IN THE COURT OF APPEAL

AT NAKURU

(CORAM: OKWENGU, KIAGE & SICHALE, JJ.A)

CIVIL APPLICATION NO. 140 OF 2017

BETWEEN

PATRICK KITAMONGE LEPARLEEN.....APPLICANT

AND

MARALAL TOWN COUNCIL.....RESPONDENT

(An application for recall and review of Judgment and order of the Court in Nakuru (Wendoh, J), dated 24th February, 2012

in

High Court Civil Case No. 146 of 2014)

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RULING OF THE COURT

[**1**] By a notice of motion dated 18th December, 2017 the applicant Patrick Kitamonge Leparleen has moved this Court under Section 3(2), 3A and 3B of the Appellate Jurisdiction Act and the inherent powers of the Court, seeking to have the judgment delivered by this Court on 22nd July 2016 in Nakuru Civil Appeal No. 146 of 2014 recalled and reviewed. The application is supported by an affidavit sworn by the applicant on 18th December 2017 and a supplementary affidavit sworn on 21st February 2018.

[**2**] The background to the motion is that the applicant had sued Yare Safaris Limited and Maralal Town Council (the respondent herein), seeking a declaration that he is the lawful owner of the piece of land compromised in a grant known as IRM.6185, and an order of vacant possession against Yare Safaris Limited. The respondent filed a defence and counterclaim in which it sought *inter alia*, a declaration that it was the proprietor of the land comprised in the grant, and that an order should issue cancelling the grant, if any, issued to the applicant in regard to IRM.6185 Maralal Township as the Grant was issued through fraud.

[**3**] Upon hearing the suit, the learned Judge of the High Court, (**Wendoh, J.**) found that there was no fraud established against the applicant to justify cancellation of his tittle. The learned Judge declared the applicant the lawful owner of the parcel subject of the grant IRM.6185, and dismissed the respondent's counterclaim holding that it could not revoke the title even though it included 3 acres of land belonging to the respondent.

[**4**] The applicant who was not satisfied appealed to this Court against the judgment of the High Court. In a judgment delivered on 22nd July 2016, this Court (**Githinji, Visram & Mohammed, JJ.A**) dismissed the appeal holding *inter alia*, that the applicant was allotted 17 acres of land being LR. No. 27353 (the suit property) adjacent to Yare Campsite that belonged to the respondent.

[**5**] In his motion, the applicant contends that the finding of this Court that there were two allocations relating to the same land parcel, has left the question of the applicant's certificate of title unresolved, as he holds a certificate of title for 20 acres, which in effect, the Court has through its judgment reduced to 17 acres without any revocation or rectification of his title or the register. The applicant contends that the judgment of the Court has caused him confusion and injustice, and urges the Court to recall and review the judgment to remove that confusion.

[**6**] Learned Counsel **Mr. John Githui**, who argued the matter for the applicant submitted that the judgment of the Court has occasioned substantial injustice. In urging the Court to review the judgment, counsel relied on several authorities. These included **Benjoh Amalgamated and Anor vs Kenya Commercial Bank Limited [2014] eKLR** in which the Court held that it had a residual discretionary jurisdiction to reopen concluded cases where bias or significant injustice is demonstrated; **Nguruman Limited vs. Shompole**

Group Ranch & Anor [2014] eKLR for the proposition that the Court had a duty to dispense justice to all parties; and **Standard Chartered Financial Services & Anor vs Manchester Outfitters & 2 Others, Civil Application No. 224 of 2006** for the proposition that in appropriate cases, the principle of fairness and justice will take priority over the principle of finality, and this may require the Court to reopen and review a concluded matter to correct errors of law that have occasioned real injustice.

[**7**] The respondent filed grounds of opposition, in which it maintained that there are no exceptional circumstances demonstrated by the applicant to warrant the issuance of the order sought in the said motion; that there is no element of fraud demonstrated, nor was there any bias on the part of the bench that heard the appeal; and that the applicant has been heard both in this Court and the High Court, and the principle of finality should therefore apply.

[**8**] Learned Counsel **Mr. Mugambi Nguthari** who appeared for the respondent, urged the Court to dismiss the motion as no substantive injustice had been demonstrated to justify a review of this Court's judgment. The respondent relied on **Musiara Limited vs William ole Ntimama [2004] eKLR**, in which the Court held that the residual jurisdiction of this Court to reopen an appeal which it had already determined, should only be exercised where it is clearly established that a significant injustice had probably occurred, and that there was no alternative effective remedy; and **Benjoh Amalgamated Limited & Anor vs Kenya Commercial Bank Limited** (supra) which was also cited by the applicant.

[**9**] We have carefully considered this motion, the submissions made before us and the authorities cited. It is clear that the applicant is invoking the residual jurisdiction of this Court to reopen an appeal. In **Musira Limited vs. William ole Ntimama** (supra), this Court agreed with and followed the approach taken in **Taylor & Anor vs. Lawrence & Anor [2002] 2 All ER 353**, echoing that judgment as follows:

> ***"The residual jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised. There was a tension between a court having such a residual jurisdiction, and the need to have finality in litigation, such that it was necessary to have a procedure which would ensure that proceedings would only be reopened when there was a real requirement for that to happen. The need to maintain confidence in the administration of justice made it imperative that there should be a remedy in a case where bias had been established and that might justify the Court of Appeal in taking the exceptional course of reopening proceedings which it had already heard and determined. It should, however, be clearly established that a significant injustice had probably occurred and that there was no alternative effective remedy."***

[**10**] In **Benjoh Amalgamated Limited & Anor vs. Kenya Commercial Bank Limited** (supra), this Court having considered many decisions of this Court and comparative jurisdictions, came to the following conclusion:

> ***"61. It is our finding that this Court not being the final court has residual jurisdiction to review its decisions to which there is no appeal to correct errors of law that have occasioned real injustice or failure or miscarriage of justice, thus eroding public confidence in the administration of justice. This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice.***
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> ***62. This Court will be reluctant to invoke its residual jurisdiction of review where, as here, there is laches or where legal rights of innocent third parties have vested during the intervening period which cannot be interfered with without causing further injustice. It will not entertain review of decisions made before the 2010 Constitution came into being."***

[**11**] The above makes it clear that this Court does have a limited residual jurisdiction to review its decisions. The residual jurisdiction is to be exercised in very exceptional circumstances where the application has been brought without undue delay and only for the purpose of correcting errors of law that have occasioned substantial injustice or miscarriage of justice, and in regard to which errors there is no other alternative remedy. In addition, the Court will not invoke the residual jurisdiction to review its decision where to do so would interfere with rights of innocent third parties.

[**12**] The circumstances before us are generally not in dispute. The learned Judge of the High Court having heard the case of the applicant and the defence and counterclaim of the respondent, gave orders in favour of the applicant and declared him to be the lawful owner of the parcel of land comprised in the Grant IRM.6185 and directed that any person in occupation should give vacant possession to him. However, the learned judge of the High Court also found that 3 acres of the land included in the Grant was not part of the land comprised in that grant as the 3 acres had only been leased to the applicant which lease had expired.

[**13**] The applicant being dissatisfied with that judgment appealed to this Court contending that the effect of the High Court judgment was to split the land parcel comprised in IRM.6185 into two portions. One portion being the one the applicant was allotted which was 17 acres, while the second portion of 3 acres which had been on lease belonged to the respondent. The applicant maintained that there is an error of fact and an error of law that has resulted in his title being interfered with by the judgment of the Court, contrary to section 23 of the Registration of Titles Act, as the judgment of the High Court had the effect of revoking his title in regard to 3 acres, thereby leaving him with only 17 acres when the land comprising his title was 20 acres.

[**14**] In the judgment of 22nd July 2016, this Court upheld the judgment of the High Court and dismissed the applicant's appeal holding that the applicant had been allotted a residential plot next to the Yare Campsite plot and that the two plots were separate and distinct, and therefore the applicant was only allotted 17 acres of land comprising LR. No. 27353 (IRM.6185).

[**15**] The applicant is now urging this Court to recall and review its judgment of 22nd July, 2016 on the ground that the judgment of the Court has occasioned an injustice to him since he now owns land which is less than the acreage shown on his certificate of title.

[**16**] The issue that we must address is whether the applicant has established an error of law, and if so, whether it is one that will cause

significant injustice such as to justify this Court overriding the principle of finality, and invoking its residual jurisdiction to recall and review its judgment.

[**17**] Both the trial court and this Court made concurrent findings of fact that the applicant was actually allotted only 17 acres and not 20 acres as shown on the Grant. Both Courts were satisfied that although the applicant had earlier been allotted a 2-year leasehold in regard to the adjoining 3-acre Yare campsite, the leasehold was not renewed and the 3-acre parcel was leased to someone else who subsequently surrendered the land back to the respondent. What this means is that the applicant has a title that includes 3 acres of land which does not belong to him. The question is whether in the circumstances the declaration by the High Court that he is the lawful owner of the land comprised in the Grant (which includes the 3 acres) is an error of law that has caused substantial injustice.

[18] Both the High Court and this Court on appeal acknowledged that in light of section 23 of the Registration of titles Act (now repealed) the applicant having been issued with a certificate of title for the Grant No. IRN 6185 (which was for 20 acres), and no fraud having been established in regard to the issuance of the Grant, he is the lawful owner of all that parcel of land comprised in the Grant. It is for this reason that the High Court rejected the counterclaim in which the respondent sought to have the applicant's title revoked, holding that the respondent could only have recourse to a claim for damages. In the above circumstances we do not see any error of law that requires the invocation of this Courts residual jurisdiction of review.

[19] The Court has made it clear that although the applicant was only allotted 17 acres, the sanctity of his title which comprises 20 acres of land is to be respected as his title remains lawful. The respondent could only have been entitled to relief by way of damages in regard to the 3 acres of land, but since it did not pursue such a relief in its counter claim the trial court could not consider the same. In our view the applicant's appeal was properly dismissed, and there is no justification for this Court to revisit this appeal by way of review. Accordingly, the applicant's motion is dismissed with costs.

It is so ordered.

DATED and delivered at Nairobi this 10th day of July, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR