



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL (APPLICATION) NO. 116 OF 2016

BETWEEN

MARVIN OPIYO AMBALA.....APPLICANT

NANCY AMBALA.....1ST INTENDED INTERESTED PARTY

AUMA AMBALA.....2ND INTENDED INTERESTED PARTY

AND

ODUOR HAWI AMBALA.....1ST RESPONDENT

OGOLA KODHEK AMBALA.....2ND RESPONDENT

(Being an application to review, vary and/or set aside the Judgment and Order of the Court of Appeal (Githinji, Okwengu & Mohammed, J.J.A) delivered on 26th April, 2018)

RULING OF THE COURT

1. In its judgment delivered herein on 26th April 2018, the Court set aside a judgment of the High Court given on 29th June 2016 in Succession Cause No. 68 of 1986 relating to the estate of Aggrey Otieno Ambala, deceased, who died on 8th June 1985. In doing so, the Court restored a consent order made in the High Court on 3rd December 2004 on the basis of which the estate was to be distributed. The Court also revoked an order by the High Court cancelling transfers of estate properties known as L.R. No. 1160/286, 287 and 288 and further ordered revocation of all transactions relating to those properties and the respective sub-divisions and assents undertaken after the judgment of the High Court given on 29th June 2016.

2. Before us now are two applications seeking review of the judgment. The first application is dated 28th August 2018 (the first application) and is made by Marvin Opiyo Ambala, Nancy Ambala and Auma Ambala who are beneficiaries of the estate. In addition to the prayer for the review and setting aside of the judgment, there is a prayer for Nancy Ambala and Auma Ambala, “*who were administrators and beneficiaries of the estate prior to this Court’s judgment*” to be joined as interested parties for purposes of prosecuting the application and the appeal. They also seek an order that the firm of W. Mathai & Associates Advocates be granted leave to come on record on their behalf.

3. The second application, also seeking review and setting aside of the judgment, is dated 19th July 2019 (the second application) and is made by Farooq Asif Butt, the 3rd respondent. He prays that the judgment be substituted with orders that: the consent order of 3rd December 2004 be set aside and declared null and void; that the certificate of confirmation of grant given to Bhupen Shah on 2nd November 1995 be declared null and void; that the confirmed grant dated 10th February 2006 made to Walter Ambala and Alfred Ambala and the orders of 2nd April 2008 and 28th November 2008 be set aside and be declared a violation of the applicant’s constitutional right to property, right to fair adjudication of disputes and fair judicial process and abuse of the court process; that L.R. No. 1160/287 and 288 be distributed equitably to all beneficiaries in proportion to any benefit accrued and vested therein; and that L.R. No. 1160/951 be vested upon the applicant objector Farooq Asif Butt through the estate of the late Otieno Aggrey Ambala junior. Also sought in the same application, is a declaration that the judgment is unconstitutional for breach of his rights to property and fair trial under Articles 40, 50 and 159 of the Constitution.

4. The first application is supported by affidavits sworn by the applicants, Marvin Opiyo Ambala, Nancy Ambala and Auma Ambala and by

their former advocate Juliet Theuri and a further affidavit by their present advocate Mercy Mathai.

5. In his affidavit in support of the application Marvin Opiyo Ambala, resident in Australia, deponed that he was never notified of the appeal; that he never authorized any advocate to make submissions and file affidavits on his behalf; that the signature appended to the affidavit submitted under his name was forged; and that he never instructed the law firm of Waruhiu, K'Owade and Nganga advocates who recorded the consent on distribution of the estate on 3rd December 2004. In her further affidavit Mercy Mathai states that a forensic document examination report indicates that the purported signature of Marvin Opiyo Ambala complained of was likely to have been made by a different author.

6. In their respective supporting affidavits, Nancy Ambala and Perez Auma Ambala deponed that having participated in the proceedings in the High Court, they should have been notified of the appeal as persons directly affected; and that they have been deprived of their constitutional right to fair hearing. Nancy Ambala deponed that, although she instructed the firm of Waruhiu, K'Owade and Nganga advocates to file an application for the removal of Bhuphen Shah as an administrator of the estate, the consent on distribution of the estate entered by those advocates on 3rd December 2004, which excluded her from the distribution, was entered without her instructions or consent.

7. According to Perez Auma Ambala, the advocate who appeared for the applicants, one Mr. Muyala, had previously acted for them but his services were discontinued due to lack of his professionalism; that she neither instructed the firm of Waruhiu, K'Owade and Nganga advocates and nor did she consent to the distribution of the estate in terms of the consent recorded on 3rd December 2004.

8. In opposition to the application Oduor Hawi Ambala deponed in his replying affidavit that applicant's application is made in bad faith; that he attended all proceedings in the High Court "over the last 7 years" and that at each of the appearances before that court, the firm of Wambo Muyala & Company Advocates held brief for J. Theuri for the applicants; that the firm of J. Theuri was not only served with the notice of appeal but was also served with the requisite notices prior to the hearing of the appeal.

9. The second application is supported by a detailed affidavit in which the applicant, Farooq Asif Butt, after setting out the background of the numerous succession proceedings deposes that the judgment of the Court is an affront to his rights to fair trial, right to property and a misapplication of judicial authority; that the judgment is not premised on any known provisions of the law governing intestate succession under the Law of Succession Act; that the interpretation accorded by the Court is tantamount to amending the law; that he bought a parcel of land L.R. No. 1160/951 from Otieno Ambala Junior, one of the administrators of the estate to whom a grant of letters of administration was issued on 26th August 1986;

10. He depones further that the judgment of this Court was issued on the wrong basis that there was an application for confirmation of grant and an order by the High Court given on 3rd December 2004 when in fact there was no such application or order; that the record shows that on that date, an oral application was made by Mr. K'Owade in the absence of the beneficiaries regarding the proposed distribution of the estate but no order was made; that the Court also proceeded on the wrong premise that Mr. K'Owade was acting for all the beneficiaries when in fact he was not.

11. Geoffrey Ochieng Ndeda, an administrator of the estate of Otieno Ambala Junior who died on 17th December 2004 and who was one of the administrators of the estate of the deceased herein swore an affidavit in support of the second application. To a large extent, he repeated the complaints in the motion and the averments in the affidavit of Farooq Asif Butt. He maintained that the judgment of this Court is based on erroneous presumptions to which reference has already been made.

12. During the hearing of the appeal via video link, the parties were represented by learned counsel. Ms. Mercy Mathai appeared for the applicants in the first application. Mr. Ogado appeared for the applicant in the second application. Mr. Gilbert Mungu appeared for the respondents. Mr. Odhiambo Ambala, an interested party, appeared in person.

13. In support of the first application, **Ms. Mathai** submitted that the Court has residual jurisdiction to re-open the matter and review its judgment. In support, she referred to the decisions of the Court in **Standard Chartered Financial Services Limited & 2 others vs. Manchester Outfitters (Suiting Division) Ltd (Now known as King Woollen Mills Ltd & 2 others [2016] eKLR**, and **Benjoh Amalgamated Limited & Muiri Coffee Estate Limited vs. Kenya Commercial Bank Limited, [2014] eKLR**.

14. Ms. Mathai submitted that the applicants were not notified of the appeal; that their right to be heard, which should not be taken lightly, was violated; that the advocates who were allegedly served with notice of appeal and notice of hearing did not file a notice of address for service in accordance with rule 79 of the Court of Appeal Rules and the applicants should therefore have been served personally.

15. Counsel submitted further that the submissions purportedly filed before the Court on behalf of the applicant were not filed with the applicants' authority and that it has been demonstrated that the affidavit purportedly sworn by Marvin Opiyo Ambala was forged.

16. For those reasons, Ms. Mathai urged us to allow the first application.

17. Opposing the application, **Mr. Mungu** began by stating that the matter has been in court for over 30 years and re-opening the same will be prejudicial; he submitted the application does not meet the threshold for review; that the advocate who appeared for the applicants before the High Court was duly served with the notice of appeal as well as hearing notice; that it was incumbent upon the applicants to either notify the court that they were acting in person or had changed advocates; that the firm of J.M. Theuri & Associates Advocates that represented the applicants did not at any time inform the other counsel that they had ceased acting for the applicants; that all parties were fully heard and the claim that the applicants were denied right to be heard is baseless.

18. As regards the claim of forgery of an affidavit of Marvin Opiyo Ambala, Mr. Mungu submitted that that is a matter for the applicants to take up with their advocate who presented the affidavit and cannot be a basis for the present application.

19. Regarding the second application **Mr. Ogado** for the applicant submitted that the Court has the power to recall its own decision where, as here, an injustice has resulted; that the judgment is based on errors on the face of the record; that when the purported consent on distribution of the estate was made on 3rd December 2004, most of the beneficiaries were minors who were not capable of giving consent; that the court wrongly assumed there was a change of administrators when in fact there was none; that the Court should have upheld the transaction in favour of the applicant as he contributed money that was paid to the Nairobi City Council which saved the estate property and the sale transaction has not been set aside; and that the one acre that he purchased should be retained in his name.

20. Mr. Mungu in opposing the second application urged that no basis for review have been established, that the matters the applicant is complaining of are matters that he ought to have raised in the lower court; that the applicant is also wrongly seeking a rehearing of the appeal in which case litigation will never end.

21. Mr. Odhiambo Ambala in opposing both applications stated that the sale to the applicant in the second application was illegal as the person who purported to have sold it did not have capacity to do so.

22. We have considered both applications, the affidavits and the submissions. The residual jurisdiction of the Court to review its own decisions is exercisable in exceptional circumstances. As the Court stated in **Benjoh Amalgamated Limited & Muiri Coffee Estate Limited vs. Kenya Commercial Bank Limited**:

“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.”

23. In the same vein, in **Standard Chartered Financial Services Limited & 2 others vs. Manchester Outfitters (Suiting Division) Ltd (Now known as King Woollen Mills Ltd) & 2 others** the Court considered past decisions on its jurisdiction to review its own decisions and stated:

“...This is to say that this Court has already pronounced itself in the Benjoh case in a way that evinces a clear intention of departing from the precedent set out in the Rai case. 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]

24. Mindful of those principles, the question is whether in the present case, there is an “*exceptional situation*” that justifies the exercise of the Court’s residual jurisdiction. Have the applicants in both applications demonstrated or satisfied us that this is a proper case for the Court to exercise its residual jurisdiction to review? In a nutshell, the two applications seek review on two grounds. The first is that the applicants’ right to fair hearing was violated. The second is that the judgment of the Court contains errors of fact and law.

25. As already noted, the applicants in the first application, namely, Marvin Opiyo Ambala, Nancy Ambala and Auma Ambala, claim that the judgment of the Court was made in violation of their right to access to justice and to fair hearing in that they were never notified of the appeal. On his part, Marvin Opiyo Ambala deposed that the submissions made, and affidavits filed before the Court “*were purportedly filed on his behalf by advocates who [he] never expressly or impliedly instructed*” to act for him.

26. Nancy Ambala and Auma Ambala on the other hand deposed in their respective supporting affidavits that after becoming aware that the judgment of the Court had been delivered, they “*visited the offices of Mrs. Theuri of J.M. Theuri Advocates who had represented the applicant [Marvin Opiyo Ambala] in Succession Cause No. 68 of 1986.*”

27. In her supporting affidavit, Juliet Theuri, the sole proprietor of J.M. Theuri & Associates Advocates deposed that she is well versed with the facts of the case and that she was “*the advocate on record for the applicant and the interested parties in Succession*

Cause No. 68 of 1986 where judgment was delivered...on 29th June 2016”. Juliet Theuri goes on to depose in her affidavit that she “*never received notification of the appeal*”.

28. Clearly, Marvin Opiyo Ambala would like to give the impression that the firm of J.M. Theuri & Associates Advocates in whose name the submissions and the affidavits he complains of were filed did so without his authority. Nancy Ambala and Auma Ambala on the other hand indicate that firm of J.M. Theuri & Associates Advocates acted for Marvin Opiyo Ambala in the Succession Cause whilst at the same time painting the picture that that firm did not represent them. Juliet Theuri on the other hand is clear that she acted for Marvin Opiyo Ambala, to whom she refers as the applicant, as well as for Nancy Ambala and Auma Ambala to whom she refers in her affidavit as interested parties.

29. In his replying affidavit, the 1st respondent, Oduor Hawi Ambala deposed that the firm of Wambo Muyala & Company advocates held brief for J.M. Theuri & Associates Advocates during all the proceedings in the superior court and that J. Theuri never appeared. Exhibited to the replying affidavit of Oduor Hawi Ambala is his notice of appeal dated 8th July 2016 intimating his intention to appeal the judgment of the High Court delivered

on 29th June 2016. That notice of appeal was duly served on the firm of J.M. Theuri & Associates Advocates on 14th July 2016 and that firm acknowledged receipt of the same by stamping and signing. Also exhibited to that replying affidavit are copies of a letter bespeaking typed proceedings and a hearing notice in respect of the appeal all served on, and acknowledged by the firm of J.M. Theuri & Associates Advocates.

30. Although the applicants would like to distance themselves from the firm J.M. Theuri & Associates Advocates, it is clear that that firm

acted for all of them in the succession cause; and that that firm was duly served with, and accepted service of the notice of appeal and the hearing notice.

31. We are persuaded, as submitted by Mr. Mungu, that it was incumbent upon the applicants to either notify the Court that they were acting in person or had changed advocates. We are satisfied that the firm of J.M. Theuri & Associates represented the applicants and service of the notice of appeal and hearing notice on that firm was adequate notice. If indeed the firm of J.M. Theuri & Associates had ceased to act for the applicants in the matter, it would have declined to receive the notice of appeal and the hearing notice. The claim by J.M. Theuri that her firm was not notified of the appeal is on the face of the affidavit of Oduor Hawi Ambala clearly not truthful, to put it mildly.

32. The written submissions that were tendered to the Court on behalf the applicant, Marvin Opiyo Ambala, on the basis of which the appeal was considered and judgment of the Court rendered were drawn and filed by the firm of J.M. Theuri & Associates. The claim by the applicant that the submissions and affidavits filed in court were forged is linked to the question of representation the same having been filed by the very firm of J.M. Theuri & Associates that he now claims was not representing him.

33. Based on the foregoing, there is clearly lack of candour on the part of the applicants in the first application. There is not merit in the complaint that the applicant's right to hearing was violated. We are accordingly not satisfied that the applicants have made a case for us to review and set aside the judgment of this Court.

34. As regards the second application, the applicant's complaints are that, in its judgment, the Court assumed that there was an application for confirmation of grant when there was none; that the order confirming the grant and upholding the consent on distribution of the estate made on 3rd December 2004 violated the Law of Succession Act as there was no order confirming the grant pursuant to the consent; that a limited grant issued to Bhupen Shah was fraudulently obtained in Succession Cause No. 13 of 1992 while there was a full grant issued earlier in Succession Cause No. 68 of 1986; that there was no order issued by the High Court on 3rd December 2004 as this Court assumed; that the Court erroneously proceeded on the basis that the late Mr. K'Owade was acting for all beneficiaries in recording the consent on 3rd December 2004 when in fact he did not have instructions from all the beneficiaries; and that the orders issued by the Court have led to a miscarriage of justice in that beneficiaries rights to property was breached.

35. In its judgment, the Court addressed the issues arising in the appeal based on the memorandum of appeal before it and examined whether the beneficiaries ratified the consent of 3rd December 2004; whether the firm of Waruhiu, K'Owade & Nganga was acting for all the beneficiaries; whether the consent of 3rd December 2004 was null and void and whether the judgment of the High Court was against the weight of the evidence.

36. The applicant's grievances in the second application are tantamount to complaints that the Court erred, both in fact and in law, in reaching the decision that it did. In our view, the applicant in the second application, in addition to framing what appears to be an originating constitutional petition, is seeking to re-litigate matters already determined or to frame a constitutional reference from the judgment of the Court. That is outside the purview of the residual jurisdiction of the Court to review its own decisions.

37. The result is that both applications are devoid of merit and are accordingly dismissed. Each party will bear its own costs of the applications.

Dated and delivered at Nairobi this 9th day of October, 2020.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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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

