



REPUBLIC OF KENYA



KENYA LAW
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**Gakibe v Ngumba & 4 others (Civil Appeal (Application)
E300 of 2021) [2023] KECA 1420 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1420 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E300 OF 2021
MA WARSAME, K M'INOTI & JM MATIVO, JJA
NOVEMBER 24, 2023**

BETWEEN

ZAKARIA MUIGAI GAKIBE APPLICANT

AND

JOHN MWENIA NGUMBA 1ST RESPONDENT

ROYAL BUILDERS LIMITED 2ND RESPONDENT

KENYA COMMERCIAL BANK 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

EQUITY BANK OF KENYA LIMITED 5TH RESPONDENT

(Being an application to vary, review and/or set aside ruling/orders (Nambuye, Jamila Mohammed and Ole Kantai JJ.A.) made on 13th May 2022 in ELC No.281 of 2009)

RULING

1. A brief history of this litigation is necessary in order to contextualize the applicant's application dated 24th June 2022 the subject of this ruling. Briefly, by a plaint dated on 12th June 2009 filed in the Environment and Land Court, the applicant herein instituted ELC No. 281 of 2009 against the respondents. The

plaint was subsequently amended on 12th August 2011 in which the applicant seeks a raft of reliefs against the respondents jointly and severally as follows:

- a. A declaration that the property known as Land Reference No. 74/16 North East of Nairobi, was held by the late Andrew Ngumba and the 1st defendant in trust for the plaintiff and is currently held by the 3rd defendant in trust for the plaintiff; in the alternative.



- b. A declaration that a resulting or implied trust sprang up in favour of the plaintiff subsequent to the payment of the deposit of purchase price and the grant of possession, the subsequent development thereof at tremendous cost without either late Andrew K. Ngumba or the 1st defendant disbursing him of the ownership thereof.
 - c. A declaration that the purported sale on 26th August 2005 and subsequent transfer of the suit property known as Land Reference No 74/16 North East of Nairobi was illegal, null and void.
 - d. An order do issue to compel the 3rd and 5th defendants to surrender the title issued to the 3rd defendant over LR ND 74/16 North East of the Nairobi for cancellation within fourteen (14) days of the judgment herein failing which, the Principal Registrar of Government Lands do take the necessary steps for cancellation thereof.
 - e. An order do issue directing the 5th defendant to execute a suitable discharge of charge in respect of the charge executed by the 3rd defendant in favour of the 5th defendant over the suit property within 14 days of the judgment, failing which, the Deputy Registrar, High Court Nairobi to prepare and register the same at the 5th defendant's costs.
 - f. A mandatory injunction compelling the 2nd defendant herein to give the plaintiff monthly statement of the loan account No. xxx (sic) University Way Branch and refund to the plaintiff the sum of Kshs. 1,656,494.50 or any excessive amount found to have been over paid to the 2nd defendant to liquidate the loan.
 - g. A permanent injunction do issue against the defendants restraining them by themselves, their servants, agents, employees or any one claiming under them from evicting the plaintiff from LR No 74/16 North East of Nairobi.
 - h. A permanent injunction do issue against the defendants restraining them by themselves, their servants, agents, employees, or anyone claiming under them from selling, transferring, charging, leasing or in any other manner; dealing with all that land known as LR No 74/16 North East of Nairobi.
1. In his statement of defence filed in court, the 1st respondent denied that the applicant ever purchased the suit property from Andrew K. Ngumba or that he paid the sum of Kshs.1,200,000.00 as deposit for the suit property. He contended that the applicant was allowed into the suit property by his deceased father as a mere licensee to erect a store for building materials but the applicant converted the store into living quarters. Further, the 1st respondent denied each and every allegation of fraud attributed to him in the plaint.
 3. The 2nd, 3rd and 4th respondents filed their respective statements of defence and denied each and every allegation of fraud attributed to them in the plaint.
 4. The trial court (Komingoi, J) in a judgment delivered on 29th July 2021 held that the applicant never proved the allegations of fraud against any of the respondents and dismissed the suit with costs to the respondents. Aggrieved by the verdict, the applicant filed a notice of appeal dated 3rd August 2021 and an application dated 24th August 2021 seeking an injunction to restrain the 1st and 3rd respondents from interfering with his possession of the suit property pending the hearing and determination of his intended appeal.
 5. This Court (Nambuye, Jamila Mohamed and Ole Kantai JJA) heard the said application on 15th December 2021. After hearing the application, the applicant's counsel Mr. Kyalo Mbobu applied for an interim stay pending the delivery of the ruling. With the consent of all the counsel for the parties,



- the court granted an interim stay/status quo pending delivery of its reasoned ruling on 13th May 2022. Ultimately, the ruling was delivered on the said date dismissing the applicant's application dated 24th August 2021 on grounds that the applicant failed to prove that his intended appeal would be rendered nugatory unless the injunction is granted.
6. Undeterred, the applicant in the instant beseeches this Court to vary, review and/or set aside the order issued on 13th May 2022 dismissing his aforesaid application. The application is premised on sections 3, 3A and 3B of the *Judicature Act*, Rule 1 (2), 35, 42, 57 & 87 of the *Court of Appeal Rules*,
 7. The grounds in support of the application as we glean them from the application, the applicant's supporting affidavit sworn on 20th June 2023; his supplementary affidavit dated 2nd August 2022 and further affidavit sworn on 17th April 2023 are that the court vacated its earlier order without recalling the parties for 'inter partes' hearing of the application. The applicant also contends that the court fell in grave error by awarding an order with one hand and taking it away with the other hand, which is unfathomable in equity. He also states that the 3rd respondent has since invaded the suit property with surveyors and sub-divided it in readiness for sale.
 8. The 1st respondent's contestation is that the application is fatally defective, an abuse of the court process and the same ought to be dismissed because the status quo order made on 15th December 2022 was to remain in force pending the delivery of the ruling on the application dated 24th August 2021, which was ultimately delivered on 13th May 2022.
 9. The 1st respondent also stated that the interim order issued on 15th December 2022 was for the preservation of the suit property pending ruling on the application dated 24th August 2021. Therefore, when the court delivered its ruling on 13th May 2022, the interim orders automatically lapsed. Further, the fact that the ruling was against the applicant is not a ground for review. The 1st respondent maintained that the applicant has not met the threshold to merit the review sought and that the application is a veiled attempt to re-litigate the application dated 24th August 2021 which is tantamount to this court sitting on appeal against its decision.
 10. The 3rd respondent's position is that the trial court and this Court have held that it is an innocent purchaser of the suit property having purchased it at an auction held on 26th April 2005 for value without notice. Further, it is in possession of the property and in the process of developing a residential estate thereon. It disputed the allegations that it rushed to the suit property with surveyors.
 11. It is also the 3rd respondent's case that the court has ruled that the applicant's remedy lies in the award of damages if he succeeds in his appeal. Furthermore, the other respondents are financial institutions capable of compensating the applicant in the event his appeal succeeds. It also stated that applicant unsuccessfully applied for an injunction in Civil Application 99 of 2010. Lastly, it denied that it transferred the property to a third party.
 12. The 2nd, 4th and 5th respondent did not participate in these proceedings.
 13. The applicant's counsel Mr. Kyalo in his submissions reiterated the grounds in support of the application and the averments in the supporting affidavits and argued that the court does issue orders haphazardly. It was his position that the fact that the Court granted orders on 15th December 2021 which lasted for almost six months created a legitimate expectation to the applicant that indeed the court was convinced on the merits of its application. He argued that the doctrine of legitimate expectation need to be nurtured and not frustrated. To support his argument, counsel cited the supreme court decision in *Communication Commission of Kenya & 5 others v Royal Media Services & 5 others* [2014] eKLR in support of the proposition that once a body arouses an expectation that is



- within its power to fulfil, it is required to fulfil that expectation. He submitted that vacating the interim orders without a further hearing occasioned the applicant an injustice, which this Court should rectify.
14. Ms. Odwa, the 1st respondent' counsel submitted that the applicant misinterpreted the orders issued in 15th December 2021 which were to subsist pending the delivery of the ruling by the court and not pending hearing and determination of the appeal. Consequently, the interim orders automatically lapsed the moment a ruling was delivered on 13th May 2022.
 15. M/s Odwa also submitted that pursuant to Rule 35 of this *Court's Rules*, the applicant has not specified the apparent error he seeks to be corrected but rather assumes there is an error while in fact the ruling is factual considering all aspects of the law. Counsel argued that the court was dealing with an application under Rule 5 (2) (b) of this *Court's rules* and it was within the court's jurisdiction to dismiss the application in its ruling, regardless of having issued an interim status quo order previously. Further, the ruling was delivered after hearing the parties on the application.
 16. On behalf of the 3rd respondent, learned counsel Mr. Chege relied on *Daniel Lago Okomo v Safari Park Hotel Ltd & another* [2018] eKLR where this Court dismissed an application for review holding that it was an appeal in disguise.
 17. Before delving into the merits or otherwise of the application, we find it necessary to examine the nature of the orders granted on 15th December 2021. These are the orders Mr Kyalo accused the trial court of vacating without hearing the application inter partes. Counsel also faulted the trial court for granting the applicant orders in one hand and taking the orders away with the other hand. It is important to interpret the said orders in order to determine whether the merits or otherwise of the said accusations.
 18. The starting point is to determine the manifest purpose of the order. In interpreting a judgment or an order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. The manifest purpose of the judgment is to be determined by also having regard to the relevant background facts, which culminated in it being made. The South African Constitutional Court in *Firestone South Africa (Pty) Ltd v Genticuro A.G.* 1.19771 4 All SA 600 (A) explained the principles of interpreting a Court judgment or order as follows:

“The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules..... Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no intrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it... Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise... But if -any-uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the or order may be investigated and regarded in order to clarify it: for example, if the meaning of a judgment or order granted on an appeal is uncertain. the judgment or order of the court a quo and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it.”



19. In order to ascertain the nature of the said orders, we will quote verbatim the relevant part of the orders. It reads:

“1) an order be and is hereby granted that there shall prevail status quo herein. By status quo we mean that the current position obtaining on the ground as well as that obtaining with regards to the documents of title to remain as obtaining today the 15th December, 2021 pending delivery of the ruling.

2) Costs of the application to abide the outcome of the ruling.”

20. Classification of interim/interlocutory orders is ascertained based on their wordings. The grant of an interim relief to any party in any proceeding is dependent upon a host of factors. The courts may while granting an interim relief, bracket it with certain conditions or riders. The tenure, extent and duration of the interim orders may be limited by the court whilst granting interim relief. Generally, the court restricts the extent and duration of the interim orders in the following words: (i) in the meanwhile...; (ii) during the pendency of the matter; (iii) till the next date of hearing of the matter; (iii) till the next date of listing; (iv) and (v) parties are directed to maintain status quo (or any other similar interim order) till further orders of this Court. The interim orders of varied wordings may be passed by the court, but each of them has a separate import about its extent and duration.
21. The relevant background to the above order is that after the hearing of the applicant’s application, the applicant’s counsel Mr. Kyalo Mbobu requested the court to grant an interim of order of injunction pending the court’s ruling on the application. As the order reads, it was to remain in force “pending delivery of the ruling” so the order was interim in nature in that it had an expiry date which was tied to the delivery of the ruling.
22. An interim order refers to an order passed by the court during the pendency of a suit or proceedings to ensure that the interests of the parties to the litigation are not harmed and the subject matter of the suit is maintained. Interim orders are provisional or temporary. It is usually an order used to maintain the status quo pending the final decision of the case, i.e. an order that asks parties to continue or stop doing an act until the final decision in the case is reached.
23. By law, an interim order, where it is, properly made, is expected to expire, by effluxion of time, at the end of its life span. In this case, the order was very clear that it was to last until delivery of the ruling. The ruling was delivered on 13th May 2022. The effect is that the said order lapsed on the said date after the ruling was delivered. Mr. Kyalo argued that the trial court erred in vacating the said orders without hearing the application inter partes. As stated above, the interim orders lapsed automatically on 13th May 2022 upon the delivery of ruling. Therefore, the argument that the court vacated the orders without hearing the applicant is hopelessly misguided because it was not necessary to hear any of the parties on the question of vacating the orders. Equally legally frail is the argument that the court granted the order with one hand and took it away with the other hand. The order simply lapsed after the expiry of its life span.
24. Even though the applicant’ core grounds have collapsed as held above, we shall proceed the address the merits or otherwise of the invitation to this Court to review its ruling made on 13th May 2022. The general principle is that once a court has pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that the court thereupon becomes functus officio. The only exception to this general principle is the limited jurisdiction under the slip rule under rule 37 of the Court of Appeal Rules, 2022 that provides for correction of clerical or arithmetical mistakes in any judgments or any error arising from accidental slip or omission.



25. In England, the final, ultimate Court of Appeal (The House of Lords) has on appropriate occasions, re-opened its concluded judgments for rehearing asserting that it has power to correct any injustice caused by an earlier decision of the House. For example, in *R v Bow Street Metropolitan Stipendiary Magistrate Ex Parte Pinochete Ugarte* (No. 20) [1999] 1 All ER 577, Lord Browne-Wilkinson stated:
- “...In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered.”
26. In *Amalgamated Trustees Ltd. v Associated Discount House Ltd.* (2007) LPELR-454 (SC) the Nigerian Supreme Court stated that it possesses inherent power to set aside its judgment in appropriate cases and provided the following examples: (i) When a Judgment is obtained by fraud or deceit. (ii) When the Judgment is a nullity such as when the court itself was not competent; or (iii) When the court was misled into giving Judgment under a mistaken belief that the parties had consented to it; or (iv) When Judgment was given in the absence of jurisdiction; or (iv) where the procedure adopted was such as to deprive the decision or Judgment of the character of a legitimate adjudication.
27. In Australia, the case of *Autodesk Inc v Dyason* (No. 2) [1993] HCA 6; (1993) 176 CLR 300, is instructive in setting forth the following principles:
- i. the public interest in the finality of litigation will not preclude the exceptional step of reviewing or rehearing an issue when a court has good reason to consider that, in its earlier judgment, it has proceeded on a misapprehension as to the facts or the law.
 - ii. As this Court is a final Court of Appeal there is no reason for it to confine the exercise of its jurisdiction in a way that would inhibit its capacity to rectify what it perceives to be an apparent error arising from some miscarriage in its judgment.
 - iii. It must be emphasized, however, that the jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered by the Court; nor is it to be exercised simply because the party seeking a rehearing has failed to present the argument in all its aspects or as well as it might have been put. The purpose of the jurisdiction is not to provide a back door method by which unsuccessful litigants can seek to re-argue their cases.
28. The Supreme Court of India, in *Rupa Ashok Hurra v Ashok Hurra*; Writ Petition (Civil) 509 of 1997 underscored the need for justice to transcend all barriers. It stated:
- “...Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to anyone. The rule of stare decisis is adhered to for consistency, but it is not inflexible in Administrative Law as in Public Law. Even the law bends before justice...Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order, the courts culled out such power to avoid abuse of process or miscarriage of justice.” (Emphasis added)
29. Also, in India in *Sow Chandra Kanta and Another v Sheik Habib* 1975 AIR 1500, 1975 SCC (4) 457, the Supreme Court delineated the boundaries for review as follows:
- “A review of a Judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and over-ruled arguments, a second



trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient.”

30. In *Northern India Caterers (India) v Lt. Governor of Delhi* 1980 AIR 674, the Supreme Court of India in dismissing a review application remarked:

“It is well settled that a party is not entitled to seek a review of a Judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a Judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so.”

31. This Court (differently constituted) in *Nguruman Ltd v Shompole Group Ranch & another* [2014] eKLR placed fair hearing as the anchor of its discharge of judicial function and, therefore, ruled that it had the right to revisit its past decisions. Also, in *Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited (Now known as King Woollen Mills Limited & 2 others* [2016] eKLR (8th April 2016) this Court, (Karanja, Okwengu, Mwera, GBM Kariuki & Mwilu, JJA) accentuated that where applicable, the principle of fairness and justice must take priority over the principle of finality.

32. Also, this Court in *Kamau James Gitutho & 3 others v Multiple Icd (K) Limited & another* [2019] eKLR (Visram, Karanja & Koome, JJA) acknowledged the residual jurisdiction of this Court to re-open its own decisions. It however stressed that such jurisdiction is to be exercised with caution and only in exceptional cases.

33. A review of post 2010 decisions of this Court shows that this Court has acknowledged its residual jurisdiction to re-open its decisions. However, this residual power is tied to a discretion, which enables the Court to confine its use to cases in which it is appropriate for the jurisdiction to be exercised. The residual powers of this Court are not an open license for the court to exercise unlimited discretion. This is because residual powers are invoked to effect fairness between the parties where a statute falls short of doing so or where there is a gap in the law. The law as we understand it is that the general rule is that a Court of Appeal will not ordinarily re-open its decisions. However, there are exceptions to the general rule, which as authorities suggest are reserved for rare and limited cases, where the facts justifying them can be strictly proved.

34. A party is not entitled to seek a review of a judgment delivered by a Court of Appeal merely for the purpose of a rehearing and obtaining a fresh decision in the case. This is evidently, what the applicant is seeking. The court may also re-open its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice. As was held in *Rodger v Comptoir d'Escompte de Paris* [1871] LR 3 PC 465:

“One of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors and when the expression “the act of the court” is used, it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matter up to the highest court which finally disposes of the case...”

35. The question before us is whether has surmounted the tests laid down in decided cases cited above so merit the review sought. As decided cases suggest, the residual jurisdiction is vested in this Court to avoid real injustice in exceptional circumstances. Proceedings will only be reopened when there is a real requirement for that to happen. As pointed out earlier, the interim orders complained of were



time bound. The orders lapsed the moment the Court delivered a final ruling on the application. Any system of justice that is fair to all parties requires that a time should come when it is time to call it a day. The time should come when the losing party must accept an adverse decision for better or worse and cease engaging in endless litigation.

36. The grounds cited by the applicants do not fall anywhere near the permissible exceptional circumstances to trigger this Court's exercise of "residual" jurisdiction. We find and hold that the application for review is totally unmerited. There is no basis at all upon which we can invoke the residual powers of this Court and review or re-open the ruling. The upshot is that the application dated 24th June 2022 is dismissed with costs to the 1st and 3rd respondents.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

M. WARSAME

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

