IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OUKO, (P), ASIKE-MAKHANDIA & KIAGE, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 55 OF 2018

BETWEEN

PATRICK NGUMBAO MWENI .....APPLICANT

AND

RICHARD KIPKEMEI LIMO.....1ST RESPONDENT

HASSAN KIPKEMBOI NGENY.....2ND RESPONDENT

LAND REGISTRAR – UASIN GISHU..... 3RD RESPONDENT

CHIEF LAND REGISTRAR.....4TH RESPONDENT

ELDORET MUNICIPAL COUNCIL.....5TH RESPONDENT

ATTORNEY GENERAL..... 6TH RESPONDENT

(Being an application for review, joinder as interested party to the appeal and injunction in respect of the judgment of the Court of Appeal (Asike- Makhandia, Kiage & Odek, JJ.A) dated 25th July, 2019

in

Civil Appeal No.55 of 2018)

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RULING OF THE COURT

When the suit involving a parcel of land in Eldoret Municipality known as **Block 7/178** was heard and determined by Ombwayo, J., in the Environment and Land Court, the applicant was not a party. Indeed, it is equally true that he was not a party to the appeal that was proffered and heard by this Court.

This Court, in upholding the decision of Ombwayo, J., confirmed that the 1st respondent, who was in a contest with the rest of the respondents, had failed to discharge the burden under **Section 107** of the Evidence Act by not providing the evidence in proof of his claim to the suit land; that the 1st respondent purchased the suit land from a person who was not the registered proprietor; that his certificate of title had no legal foothold; and that the 2nd respondent demonstrated the root of his title and procedure he followed to obtain title to the suit land**.**

After that decision was rendered, the applicant, who as we have stated above, has never been a party to the dispute, now by the instant application wants this Court's judgment reviewed by being set aside, to be joined in the proceedings as an interested party, the petition to be heard afresh, and an interlocutory injunction to be issued to restrain the 2nd respondent from transferring or charging the suit land.

These prayers are brought on the basis that the applicant, who was the vendor of the suit land to the 1st respondent in this application, has some crucial evidence that will assist the Court to reach a just determination of the dispute.

As would be expected the 1st respondent supports the application while the 2nd respondent is opposed to it. The latter's opposition is informed by the consistent findings by the trial court and this Court on two occasions that the origin of the 1st respondent's title was questionable; that if the applicant was indeed the registered owner, who sold it to the 1st respondent, why was he not availed by the latter at the trial as a witness; and that by this application the applicant was inviting the Court to sit on appeal in its own judgment.

The 1st respondent's case throughout the trial and in the appeal was always that he purchased the suit property from the applicant who had authority from Rhoda Chelagat Kandie, the registered owner at the time, to sell.

Ombwayo, J., made an express finding that the applicant could not have passed any title to the 1st respondent as he was not the registered owner at the time and therefore, did not have a registerable interest in the suit land; that the suit land was registered in the name of Rhoda Chelangat Kandie as the administrator of the Estate of Aron K. Kandie; that there was no agreement of sale between Rhoda Chelangat Kandie and the 1st respondent; that similarly, there was no agreement of sale between Rhoda Chelangat Kandie and the applicant; and finally that there was no certificate of lease issued in the name of the applicant.

Agreeing with the Judge, this Court in the judgment sought to be set aside, also reiterated that the applicant **"had no legal capacity to transfer the suit property to the appellant** (1st respondent herein)**".**

The 1st respondent also urged this Court in the appeal to order a retrial in the trial court to enable Rhoda Chelagat Kandie and the applicant to be heard. In declining to accede to that request the Court expressed:-

> **"The memorandum of appeal as filed contains no prayer for re-hearing or retrial of the suit. This Court in Abdul Shakoor Sheikh -v- Abdul Najib Sheikh and 2 others, Civil Appeal No 161 of 1991 held that as a general rule, a party is not entitled to reliefs which he has not specified.**
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> **Further, in the instant matter, the appellant as the petitioner before the trial court was duty bound to call any witnesses that were relevant and crucial to his case. A re-hearing is not a proper remedy to enable a party to fill gaps or bolster its case. It is not the duty of a judge to call any witness or to direct a party to call a particular witness. A court makes a determination based on the evidence tendered by the parties. That is the essence of the adversarial justice. The appellant has not pointed to us any law that allows us to order a re-hearing to enable a party to summon or call more witnesses with a view to fill gaps in its case. We find the prayer for re-hearing has no merit."**

Once again in Civil Application Sup 131 of 2019, the 1st respondent asked the Court to certify for the purpose of appealing to the Supreme Court, that a matter of general public importance was involved. The application was dismissed, the Court holding that the issue of proof of the root of the 1st respondent's title could not qualify to be certified as raising a matter of general public importance.

All the other prayers in this application depend on the granting of the prayer for review or the setting aside of the judgment. The residual jurisdiction of this Court to review its decisions, since the establishment of the Supreme Court as the apex court, is now settled beyond debate and we can do no more than to reproduce the following passage from the decision in the case **Benjoh Amalgamated Ltd vs. Kenya Commercial Bank Limited** [2014] eKLR:

> **"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".**

It is a general principle of law that a Court after passing judgment becomes *functus officio* and cannot reconsider that judgment one more time on merits.

Finality of litigation as a fundamental principle of law enunciated in the maxim *interest republican sit finis litium*, is hinged on the public interest policy which requires that after long-running and expensive litigation, the litigation has to come to an end; a line must be drawn beyond which no party can go, and at which stage they must be told to move on with their lives.

To quote Bosire, J.A in **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others** [2007] eKLR;

> **"… litigation must end at a certain point regardless of what the parties think of the decision which has been handed down."**

Indeed, in view of the above background and the prevailing jurisprudence, the road must come to a dead end for the 1st respondent. We believe that he is clearly behind the unending litigation, including using proxies through this application to re-open the case. He has had his day in court. He had the opportunity, many chances, to bring forward his whole case.

This, therefore, in our estimation, is not a proper case for us to exercise our limited jurisdiction to review the original decision. All the issues that were relevant in the dispute have been extensively considered and with finality determined by both the Environment and Land Court and by this Court.

It has not been demonstrated to us that in determining the appeal, over the ownership of the suit land, there was fraud, bias, or other injustice, being the only grounds permitted to be considered in an application like this.

The application before us is bereft of any merit. We accordingly dismiss it with costs to the 2nd respondent.

Dated and delivered at Nairobi this 19th day of March, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR