



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL (APPEAL) APPLICATION NO. 88 OF 2016

BETWEEN

KURSHED BEGUM MIRZA.....APPLICANT

AND

JACKTON KAIBUNGA.....RESPONDENT

(An application for review and or setting aside the judgment of this Court at Malindi (Visram, Karanja & Koome, JJA.) delivered on the 5th October, 2017

in

Malindi ELC Suit No. 147 of 2014.)

RULING OF THE COURT

The applicant, Kurshed Begum Mirza has brought this Notice of Motion dated 10th May 2019 made under ***sections 3 (2) and 3A*** of the ***Appellate Jurisdictions Act*** and ***rules 1 (2) and 42*** of the ***Court of Appeal Rules, Articles 25 (c), 50 (1) and 159 (2) (d)*** of the Constitution, and ***order 9 rule 9*** of the ***Civil Procedure Rules*** against ***the respondent, Jackton Kaibunga*** seeking for orders of stay of execution of the judgment of this Court issued on 5th October 2017 pending the hearing and determination of the application; that leave be granted for the applicant, to act in person; that this Court review its judgment dismissing the applicant's appeal and order each party to bear their own costs and finally, that the Environment and Land Court's taxation order be set aside.

In the motion, the applicant seeks to have the decision of this Court reviewed on grounds that the applicant's advocate on record conducted the appeal in a slovenly manner and she was not afforded a fair hearing on the issues raised during the appeal; that this has given rise to errors on the face of the record, in that one of the sale agreements in respect of Plot No. 21 Watamu (*the Watamu plot*) made between the respondent, and the seller, Mr. Suleiman Ali Suleiman, was unsigned and could not be relied upon, and further, that the respondent had forged the applicant's late husband, Mizra Shah's signature, and unless the orders are granted the applicant will continue to suffer irreparable harm. The application was supported by a supporting affidavit of the applicant sworn on 23rd October 2018 which reiterated the contents of the motion.

In a replying affidavit sworn by the respondent on 3rd April 2019, it was deponed, that this Court having rendered its decision in respect of the appeal with costs, it lacked the jurisdiction to entertain the application for review and was in effect functus officio; that there was no positive order capable of being stayed by this Court; that the prayer on taxation of costs were matters within the remit of the Environment and Land Court and outside the jurisdiction of this Court. Furthermore, that there was no error apparent on the record of this Court's judgment that warranted a review; that the applicant was represented by counsel who ought to have raised all the issues of law and facts now being canvassed in the application in both the trial court and this Court.

A brief background to the application, is that the applicant is the administrator of the estate of her late husband Mirza Shah Marzar Baluchi, (the deceased), who died on 16th June, 1997. Her case was that both her late husband and herself had separately bought shares in a parcel of land described as the Watamu plot, originally owned by one Suleiman Bin Ali. The respondent and other persons also purchased some shares in respect of the same parcel of land.

During his lifetime, the deceased held 4/48 shares and following his demise, the shares devolved to the applicant. In addition to those shares, the applicant purchased a further 7/48 shares in her own name. The applicant contended that the shares were definite, but the Watamu plot was undivided as no survey was ever undertaken, but that the deceased had built some makuti sheds, a cinema and a bar on his portion of the plot.

According to the applicant, the dispute had arisen when the applicant sold her 7/48 shares to one Roberto Manganelli (a third party), who upon purchase attempted to take possession of the parcel but was stopped by the respondent who claimed to hold a valid title to that parcel. The situation worsened on 10th July, 2014, when the respondent demolished the structures thereon and proceeded to erect a stone wall, thereby inhibiting the applicant's ability to deal in the land.

This prompted her to seek a declaration that the respondent's encroachment of her portion of the Watamu plot was unlawful, and illegal. Also sought was a mandatory injunction compelling the respondent to demolish the structures already constructed on the subject portion of Watamu plot or in the alternative for the applicant to be granted leave to demolish the structures herself, at a cost to be recovered from the respondent, and a permanent injunction restraining the respondent by himself, his servants, workers, and other persons claiming under him from entering, constructing, alienating or interfering with, the applicant's portion of the Watamu plot.

In his defence, the respondent asserted that his occupation of the Watamu plot was lawful, since he was the registered proprietor of the portion he occupied, that being Plot No. 670 (Original 21/18) Watamu Cr. 24159 and Plot No. 809 (Original 21/20) Watamu CR. 27630, all of which were borne out of the undivided shares of the Watamu plot. He further contended that while the applicant and the deceased had bought shares, their portion of the Watamu plot remained undivided and unidentifiable, and in purporting to sell her shares, the applicant had encroached on his parcel, hence the dispute.

The respondent stated that the Watamu plot was owned by several people in definite, but undivided shares, but that his portion had been surveyed, beacons installed and the title issued. He stated that he had instituted proceedings against the deceased, namely, *Malindi PMCC No. 71 of 1996* to restrain him from interfering with his Plot Nos. 607 and 809, but upon the deceased's demise, the suit abated as no letters of administration were obtained by the estate. As such, the respondent was of the view that the present suit was devoid of a cause of action against him, and urged that it be dismissed with costs.

After hearing the evidence, the trial court found that the suit was unmerited and dismissed it. The applicant was aggrieved by the Environment and Land Court's decision and appealed to this Court.

After considering the grounds of appeal, the record and the submissions of the parties, this Court found that the learned judge of the trial court rightly dismissed the suit for the reasons that the applicant's shares were undivided, and therefore her portion of the Watamu plot remained as shares of a tenancy in common; that further, the applicant had not discharged the burden of proving the existence of her portion of the Watamu plot, in the absence of which, her portion of the Watamu plot remained unidentifiable. On this basis the learned judges of this Court dismissed the applicant's appeal.

The applicant was once again aggrieved by this Court's decision and has now filed this motion for review, which is what is before us.

In the written submissions which the applicant appearing in person sought to highlight, it was submitted that she had not in any way encroached onto the respondent's portion but that it was the respondent who was seeking to encroach on her portion; that the learned judges of this Court had overlooked the fraudulent sale agreements which the respondent had produced as one did not bear the signature of Mr. Suleiman Bin Ali's the seller, and that the deceased's signature was forged; that further, the respondent has since demolished the structures on the applicant's portion of the Watamu Plot, and by so doing had violated her constitutional rights to the property.

Learned counsel **Mr. Mbura** holding brief for Mr. Kilonzo for the respondent informed us that he would rely on the respondent's replying affidavit and the written submissions in respect of the appeal in their entirety.

We have considered the applications and the submissions of the parties, and from what we can discern, two issues are for consideration. Firstly,

whether we have jurisdiction to review our decision, and if so whether, in arriving at our decision an error has been established on the face of the record.

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 Court’s decisions 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.”

As well as in the case of *Fredrick Otieno Outa (supra)* which 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 this case, the applicant has sought to review this Court’s decision for the reason that an error exists on the face of the record; that she was not afforded a fair hearing in respect of the appeal, particularly as one of the respondent’s sale agreements with one, Mr. Suleiman Ali Suleiman is unsigned, and that the respondent has forged the signature of the applicant’s late husband and therefore the agreements ought not to have been relied upon.

In considering these complaints, there is nothing that shows that they are concerned with clerical or arithmetical errors as defined by **rule 35**, or with unspecified timeframes as required by **rule 51**. Neither has it been demonstrated that the criteria stipulated in the ***Manchester Outfitters case (supra)*** are applicable to the circumstances of this case, that is, whether it has not been shown that conflicting decisions of this Court existed or that the decision was *per incuriam*. Additionally, it has also not been shown that the judgment was borne out of fraud nor deceit, or this 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, the grounds raised having failed to meet any of the criteria set out above and we find that, the applicant not having established a basis, a review of our decision in the premises sought is beyond our mandate.

As such the Motion dated 10th May 2019 is dismissed. To avert further acrimony ensuing between the parties, we order each party to bear their own costs.

It is so ordered

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

D.K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR