explained by the authors of the *Halsbury's Laws of England*, 4th Edn. Vol. 37 Para. 14 as follows;

> " The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them." See also *Meshallum Waweru Wanguku* (*supra*) This inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice."

24. It is clear to us that this Court is clothed with residual jurisdiction to reopen and rehear a concluded matter where the interests of justice so demand, but such jurisdiction will only be exercised in exceptional situations where the need to obviate injustice outweighs the principle of finality in litigation. It is therefore not necessary for us to attempt to re-invent the wheel on this issue.

25. The question that we must answer is whether the instant application falls within this special category in which the exercise of the Court's residual jurisdiction with regard to revisiting its previous judgment is justified. We have already stated that the appeal having been dismissed for non-attendance, the applicant through its advocate filed an application for its reinstatement, which it alleges was never considered on merits. The outcome of the application (if any), is not clear from the court file. The impugned judgment is in fact silent on the dismissal orders made on 28th October 2015 as well as the outcome of the application for reinstatement. This is despite the applicant's advocate having been served with hearing notices for the application and a ruling notice thereon. Rule 35 of the *Rules* of this Court stipulates that decisions of this Court are to be embodied in orders. Therefore, even if we were to assume, for argument's sake, that the application was allowed on 13th May 2020 when it was scheduled for hearing, a copy of the order allowing the said application, if at all, ought to have been prepared and served upon the parties. What appears from the available record is that this Court went ahead to determine the main appeal based on the submissions already in the Court file. This is acknowledged at page 6 of the impugned judgment in the following terms:

> " When the appeal came up for hearing before us, the appellant, who had appointed new lawyer's M/s Zablon Mokua & Company Advocates (Notice of Change of Advocates filed on 26th February 2015) had filed written submissions on 9th July 2015. The respondent's written submissions were filed on 23rd July 2015. The parties did not find it necessary to highlight those submissions and they left the whole matter to us."

26. The appeal having been dismissed for non-attendance, and in the absence of a ruling and/or orders reinstating the said appeal, it is not clear how the Court subsequently heard the appeal and dismissed it on merit. We believe that the bench that heard the appeal a second time must have assumed that the appeal had been reinstated for hearing as had been sought by the applicant.

27. Before M/s Mitey & Associates Advocates came on record for the applicant, the previous advocate for the applicant had already filed submissions, and the new advocates did not file any further submissions. The Court considered the submissions filed by both parties and made a substantive determination on the merits of the appeal.

28. In addition, it is a fact that the application for reinstatement of the appeal was filed on 9th October 2019, close to four years from the date the appeal was dismissed for non-attendance. The applicant has not explained the reason for this long delay. Furthermore, the instant application was brought more than one year from the date of delivery of the impugned judgment. In *Benjoh Amalgamated Limited* (*supra*), this Court observed thus:

> " 62. This Court will be reluctant to invoke its residual jurisdiction of review where, as here, there is laches or where legal rights of innocent third parties have vested during the intervening period which cannot be interfered with without causing further injustice. It will not entertain review of decisions made before the 2010 Constitution came into being.
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> 63. In dealing with laches, *Halsbury's Laws of England*, 4th Ed. Vol. 16(2) at 910 has this to say:
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> > " A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation equity aids the vigilant, not the indolent' or 'delay defeats equities'. A Court of equity refuses its aid to

> stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay ('laches').

64. Lord Selbourne LC delivering the opinion of the Privy Council in *The Lindsay Petroleum Co v Hurd (1874) LR 5 PC 221* said at page 240:

> "Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

29. There was inordinate and unexplained delay in bringing this application. The status of the suit property between the year 2015 when the appeal was dismissed and the year 2019 when the application was made is not clear. What is evident is that the County Commissioner, Trans Nzoia County, had, vide a letter dated 5th September 2019 and while enforcing the orders issued by the High Court given the applicant's members 30 days to vacate the suit property lest they be evicted therefrom. An application seeking stay of execution of the orders made by Sitati, J. to wit, Civil Application No. Nai 95 of 2011 (UR. 64/2011) was also dismissed by this Court (Mwera, Warsame & Mwilu, JJA) on 1st April 2011 for non-attendance. Therefore, it is our view that a lot could have transpired over the suit property between the year 2015 when the appeal was dismissed and 2019 when the application for reinstatement was filed.

30. We fully adopt the finding of this Court in *Benjoh Amalgamated Limited* (*supra*) that in a review application, the length of the delay and what has transpired in the interim period is critical as it bears on the balance of justice.

31. In the upshot, the applicant has not satisfied this Court that it is deserving of the exercise of this Court's residual powers to set aside its judgment dated 24th July 2020. The application dated 24th September 2021 is unmerited and we accordingly dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2024.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR