



REPUBLIC OF KENYA



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**Ashmi Investment Limited v Riakina Limited & another (Civil Appeal
(Application) 384 of 2019) [2023] KECA 410 (KLR) (14 April 2023) (Ruling)**

Neutral citation: [2023] KECA 410 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 384 OF 2019
HM OKWENGU, F SICHALE & KI LAIBUTA, JJA
APRIL 14, 2023**

BETWEEN

ASHMI INVESTMENT LIMITED APPELLANT

AND

RIAKINA LIMITED 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

(Being an application for review and setting aside of the Judgment and Orders of the Court of Appeal at Nairobi (Okwengu, Sichale & Laibuta, JJ.A.) delivered on 19th November 2021 in Civil Appeal No. 384 of 2019)

RULING

1. Before us is the applicant's Notice of Motion dated March 8, 2022 and made under sections 1A, 3A and 80 of the *Civil Procedure Act*, Order 45 rule 1 and Order 51 of the *Civil Procedure Rules* seeking, *inter alia*, orders to review and vary and/or set aside this Court's judgment and order dated November 19, 2021, and that costs of the application be in the cause. The Motion is supported by the annexed affidavit of Abdirahman Mohamed Elmi, a director of the applicant, and is anchored on a whopping fourteen (14) grounds set out on the face of the application, and which we need not replicate here.
2. With the exception of ground Nos 2 and 3, namely that there was an error apparent on the face of the record and that there is sufficient reason for review; and that the doctrine of *lis pendens* cannot be said to apply in this matter, the remaining 12 grounds are essentially an argumentative restatement of the applicant's case in the ELC and on appeal to this Court.
3. The genesis of the applicant's Motion for review is its dissatisfaction with this Court's judgment dated November 19, 2021 dismissing the applicant's appeal from the judgment and decree of the ELC (Bor, J) in Nairobi ELC Case No 646 of 2014. In addition to the supporting affidavit, which merely restates the grounds on which the Motion is made, learned counsel for the applicant, M/s Prof Tom Ojienda &



Associates, filed written submissions, list of authorities and case digest dated February 23, 2023 citing six (6) authorities, including the case of *Mohammed Jawayd Iqbal (personal representative of the estate of the late Ghulam Rasool Janmohamed) vs George Boniface Mbogua* [2020] eKLR on the Court's power to review its own decisions. The remaining 5 relate to the role or duty of this Court on first appeal; the principle that allegations of fraud must be strictly proved; and the standard of proof, to which we need not pronounce ourselves as if we were sitting on appeal from our own judgment.

4. None of the respondents filed any affidavit in reply to, or submissions in support of or in opposition to, the applicant's Motion. However, when the Motion came for hearing on the GoTo Meeting virtual platform, Mr Isaac Ayoo appeared for the 1st respondent, Riakina Limited, and made oral submissions urging us to dismiss the applicant's Motion for lack of merit. There was no representation on the part of the 2nd respondent, the National Land Commission.
5. Be that as it may, the Motion before us stands or falls upon our finding on two main issues, namely: whether the application is proper in form; whether the applicant has made a case for review in exercise of this Court's residual jurisdiction to correct errors of law that have occasioned real injustice or failure or miscarriage of justice thus eroding public confidence; and, accordingly, what orders ought we to make, including orders as to costs.
6. On the first issue, it is evident that the applicant's Motion is made under sections 1A, 3A and 80 of the *Civil Procedure Act* (Cap 21), Order 45 rule 1 and Order 51 of the Civil Procedure Rules, 2010. We need not overemphasise the fact that the *Civil Procedure Act* and the Rules made thereunder do not govern the exercise of this Court's jurisdiction in relation to applications of this nature. That Act and Rules apply to proceedings in the High Court, the courts of equal status, and to courts subordinate thereto. What then is the fate of the applicant's Motion?
7. Though glaringly in want of form having been made under the wrong provisions of law, the applicant's Motion is not fatally defective so as to warrant striking out on that account only. In *Kariuki vs Kariuki* [2021] KECA 205 (KLR), this Court had this to say:

“Before us is a notice of motion dated March 27, 2019 erroneously expressed to be brought under Order 42 Rules 4 and 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, which in our view do not govern the exercise of our mandate in an application of this nature. The proper provision of law for accessing the relief sought is Rule 5 (2)(b) of the Court of Appeal Rules. It is however, our view that failure to cite the correct provision of law for accessing the relief sought will not disentitle the applicant determination of the application on its merits and send her away empty handed from the seat of justice.”

8. Likewise, in *Kivae Residents Organization vs Lukenya Ranching & Farming Cooperative Ltd & 2 others* [2022] KECA 721 (KLR) Makhandia, J A held that:

“... From the outset, I must point out that the application is brought under the wrong provisions of the law. This Court's jurisdiction for extension of time is derived from Rule 4 of this Court's Rules. The applicant has cited Sections 79G and 95 of the *Civil Procedure Act* and Order XLIX Rule 5 of the Civil Procedure Rules. These provisions are inapplicable in this Court but in the Courts below. I will however proceed to consider the motion as though it was brought under the proper provisions of the law in the interest of substantive justice and pursuant to Article 159 of the *Constitution*.”

9. We also take to mind the provisions of Article 159(2) (d) of the *Constitution*, which impels us to administer justice without undue regard to procedural technicalities. That leaves us with the second



issue as to whether the applicant has satisfied the Court that its Motion meets the threshold for review as sought. In determining this issue, we must be alive to the principle that what is sought cannot culminate in a merit review of our own judgment.

10. This Court in *Benjob Amalgamated Limited & another vs Kenya Commercial Bank Limited* [2014] eKLR, after reviewing decisions from different jurisdictions on the question of review, laid down the test that must be met in order to merit review in exercise of the Court’s residual jurisdiction thus:

“ 57. 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).”

11. To merit the orders sought, the applicant must demonstrate that this Court made errors of law that have occasioned real injustice or failure or miscarriage of justice to the applicant’s prejudice. What constitutes an “error of law” was described in The Supreme Court of Canada in *R vs J M H*, 2011 SCC 45, [2011] 3 S C R 197 as including “making a finding of fact for which there was no evidence; where the legal effect of findings of fact or undisputed fact raises a question of law; an assessment of the evidence based on a wrong legal principle; and a failure to consider all of the evidence in relation to the ultimate issue”
12. Other than the two grounds that are relevant to applications for review, the remaining twelve (2) set out on the face of the applicant’s Motion relate to matters of evidence, namely: in whose favour title to the suit property was first issued; the date on which the Deed Plan was issued to the applicant; the opinion of the Ministry of Lands relating to ownership of the suit property; matters relating to approvals before issuance of title to the suit property; the evidence of Zacharia Ndege on the accounts analysis of payment made on account of the suit property; matters relating to the alleged fraud; that the applicant was an allottee for value; and the time within which the Motion was brought, which do not disclose an error or errors of law occasioning real injustice.
13. With due respect to learned counsel for the applicant, none of those grounds, which are extensively deponed to in Mr Elmi’s supporting affidavit, disclose errors of law that have occasioned real injustice or failure or miscarriage of justice to the applicant’s prejudice. Neither has the applicant made a case for review to promote public interest and enhance public confidence in the rule of law. Moreover, the Court’s residual jurisdiction in this regard is exercised cautiously and only in exceptional circumstances where it will serve to promote public interest and enhance public confidence in the rule of law.
14. The question is: what constitutes exceptional circumstances? The High Court at Nairobi in *Republic v Kenya Revenue Authority Ex Parte Style Industries Limited* [2019] eKLR, which we cite with approval, attempted to define the term “exceptional circumstances” as follows:

“ 38. What constitutes exceptional circumstances depends on the facts of each case and it is not possible to have a closed list.



... ..

40. The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in cases generally. The circumstances do not have to be unique or very rare but they do have to be truly an exception rather than the rule.”
15. In the same vein, this Court in *Standard Chartered Financial Services Limited & 2 others vs Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited & 2 others* [2016] eKLR held that:
- “[52] ... this Court is clothed with residual jurisdiction to reopen and rehear a concluded matter where the interest of justice demands, but that such jurisdiction will only be exercised in exceptional situations where the need to obviate injustice outweighs the principle of finality in litigation”
16. That said, in the recent case of Manchester Outfitters (Suiting Division) Limited (Now known as King Woollen Mills Limited & 2 others vs Standard Chartered Financial Services Limited & 2 others, Supreme Petition No 6 of 2015 the Supreme Court applied the principles set out in *Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai Estate & 4 others*, SC Petition No. 4 of 2012; [2013] eKLR and *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR and extended the parameters of review of this Court’s decisions to circumstances that would meet the ends of justice.
17. In identifying the applicable instances, the court relied on circumstances set out in the case of Jasbir Singh Rai & 3 others (*supra*) which are;
- a) where there are conflicting past decisions of the Court, it may opt to sustain and to apply one of them;
 - b) the Court may disregard a previous decision if it is shown that such decision was given per incuriam;
 - c) a previous decision will not be disregarded merely because some, or all of the members of the Bench that decided it might now arrive at a different conclusion; and
 - d) the Court will not depart from its earlier decision on grounds of mere doubts as to its correctness.
18. In the case of Fredrick Otieno Outa (*supra*) applicable circumstances include where, the judgment, ruling, or order, is obtained, by fraud or deceit, or the judgment, ruling, or order, is a nullity, such as, when the Court is itself incompetent or was misled into handing down a judgment, ruling or order under a mistaken belief that the parties had consented thereto or the judgment or ruling was rendered on the basis of a repealed law, or as a result of a deliberately concealed statutory provision.
19. Having carefully considered the application before us, the grounds on which it is anchored, the affidavit in support thereof, the impugned judgment, the written and oral submissions of the applicant’s and 1st respondent’s counsel, statute law and cited authorities, we find that the applicant’s Notice of Motion dated March 8, 2022 lacks merit. The same has failed to demonstrate that the applicant’s case falls within the instances that call for review as enunciated in the case of Jasbir Singh Rai & 3 others (*supra*). Accordingly, the Motion is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL, 2023

HANNAH OKWENGU



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JUDGE OF APPEAL
F SICHALE

.....
JUDGE OF APPEAL
DR K I LAIBUTA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

