IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & M'INOTI, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 61 OF 2019

BETWEEN

JEDIDAH WAMBUI KARANJA.....1ST APPLICANT

MARTIN THIRIMBU KARANJA.....2ND APPLICANT

Legal representatives of Mary Njoki Karanja (Deceased)

AND

ESTHER NJOKI NDIRANGU.....1ST RESPONDENT

AMOS KINUTHIA NDIRANGU.....2ND RESPONDENT

Legal representatives of Peter Ndirangu Kinuthia (Deceased)

(Application for review of the judgment of the Court of Appeal (Kiage, M'Inoti & Murgor, JJA) dated 8th February 2019

in

CA No. 36 of 2017)

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RULING OF THE COURT

This ruling determines a motion on notice dated 22nd February 2019 by the two applicants, ***Jedidah Wambui Karanja*** and ***Martin Thirimbu Karanja***, the legal representatives of ***Mary Njoki Karanja, deceased, (Mary)***, seeking review and rescission of the judgment of this Court ***(Kiage, M'Inoti and Murgor, JJ.A)*** delivered on 8th February 2019. By that judgment, the Court upheld the judgment of the High Court ***(Waweru, J.)*** in which the learned judge ordered the applicants to vacate ***LR No. Muguga/Gitaru/1705*** within 14 days from the date of the judgment of the High Court and to deliver vacant possession thereof to ***Peter Ndirangu Kinuthia (Peter)***, who is since deceased and is represented in this application by the his personal representatives, ***Esther Njoki Ndirangu*** and ***Amos Kinuthia Ndirangu (the respondents)***. The learned judge also awarded the deceased damages of ***Kshs. 800,000.00*** for wrongful and violent eviction from his land, as well as costs of the suit.

Before we consider the merits of the application for review, it is apposite to set out briefly the background to the application. The litigation culminating in this application has been long, tortuous and acrimonious, but the essential facts are as follows. After the parcel of land known as ***Muguga/Gitaru/805*** was transferred to Mary by an order in ***Nairobi HC. Succession Cause No. 1735 of 1995***, she obtained an order for eviction of Peter therefrom. Peter however has maintained all along that he was in occupation of his own parcel of land, ***Muguga/Gitaru/1705***, which is different and adjacent to ***Muguga/Gitaru/805***. Be that as it may, on 29th August 2001, Mary, with the assistance of the police, caused him to be violently evicted from the land he was occupying and in the process destroyed his property and possessions and demolished his houses. Peter then instituted a suit against Mary in which he averred that the whole of ***Muguga/Gitaru/805*** was compulsorily acquired by the Government for the construction of the Nairobi-

Nakuru highway as was approximately 30% of his adjoining parcel of land then known as ***Muguga/Gitaru/804.*** The reminder of his land was subsequently registered as ***Muguga/Gitaru/ 1705***, from where Mary illegally and violently evicted him. He accordingly prayed for various orders including a declaration that his eviction was wrongful and illegal, a mandatory injunction to restore his possession of

Muguga/Gitaru/1705, a mandatory induction to stop Mary from interfering with his possession of Muguga/Gitaru/1705 and general damages for trespass, loss and damage.

In her defence and counterclaim, Mary averred that in eight previous specified suits over Muguga/Gitaru/1705, the courts had found in her favour. She maintained that Muguga/Gitaru/ 1705 was part of Muguga/Gitaru/805 and that it was unlawfully and surreptitiously created by Peter in collusion with the Land Registrar, Kiambu. It was her position that Peter owned no land and that he was a trespasser on Muguga/Gitaru/805.

She therefore prayed in the counter-claim for cancellation of title number Muguga/Gitaru 1705, which she claimed was part of Muguga/Gitaru/805. ***Aganyanya, J.*** (as he then was), heard the suit in which Peter testified and called seven witnesses, who included, the land registrar, Kiambu, four surveyors, from the Government and in private practice, and the registrar of titles. Two witnesses testified in support of Mary. For reasons which are stated in the judgment of the High Court, it fell upon ***Waweru, J.*** to write the judgment. After considering the evidence, the learned judge concluded as follows:

> *"42. PW1, PW3, PW4, and PW8 were all public officers who had been brought into the controversy between the plaintiff (Peter) and the 1st defendant (Mary) by orders of the court which required them to carry out certain exercises towards resolution of the dispute in this case. PW1, PW3, and PW8 were required, in effect, to ascertain whether parcel Muguga/Gitaru/1705 in fact existed on the ground independently of parcel No. 805, or whether it was part of parcel No. 805. PW4 on the other hand was required to establish if the houses demolished in the course of evicting the plaintiff were in parcel No. 1705 or part of parcel No. 805.*
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> *43. I am satisfied from the totality of the evidence placed before the court that whereas more or less the entire parcel Lr No. Muguga Gitaru 03 was compulsorily acquired for purposes of the Nairobi-Nakuru highway, only about a third of parcel No. 804 was similarly acquired. The remaining portion of about two-thirds thereof was subsequently registered as parcel L.R. Muguga/Gitaru/1705 in the name of the plaintiff. This parcel boarders on parcel No. 805 which was more or less untouched by the highway. it belonged to the 1st defendant (Mary).*
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> *44. The assertion by the 1st defendant that the entire parcel No. 804 was compulsorily acquired for purposes of the highway is not borne out by the evidence now before the court. Her further assertion that the title Lr Muguga/Gitaru/1705 was fraudulently and illegally curved out of parcel No 805 is also not borne out by the available evidence. The 1st substituted defendant did not place any evidence before the court that comes anywhere near challenging the evidence adduced by PW1, PW3, Pw4 and PW8.*
>
> *45. I therefore find that it was not the entire parcel No. 8-4 that was acquired by the Government; only a portion thereof was acquired. The remainder was properly and procedurally registered as the new parcel No. 1705 in the name of the plaintiff. That parcel was not curved, fraudulently, unlawfully or otherwise from parcel No. 805 as alleged by the 1st defendant. The two parcels in fact exist side by side independently of each other. parcel No 805 should measure approximately 0.424 acres while parcel No. 1705 should measure approximately 0.298 acres. I find that title LR No. Muguga/Gitary 1705 is not a fraudulent and illegal fiction that does not exist or represent any land existing on the ground independently of parcel No. 805. It does exist!*

As for the suits that Mary claimed to have been determined in her favour, the learned judge considered them and found that the suit before him was not *res judicata*. Accordingly, he entered judgment for Peter as previously mentioned.

The applicants were aggrieved and preferred an appeal in this Court. The Court identified the following five issues for determination in the appeal:

> *(i) whether the suit was res judicata or otherwise barred by estoppel;*
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> *(ii) whether the applicants were denied fair hearing of the case;*
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> *(iii) whether the respondents case was contradictory and inadequate;*
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> *(iv) whether the expert evidence was wanting for non-involvement of the applicants; and*
>
> *(v) whether the trial court erred in deciding the case relying on previous proceedings.*

The Court carefully re-evaluted the evidence as it was duty bound to do, even citing ***Selle v. Associated Motor Boat Co. [1968] EA 123*** as regards the import and parameters of that duty. It then considered each of the five issues separately and in turn and concluded that there was no basis for interfering with the decision of the trial court. It therefore dismissed the appeal with costs. It is that judgment that the applicants now wants reviewed and set aside.

An earlier order of the Court dated 28th March 2019 directed that the application for review be heard by the three judges who heard the appeal. However, in view of the fact that they were serving in different stations of the Court when the application for review came up for hearing on 9th December 2019, the parties, by consent, agreed that the application be heard by the Court as constituted on that day.

The grounds upon which the review of the judgment is sought are that Muguga/Giratu/805 is the property of Mary through the decision in ***HC. Succession Cause No. 1735 of 1995***; that Peter's appeal to this Court challenging the decision in the succession cause was dismissed in ***CA No. 270 0f 1997***; that the order to evict Peter from Muguga/Gitaru/805 was not appealed from and therefore the matter is *res judicata*; that the decision of this Court which the applicants are seeking to review deprived them of their property and opened an avenue for endless

litigation; and that the Court did not consider the issues that were raised in the memorandum of appeal.

The application is supposed by a 71 page affidavit sworn by the 1st applicant on 22nd February 2019 and a further affidavit sworn on 17th May 2019 which repeats the long history of the litigation and raises the very same issues that were considered and determined by the Court in its judgment, such as *res judicata*, the alleged unlawful and fraudulent creation of Muguga/Gitaru/1705, and the writing of judgment based on proceedings recorded by a different judge.

If we had any doubt that what the applicants were inviting us to do was to sit on appeal from the judgment of this Court dated 8th February 2019, that doubt evaporated when the application was argued orally on 9th December 2019. Both the 1st appellant and ***Mr. Nyaburi,*** learned counsel for the respondents, argued the application as though it was an appeal, one party striving to demonstrate how the Court erred in the judgment, the other defending the judgment of the Court on it's merits.

We have carefully considered the application and we are satisfied that, much as this Court has jurisdiction to review its judgments, that jurisdiction is exceptional and is not available in a case like the present where the applicants are literally seeking to reopen the litigation and take a second bite of the cherry, without relying on anything exceptional, other than that they are dissatisfied by the judgment of the Court. When it rendered its judgment of 8th February 2019, the Court considered all the issues that were raised by the applicants on appeal, and it found, on merits, that it was in agreement with the trial court. We have no jurisdiction to reopen that judgment and come to a different conclusion on the merits of the appeal.

In ***Standard Chartered Financial Services Ltd & Another v. Manchester Outfitters [2016] eKLR,*** this Court emphasized the principle on review of its judgments as follows:

> ***"We reiterate that position and stress that this Court is clothed with residual jurisdiction to reopen and rehear a concluded matter where the interest of justice demands, but that such jurisdiction will only be exercised in exceptional situations where the need to obviate injustice outweighs the principle of finality in litigation." (Emphasis added).***

And in ***Mukuru Munge v. Florence Shingi Mwawana [2016] eKLR,*** the Court added thus:

> ***"The residue power of the Court to reopen its decisions is therefore a circumscribed power to be exercised in exceptional cases. That power is not intended to circumvent the principle that, save in those cases where the Constitution allows an appeal to the Supreme Court, decisions of this Court are otherwise final."***

Yet still, in ***Niels Bruel v. Moses Wachira & 2 Others (CA No.***

188 of 2012), the Court added:

> ***"Starting with the first prayer to re-open the appeal and review the judgment of this Court, it is axiomatic that this Court has jurisdiction to do so. But that jurisdiction is exceptional and has to be exercised sparingly and with circumspection to thwart disaffected parties who merely seek a second bite of the cherry or who invite the Court to sit on appeal from its own judgment."***

(See also ***Benjoh Amalgamated & Another v.Kenya Commercial Bank Ltd [2014] eKLR*** and ***Boniface Inondi Otieno v. Mehta Electricals Ltd, CA No. 29 of 2014).***

We are satisfied that this is not a proper and fit case to invoke the residual and exceptional review jurisdiction of this Court. No basis has been laid for doing so. The applicants are merely inviting us to sit on appeal on the judgment of this Court that they are unhappy with. That, we cannot do. We find that the application for review of the judgment of the court dated 8th February 2019 has no merit and is hereby dismissed with costs to the respondents. It is so ordered.

Dated and delivered at Nairobi this 22nd day of May, 2020

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR