Ithongo (Suing as Legal Representative of the Estate of the Late Ishmael Ithongo) v Ithongo (Suing as Legal Representative of the Estate of the Late Geoffrey Ithongo Thindiu) (Civil Appeal (Application) 16 of 1981) [2022] KECA 1052 (KLR) (23 September 2022) (Ruling)

Neutral citation: [2022] KECA 1052 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 16 OF 1981

DK MUSINGA, F SICHALE & HA OMONDI, JJA

SEPTEMBER 23, 2022

BETWEEN

HARRY KINUTHIA ITHONGO ..... APPELLANT

SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE ISHMAEL ITHONGO

AND

KENNEDY THINDIU ITHONGO ..... RESPONDENT

SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE GEOFFREY ITHONGO THINDIU

(An application for review of the Judgment in Civil Appeal No. 16 of 1981 in the Court of Appeal at Nairobi (Law, Miller & Simpson, JJ.A.) on 10th July, 1981 arising from the Judgment of the High Court of Kenya at Nairobi (Scriven, J.) in H.C.C.C. No. 1031 of 1977 (O.S).)

RULING

1. Before this court is a Notice of Motion application dated March 15, 2018which in its very nature could re-open litigation in an appeal which was heard and concluded by this court on July 10, 1981.

2. The dispute between the parties revolves centrally over the ownership of a parcel of land known as Kabete/Kibichiko/190 (the "suit land"). It is important to point out that the original litigants, to wit, Ishmael Ithongo and Geoffrey Ithongo Thindiu, who were kinsmen are both deceased and have been substituted by their respective legal representatives.

3. The genesis of the litigation is a suit by way of Originating Summons, to wit, HCCC No.1031 of 1977, which was filed at the High Court in Nairobi by Ishmael Ithongo (deceased). His claim was that he ought to be registered as the proprietor of the suit land under the provisions of the *Limitation of*

Actions Act. This claim was defended by Geoffrey Ithongo Thindiu who asserted ownership of the suit land. In a judgment dated July 31, 1979, the High Court (Scriven, J.) (as she then was) dismissed the claim by Ishmael Ithongo with costs.

4. Aggrieved by the decision of the High Court, Ishmael Ithongo preferred an appeal to this court, to wit, Civil Appeal No.16 of 1981. The appellant through his Memorandum of Appeal dated 9th September 1980 faulted the decision of the learned judge for, inter alia, failing to find that the appellant had provided sufficient evidence to support his claim for adverse possession; misdirecting himself in making the finding that the appellant had been fraudulent and failed to consider and /or appreciate the high degree required in law to prove fraud, and making the finding that the limitation period did not start to run until 1976.

5. This Court (Law, Miller, JJA & Simpson Ag JA) vide a judgment dated July 10, 1981 held that the appellant had acquired title to the suit land through adverse possession, openly and without fraud. Accordingly, the Court allowed the appeal with costs and further ordered that the appellant be registered as the proprietor of the suit land. The respondent was given three months from the date of the judgment to vacate the suit land and to remove his personal property therefrom.

6. It is the above noted decision of this court that is the subject of the instant application. The respondent/applicant in its application which is premised on un-defined provisions of *the Constitution* of Kenya, 2010, sections 3, 3A and 3B of the *Appellate Jurisdiction Act* and all other enabling provisions of the law, prays for a multiplicity of orders. The principal orders sought by the respondent/applicant is in our view that:

> " Thecourt be pleased to review and set aside its judgment and decree dated the April 10, 1981and substitute it with orders that:
>
> i. Thecourt had no jurisdiction to hear and determine the appeal as the suit was not properly before the court at the time of the hearing.
>
> ii. The court do uphold the judgement and decree of the trial Court in High Court Civil Case No.1031 of 1977 by Scriven, J. dated July 31, 1979.
>
> iii. The appellant was a trustee of the suit land and could not legally be a trespasser on the said land.
>
> iv. The appellant did conceal material facts pertaining to the registration and ownership of the registration and ownership of the suit land to the respondent's detriment.
>
> v. The transmission of the suit land to the estate of the deceased appellant be rectified and replaced with the name of the Administrator of the estate of the deceased respondent.
>
> vi. The Administrator and/or the beneficiary of the estate of the deceased appellant do deliver vacant possession of the suit land to the Administrator and/or beneficiaries of the estate of the deceased respondent within 14 days of the order."

7. The application is supported by the grounds appearing on the face thereof and in the supporting affidavit sworn by Kennedy Thindiu Ithongo, the legal representative of the deceased respondent on March 15, 2018. For starters, the respondent/applicant argues that the court did not have proper jurisdiction to hear and determine the appeal owing to the demise of the appellant. It is stated that

the appellant passed away on November 9, 1980, a few months after the filing of the appeal. It is the respondent/applicant's position that the court went ahead to hear and determine the matter without substitution and thereby occasioned the respondent grave injustice which could be rectified by grant of the orders sought in the application.

8. The respondent/applicant faults the decision of this court for what he cites as its failure to find that the appellant, being the eldest son in the family, became a trustee upon the demise of the appellants and respondent's father. He faults thecourt for failing to consider and pronounce itself on the existence of a traditional trust known as "Muramati" created by the fact that the appellant, being the elder son in the family, became a trustee of all lands owned by his deceased father on behalf of all his brothers.

9. The application was opposed by way of a replying affidavit sworn by the appellant/respondent on May 27, 2022. He stated that thiscourt became functus officio the minute it delivered its judgment on July 10, 1981; that this court has no jurisdiction over the matters raised in the application; and that in any case, the application is brought after inordinate delay and does not disclose any grounds to warrant the court's intervention.

10. The appellant/respondent further argues that litigation must at some point come to an end. It is his position that the court made sound determination of the issues brought before it and the respondent/applicant by bringing the application merely seeks to deny him the enjoyment of the fruits of the judgment.

11. At the hearing of this application, the respondent/applicant appeared in person from the court's Registry at Nairobi while learned counsel Mr. Marete was present for the appellant/respondent. In his oral submissions, the respondent/applicant noted that his deceased father was a man of little education as opposed to the deceased appellant who was an employee of the Judiciary and who was able to use his position to illegally acquire the suit land to the detriment of the respondent and his family. He stated that the deceased appellant owing to his advanced level of education did not consider the resolution of this dispute at the family/clan level but instead opted to file suit in court, a forum he knew too well the deceased respondent and his family had little knowledge of as well as the necessary resources to seek professional legal representation.

12. With regard to his written submissions dated May 24, 2022, he states that the deceased appellant admitted before the High Court to being a trustee on behalf of his siblings. Further, that the appellant's use of the property was with permission and was not open and uninterrupted possession as he had alleged.

13. Learned counsel Mr. Marete on his part reiterated the argument that the Court upon delivering the impugned judgment become functus officio. He submitted that if the power to review its judgment existed, then the same is very restricted. This court's decision in *Kiru Tea Factory Company Limited v Stephen Maina Githaiga*, Civil Application No 137 of 2017 (UR100/2017) was cited in support of that submission.

14. Mr. Marete further submitted that the jurisdiction of review where it exists must be invoked in a timely manner. He stated that the instant application was made some 41 years after judgment and after the suit land had already gone to the successors.

15. We have considered the grounds in support of the application for review, the replying affidavit filed in opposition, submissions by both parties and all authorities cited by the parties. Thiscourt in the case of *Benjoh Amalgamated Ltd v Kenya Commercial Bank Limited* [2014] eKLR, stated that the residual

jurisdiction of the Court to review its own decisions "should be invoked with circumspection." The court, after reviewing decisions from different jurisdictions on the question of review stated thus:

> " The jurisprudence that emerges from the case- law from the aforementioned jurisdictions shows that where thecourt 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)."

16. In *Kiru Tea Factory Company Ltd v Stephen Maina Githiga,* (*supra*) this court made reference to its earlier decision in *Nguruman Limited v Shompole Group Ranch & another* [2014] eKLR where it held that it has very restricted power to review or rescind its decisions. Where the power to review exists, it is to enable the court correct an error or mistake so as to give effect to what its intention was at the time when the error or mistake was made.

17. The respondent/applicant states that the court did not have jurisdiction to hear and determine the appeal since the appellant passed away on November 9, 1980whereas judgment was delivered on July 10, 1981. Save for a letter dated August 12, 1981which was addressed to the deceased respondent by the Public Trustee and which states that the appellant passed away on November 9, 1980, the respondent/ applicant has not provided a copy of the appellant's death certificate which would have otherwise confirmed the actual date of death of the appellant.

18. In the year 1980 when the appellant is said to have passed away, the court was being guided by the *Court of Appeal For East Africa Rules,* 1972 (Revoked by L.N. 152/2010, r. 116)

Rule 96 which provided for death of party to appeal read as follows:

> " 96. An appeal shall not abate on the death of the appellant or the respondent but the Court shall, on the application of any interested person, cause the legal representative of the deceased to be made a party in the place of the deceased." [Emphasis added]

19. Rule 96 did not in any way provide that upon the demise of an appellant, an appeal would stand abated as alleged by the respondent/applicant. The timeline within which an appeal would be considered as having abated was introduced in subsequent amendments to the Rules. For instance, the *Court of Appeal Rules*, 2022 provides as follows on the death of a party in an appeal:

> " 102. Death of party to appeal
>
> 1. An appeal shall not abate on the death of the appellant or respondent but thecourt shall, on the application of any interested person, cause the legal representative of the deceased person to be made a party in place of the deceased.
>
> 2. If no application is made under sub-rule (1) within twelve months from the date of the death of the appellant or respondent, the appeal shall abate.

3. The person claiming to be the legal representative of a deceased party or an interested party to an appeal may apply for an order to revive an appeal which has abated and, if it is proved that the legal representative was prevented by sufficient cause from continuing the appeal, the court shall revive the appeal upon such terms as to costs or otherwise as it deems fit."

20. In the present case, we note that the appellant has already been substituted with one Harry Kinuthia Ithongo, the appellant/respondent herein in his capacity as the legal representative of the deceased appellant. The respondent /applicant has not told the court when this happened. Even if we were to assume that the appellant was not substituted during the pendency of the appeal, there was nothing to stop the respondent or his estate from moving the court to have the deceased appellant substituted. It is our view that the words 'any interested person' in rule 96 of the *Court of Appeal For East Africa Rules* 1972 includes and is not limited to the deceased respondent and/or his estate. In any case, and without prejudice to what we have stated hereinabove, the respondent/applicant has not demonstrated to us that the Court could have arrived at a different decision had the appellant been substituted.

21. The respondent/applicant has also argued that the court did not consider the issue of trusteeship otherwise known as 'Muramati'. We have perused the impugned judgment and note that the issue was extensively addressed at page 3 of the judgment. This issue was therefore conclusively and finally determined by the court. Having so noted, it is our view that this application is not deserving of the exercise of the court's limited jurisdiction to review its decision.

22. This court considered the appeal on its merit and rendered a decision thereon. The Supreme Court in *Menginya Salim Murgani v Kenya Revenue Authority* [2014] eKLR observed thus:

> "It is a general principle of law that a court after passing Judgment, becomes *functus officio* and cannot revisit the Judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law."

23. The respondent/applicant is attempting to re-litigate a concluded matter through the backdoor. Litigation must inevitably come to an end. This court in *Karanja v Ndirangu & another* (Civil Application 5 of 2021) [2021] KECA 57 (KLR) (8 October 2021) (Ruling) stated thus:

> "We are aware that litigation is burdensome, tedious, time consuming and costly and it is time for the applicant to realize that he has reached the end of the road. It may be painful and sometimes unfavourable to him but the earlier he comes to the realization that time is up, the better. The applicant must forget the past and forge a unity with his other family members and be satisfied with what he has, so that he can live in peace and harmony with the rest of the family. That is not an easy burden but is a reality for now. We think we have said enough to demonstrate that the journey is over and there is no more through road for the applicant."

24. In the upshot, we agree with counsel for the appellant/respondent that the respondent/applicant by bringing this application is inviting us to sit on appeal on the judgment of this court that he is unhappy with. That we cannot do. We find that there is no merit in the applicant's application dated March 15, 2018 and the same is hereby dismissed with costs to the appellant/respondent.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

H. OMONDI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR