Kabita & 4 others v Kariuki (Civil Appeal (Application) 33 of 2015)
[2023] KECA 1551 (KLR) (15 December 2023) (Ruling)

Neutral citation: [2023] KECA 1551 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL (APPLICATION) 33 OF 2015

MSA MAKHANDIA, FA OCHIENG & WK KORIR, JJA

DECEMBER 15, 2023

BETWEEN

ANGELICA KABISA KABITA ..... 1ST APPLICANT

JOYCE WAMBUKU NGANGIRA ..... 2ND APPLICANT

BONIFACE KIRATU NJOGU ..... 3RD APPLICANT

MARY AGNES GATHONI GAKUO ..... 4TH APPLICANT

VITALIS L OLOO ..... 5TH APPLICANT

AND

SAMWEL MAINA KARIUKI ..... RESPONDENT

(Being an application to reopen, re-examine or set aside the Judgment of the Court of Appeal at Nakuru, (Nambuye, Okwengu & Kiage, JJ. A) dated 18th October, 2017 in Civil Appeal No. 33 of 2015)

RULING

1. The application before us is dated 13th February, 2023. The application is brought pursuant to Section 3 of the *Appellate Jurisdiction Act*, and Rule 1(2) of the *Court of Appeal Rules*. The applicant prays for orders that; the court be pleased to have its judgment dated 18th October, 2017 reopened, re-examined, set aside and the appeal heard afresh.

2. The application is premised on the grounds that:

    "a) The court misdirected itself on the issue of the consent of the Land Control Board.

b. There is new evidence which was not within the applicant's knowledge as at the time the appeal was heard, and it is vital for the applicant to be reheard."

3. The application was further supported by the applicant's affidavit in which he stated as follows:

"a) The applicant was aggrieved by the impugned judgment and wants the said judgment to be reviewed.

b. The consent to sub-divide Nakuru Municipality Block 22/1719, hereinafter, "the suit land" had been obtained.

c. The court failed to appreciate that the respondent's father had sold the suit land to Unitex Commercial Agencies before he died.

d. Information that the original title to the suit land was in the custody of Kamere & Company Advocates, awaiting the conclusion of the transaction that will lead to the subsequent sub-division of the suit land was not in the applicant's knowledge, until sometime in early 2021.

e. It has come to the applicant's attention that the respondent fraudulently obtained title to the suit land by forging a police abstract, affidavit and gazette notice. The respondent has been sued in Nakuru Criminal Case No. E1923 of 2021 which is pending before court.

f. The impugned judgment was based on fraudulent facts; it ought to be reviewed.

g. This court ought to determine whether the respondent obtained a good title through transfer by transmission; the applicants are bona fide purchasers of the parcels arising from the subdivision of the suit land; and whether a consent was obtained from the Land Control Board with respect to the subdivision of the suit land.

h. The judgement in question should be reviewed, set aside, and the judgement of the trial court should be upheld."

4 In opposition to the application, the respondent in his replying affidavit stated that:

"a) The application is mischievous, bad in law and an abuse of the court process aimed at delaying and frustrating the respondent from enjoying the fruits of the judgment.

b. The firm of Njeri Njagua & Company Advocates is not properly on record as the applicants were previously represented by the firm of Ogeto & Oseto Advocates.

c. The decree has been partly complied with, and only the applicant is on the suit land.

d. The issue of the Land Control Board consent is res judicata. The purported consent annexed to the application was not referred to in the trial court, and it was prepared after the conclusion of the case, and in any case, this was not an issue before the trial court.

e. The sale agreements were made out in 1998 while the consent was obtained in the year 2000.

f. There was no consent from Unitex to the applicants.

g. This court is no longer able to make decisions, and the provisions of law cited do not give this court the authority to grant the requested prayers."

5. When the application came up for hearing on 4th October, 2023, Ms. Njeri Njagua, learned counsel appeared for the applicant whereas Mr. Mbiyu, learned counsel appeared for the respondent. Counsel relied on their respective written submissions, which they briefly highlighted.

6. Ms. Njagua submitted that the applicant owned the suit land as the impugned judgment has not been executed. The applicant was acting in person, and after judgment, her firm filed a notice of appointment of advocates. It is trite that where a parcel of land is within the municipality, consent is not required. However, consent was obtained in this instance.

7. Mr. Mbiyu submitted that a court must only have one go at a matter, unless it is for the correction of an error. The annexed consent relates to the suit land, whereas the agreement before the trial court related to Block 22/982 which had no consent. The applicant has not filed an application to adduce additional evidence yet seeks to introduce new evidence. Counsel pointed out that the application has been brought six (6) years late.

8. Citing the cases of *Raila Odinga & 2 Others v IEBC & 3 Others* [2013] eKLR and *Telkom Kenya Limited v John Ochanda & 996 Others* [2014] eKLR the respondent reiterated that this Court was *functus officio* and it could not be called upon to re- engage in a matter it had already pronounced itself on.

9. We have carefully perused the application, the affidavits by both parties, submissions by counsel, the authorities cited and the law. The issue for determination is whether or not the application before us is merited.

10. The applicant has relied on the overriding objectives to invoke the residual jurisdiction of this Court to review its own judgment. The residual jurisdiction of this Court is limited in scope, and it is to be applied cautiously and sparingly in cases whose decisions are not appealable to the Supreme Court; and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice. In the case of *Nyutu Agrovet Limited v Airtel Networks Kenya Ltd & Another* [2019] eKLR the Supreme Court held thus:

> " ... thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction."

11. Similarly, in *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR, the court stated that:

> " In the interest of safeguarding the integrity of the administration of justice and particularly in the absence of an express bar we, like the House of Lords in *Inco Europe Ltd & others* (*supra*) hold that the Court of Appeal should have residual jurisdiction but only in

exceptional and limited circumstances. Such a finding is in consonance with practises from other jurisdictions and maintains fidelity to the law."

12. When called upon to exercise the residual jurisdiction of the court, two competing principles come to mind; the "principle on finality" of litigation on the one hand which does not support review and the "justice principle" on the other hand which favours limited review, predicated on the basis that the object of litigation is to do justice.

13. In the case of *Taylor & another v Lawrence & Another* [2002] 2 All ER 353, the lead judgment by the Chief Justice, Lord Woolf, dealt with both the justice principle and finality principle and held that the Court of Appeal:

> " Had a residual jurisdiction to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances.
>
> > " The Court had implicit powers to do that which was necessary to achieve the due objectives of an appellate Court, namely to correct wrong decisions so as to ensure justice between the litigants involved, and to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents. A Court had to have such powers in order to enforce its rules of practice, suppress any abuses of its process and defeat any attempted thwarting of its processes. The jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised. There was tension between a court having such residual jurisdiction and the need to have finality in litigation, so that it was necessary to have a procedure which would ensure that proceedings would only be reopened when there was a real requirement for that to happen. The need to maintain confidence in the administration of justice made it imperative that there should be a remedy in a case where bias had been established and that might justify the Court of Appeal in taking the exceptional cause of reopening proceedings which it had already heard and determined. It should however, be clearly established that a significant injustice had probably occurred and that there was no alternative effective remedy...'"

14. This Court in the case of *Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited* [2014] eKLR held that; the residual jurisdiction of the court to review its own decisions

> " should be invoked with circumspection".

In that case, the court, after reviewing decisions from different jurisdictions on the question of review had this to say:

> " 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 jurisdiction that should be involed with circumspection and only in cases whose decisions are not appealable (to the Supreme Court)"

15. The applicant's main ground for seeking to reopen the appeal is the discovery of new evidence. In the case of *Brown v Dean* [1910] AC 373, the House of Lords affirmed a decision of the Court of Appeal and quoted the passage of Lord Loreburn, L.C. where it stated at pg. 374 that:

> " When a litigant has obtained a judgment in a court of justice, whether it be a county court, or one of the High Courts, he is by law entitled not to be deprived of that judgment without very solid grounds; and where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed would be conclusive."

16. In *Re Barrell Enterprises & Others* [1972] 3 All ER 63, the Court of Appeal, Civil Division, declined to open a concluded appeal and held that the discovery of fresh evidence was not a ground for allowing a further hearing before the Court of Appeal. The Court (as per Russel, L. J) stated (pg. 636 letters f to g that:

> " ...the cases to which we were referred in which judgments in civil courts have been varied after delivery (apart from the correction of slips) were all cases in which some most unusual element was present."

17. The applicant stated that he discovered new evidence in early 2021, that the original title to the suit land was in the custody of Kamere & Company Advocates. In our view, the mere stating that the applicant had discovered new evidence was not enough. He had an obligation to explain the effect of the new discovery on the impugned judgment. In this instance, the applicant has failed to demonstrate how this discovery will impact the impugned judgement.

18. In *Flower v Lloyd* (C. A. 1877) Law Reports, Ch D, the Court of Appeal (Chancery Division) emphasized that; it had no jurisdiction to rehear the appeal and that in the case of a decree or judgment being obtained by fraud, there was always power in the courts of law to give adequate relief.

19. The applicant also stated that the respondent had obtained the title to the suit land fraudulently. We note that there is a criminal case pending before court in this regard, and therefore we cannot pronounce ourselves on the issue.

20. The applicant has also pointed out that the impugned judgment was based on the fact that a consent from the Land Control Board had not been obtained in relation to the suit land; but he had also discovered that a consent had indeed been obtained. We find that the consent exhibited is doubtful. The applicant mentioned that the consent was not necessary, yet he had proceeded to obtain the same.

21. The respondent was of the view that the issues being raised by the applicant were new issues which were not raised before the trial court, hence the trial court did not have the opportunity to address itself on the issues. He also pointed out that the application had been brought six (6) years late. We find that the delay in filing the application has not been explained, the applicant having made the discoveries in the year 2021. The present application was filed in 2023, over a year after the said discovery.

22. In the case of *Ushago Diani Investment Limited v Jabeen Manan Abdulwahab* [2019] eKLR, this court while dismissing the application for review held that:

> " The case was not a proper case for the exercise of the court's limited jurisdiction to review its decision."

23. We are not satisfied that the grounds set out by the applicant are sufficient to invoke this court's limited jurisdiction to review its own decision, as that window for reopening an appeal is limited.

24. In the result, we find that the application lacks merit and it is dismissed. As costs follow the event, the respondent will have the costs of this application.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF DECEMBER, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

.....

W. KORIR

.....

JUDGE OF APPEAL

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

signed

DEPUTY REGISTRAR