



IN THE COURT OF APPEAL

AT MALINDI

CORAM: (MUSINGA, GATEMBU & MURGOR, JJA)

CIVIL APPLICATION NO. 18 OF 2019

BETWEEN

GODFREY KARUME.....APPLICANT

AND

1. KILIMO SHUTU
2. PHILIP CHARO SHUTU
3. JOHN CHARO SHUTU
4. TIMA MAULANA SAID AHMED
5. MAULANA SAID MOHAMED
6. ADIJA MAULANA MOHAMED
7. PRISCILIA MUGAMBI.....RESPONDENTS

(Being an application and setting aside of the judgment and orders of this Court Nairobi (Asike-Makhandia, W. Ouko and K.M'Inoti, JJA.) delivered on 31st March 2017)

in

Civil Appeal No. 43 of 2018)

RULING OF THE COURT

In this Notice of Motion dated 18th April 2017 made under **Article 159. (d)** of the **Constitution, sections 3(2), 3A and B** of the **Appellate Jurisdiction Act** and **rules 1 (2) and 42** of the **Court of Appeal Rules, the applicant, Godfrey Karume**, seeks to have this Court re-call, re-open, review or set aside the judgment and orders of this Court (*Asike-Makhandia, W. Ouko and K. M'Inoti, JJA.*), and substitute therefor a dismissal of the respondents' appeal with costs.

The application is premised on grounds that this Court mistakenly determined the date of the letter of allocation as the date when time started to run in a claim for adverse possession made by the respondents against the applicant, the registered owner of LR No. 4161, Grant Cr. No. 37527 Malindi, located opposite the Malindi Airport (*the suit property*).

The applicant's contention is that on 28th December 1986 he was allocated the suit property by the Commissioner of Lands, and that upon registration of a grant on 16th April 2004, he thereafter became the registered proprietor of the suit property. It was contended that in so far as the respondents' claim for adverse possession was concerned, time started to run from 16th April 2004, when he became the registered owner of the suit property and not on 28th December 1986 when the Commissioner of Lands issued the letter of allotment; that this Court mistakenly relied upon the date of allotment to compute whether or not adverse possession was established. It was further contended that the respondents have not been in continuous, open and exclusive occupation of the suit property as the applicant has variously sought to evict them, and that the portion of land the respondents occupied had not been ascertained.

In a judgment delivered on 19th June 2015, the learned judge (Angote, J.) found that the land belonged to the applicant for the reason that adverse possession was not established because, 12 years from 16th April 2004 when the applicant was registered as owner of the suit property had not elapsed in favour of the respondents against the applicant's title, as according to *sections 21 (2) and 32 (1) of the Registrations of Titles Act (repealed)*, an interest in land could only be effectual upon registration. The court observed that since the suit was filed in 2009, the respondents' occupation of the suit property did not amount to adverse possession, as the period between registration of the applicant's proprietorship and institution of the suit was less than 12 years.

The respondents were aggrieved and appealed against the Environment and Land Court's decision to this Court, which allowed the appeal with costs to the respondents, on the basis that adverse possession was established since the period of computation was from 1st February, 1986, when the suit property was allocated to the applicant and not 2004. In this regard this Court stated thus;

“As a holder of an allotment letter the respondent (applicant) was only a beneficial owner hence the doctrine of adverse possession could not be invoked against him at that stage and similarly he could not effectively assert his title to the suit property. The year the letter of allotment was issued to the respondent was not indicated. It was simply dated as 18th April. But it shows nonetheless that rent would be paid for the period 1st February 1986 to 31st December 1986. It must follow therefore that it was issued in 1986.”

This Court continued;

“Our consideration must now turn to the date the respondent became a lawful owner, namely the 1st February, 1986, and not 2004 as erroneously found by the learned Judge, when a grant No. 37527 was issued to the respondent for a term of 99 years from that date.”

It is this decision that has provoked this application for review before us.

Mr. Gikandi Ngibuini, learned counsel for the applicant filed written submissions, and in highlighting them stated that the dispute which concerned a claim for adverse possession, was in respect of a title to the suit property that was registered in the applicant's name on 16th April 2004; that the certificate of title included in the record of appeal was incomplete, as the second page was missing and a supplementary record of appeal was not filed to include the missing page.

It was further submitted that in determining the appeal, this Court found that the date of registration of the title in the applicant's name was 1st February 1986, and concluded that the respondents had made out a case for adverse possession. Counsel argued that had the Court taken into account that the date of registration of the title was 16th April 2004 and not 1st February 1986 it would not have concluded that the adverse possession was established, more particularly since the suit was filed in 2009; that the period between the date of registration of the title and the date when the suit was filed was a mere 5 years, and therefore the respondents could not have acquired the suit property through adverse possession; that this Court erred when it found, on the basis of an incomplete record, that adverse possession was established.

In addition counsel submitted, the respondents did not file a counterclaim for adverse possession, and therefore, it was untenable for this Court to have granted an order that was not prayed for.

For his part, **Mr. Mwadilo**, learned counsel for the 4th to 7th respondents, holding brief for Dr. Khaminwa, SC, also filed written submissions which were also highlighted. Counsel opposed the application and submitted that no proper reasons had been raised for a review or setting aside of the decision; that this Court properly analysed the record and arrived at a proper judgment; that the decision was based on the evidence that the applicant was allocated the land in 1986 and subsequently thereto took possession of the suit property

On the issue that there was no counterclaim, it was asserted that the defence filed clearly showed that the respondents were in possession, and therefore they were entitled to be registered as the proprietors, which this Court had rightly ordered.

Though served, there was no appearance for the 1st to 3rd and 6th respondents.

In reply, Mr Gikandi asserted that a complete Certificate of title had been annexed to the motion that showed the date when the applicant was registered, and that on this basis this was a proper case for this Court to review its decision.

We have considered the record and the submissions of the parties, and are of the view that the two issues that fall for consideration are whether this Court can review its judgment rendered on 31st March 2017, and if so whether this Court wrongly determined 1st February 1986 as the date from which adverse possession was to run.

Concerning whether this Court is empowered to review its decisions, **Article 164 (3)** of the Constitution defines this Court's jurisdiction thus:

“The Court of Appeal has jurisdiction to hear appeals from:-

a. the High Court; and

b. any other court or tribunal as prescribed by an Act of Parliament.”

Section 3 of the *Appellate Jurisdiction Act* which confers jurisdiction on this Court specifies that:-

“i. The Court shall have jurisdiction to hear and determine appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament in cases in which an appeal lies in the Court of Appeal under law; (emphasis ours).

ii. For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.

iii. In the hearing of an appeal in the exercise of the jurisdiction conferred by this Act, the law to be applied shall be the law applicable to the case in the High Court.”

As concerns re-opening or reviewing decisions, *rule 35 (1)* of the *Court of Appeal rules* provides that:-

“A clerical or arithmetical mistake in any judgment of the Court or any error arising therein from an accidental slip or omission may at any time, whether before or after the judgment has been embodied in an order, be corrected by the Court, either of its own motion or the application of any interested person so as to give effect to what the intention of the Court was when judgment was given.”

While *rule 57 (1)* specifies thus:

“An order made on an application heard by a single judge may be varied or rescinded by that judge or in the absence of that judge by any other judge or by the Court on the application of any person affected thereby, if –

a. the order was one extending the time for doing any act, otherwise than to a specific date; or

b. the order was one permitting the doing of some act, without specifying the date by which the act was to be done, and the person on whose application the order was made has failed to show reasonable diligence in the matter.”

As can be discerned from the above provisions, this Court’s jurisdiction is limited to hearing and determining appeals, and in the case of reviews of this Court’s orders or appeals, these can only be undertaken in certain specific circumstances—under *rule 35*, commonly referred to as the ‘*Slip Rule*’ where clerical or arithmetical errors have arisen, or under *rule 51* for the purposes of extending time in applications heard by single judges to do a particular act or for dealing with a situation where a particular act requires to be done and no time frame was specified.

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 Courts to circumstances that would meet the ends of justice. In identifying 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.”

In the case of *Fredrick Otieno Outa (supra)*, such 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.

In the application, the applicant seeks a review on the basis of what he perceives to be an error on the face of the record, in that, because the record of appeal was incomplete, this Court mistakenly computed the date when adverse possession began to run as 1st February 1986 which was the date the applicant was issued with a letter of allotment, instead of from 16th April 2004 when he became the registered owner. As to why the learned judges distinctly expressed the date of the letter of allotment to be the, “...date the respondent became a lawful owner, namely the 1st February, 1986, and not 2004 as erroneously found by the learned Judge...” to compute when adverse possession began to run is not apparent from the judgment. What is clear however is that, the 1st February 1986 is the date on which the conclusions reached in the judgment are founded.

But more importantly, when the reasons for review, that is the incomplete record, or the perceived mistaken conclusions are viewed against the rules of this Court and the threshold requirements set out in the Supreme Court’s decision in *Manchester Outfitters (Suiting Division)*

Limited (supra), we find that there is nothing that shows that the review sought is premised on clerical or arithmetical errors as defined by *rule 35*, or with unspecified timeframes as required by *rule 51*. Neither has it been demonstrated that any of the criterion outlined in the *Manchester Outfitters case (supra)* was satisfied, in that it has not been shown the judgment was borne out of fraud nor deceit, or the Court's incompetence or a mistaken belief that the parties had reached a consent or, on the basis of a repealed law, or a deliberate concealment of a statutory provision. In effect, a review of this Court's judgment in the manner suggested goes above and beyond this Court's jurisdictional mandate outlined above.

As a consequence, we decline the invitation to review our decision, and in so concluding we need go no further to address the question of whether this Court rightly concluded that adverse possession was properly established.

As such, the motion dated 18th April 2017 be and is hereby dismissed with costs to the respondents.

It is so ordered

Dated and delivered at Nairobi this 24th day of April, 2020.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR