IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OKWENGU, J. MOHAMMED & KANTAI, JJ.A)

CIVIL APPLICATION NO. 35 OF 2019

BETWEEN

DAVID KILI SAWE.....1ST APPLICANT

GEORGE WASHINGTON MOSES THUKU.....2ND APPLICANT

AND

GEORGE KAMAU KIMANI.....1ST RESPONDENT

JAMES MUCHORI KIMANI .....2ND RESPONDENT

(An application for setting aside in total the judgment and order made by the Court of Appeal on 17th January, 2019 in **Civil Appeal No. 113 of 2015**

****

RULING OF THE COURT

Background

1) By way of a notice of motion dated 28th March, 2019 **David Kili Sawe** (the 1st applicant) and **George Washington Moses Thuku** (the 2nd applicant) urge this Court to grant orders in the main:

a) That pending the hearing and determination of the application *inter partes*, there be a stay of execution of the judgment of this Court and the consequential order(s) delivered on 17th January, 2019 in Civil Appeal No. 113 of 2015 (the impugned judgment);

b) That this Court be pleased to review and/or set aside the impugned judgment and its consequential order(s) re-open, re-hear and re-determine the said matter;

c) That this Court be pleased to grant leave to the applicants to allow them to introduce new evidence in order to initiate a new trial on that specific evidence in Civil Appeal No. 113 of 2015.

2) The application is supported by the affidavit of the 2nd applicant and is based *inter alia* on the following grounds:

a) That this Court delivered the impugned judgment in which the Court allowed the respondent's appeal and overturned the decision of the Environment and Land Court (ELC) (Obaga, J.) in Kitale Land Case No.1 of 2012 in which the learned Judge of the ELC found that the applicants herein committed no fraud in registering land title number Waitaluk/Kapkoi Block 4/Waitaluk/166 (the suit property) in the name of the 2nd applicant herein;

b) That in the impugned judgment this Court held that the applicants committed fraud in registering the suit property in the name of the 2nd applicant and ordered the Land Registrar to cancel the registration and revert the title into the names of the respondents herein within 60 days from the date of judgment yet the Court did not have an opportunity of considering evidence which showed that the suit property belonged to the 2nd applicant herein;

c) That since allegations of fraud are serious with far reaching consequences, and in view of the fact that this Court's decision that the applicants herein acted fraudulently in transferring the suit property into the name of the 2nd applicant, is final and not

appealable to the Supreme Court, the applicants pray for leave to introduce additional evidence which was not available when this Court delivered its judgment but which evidence has now become available;

d) That the evidence sought to be introduced was inadvertently left out and the applicants only remembered about the same after judgment had already been delivered;

e) That the evidence sought to be introduced is credible and will have an important influence in the outcome of the appeal;

f) That no prejudice will be caused to the respondents if the new evidence is introduced for consideration by the Court;

g) That this Court has discretion to set aside its judgment and to order for additional evidence to be adduced in such manner as it may direct for purposes of enforcing Section 3A of the Appellate Jurisdiction Act;

h) That the respondents herein being the successful parties in the impugned judgment are in the process of executing the order of this Court and may evict the 2nd applicant from the suit property. There is therefore need to have the said order stayed pending the hearing and determination of this application *inter partes*.

3) The application was opposed by the respondents through a replying affidavit dated 24th June, 2019 sworn by the 1st respondent. The respondents also filed written submissions. In the replying affidavit the 1st respondent contended:

a) That the evidence which the applicants claim is new is not new and was always available to the 2nd applicant from the time of institution of the case in the High Court as the parties alleged to have had the 'new evidence' are and have at all material times been the applicants' neighbours;

b) That the claim herein was a contract of sale of land that was reduced into writing and no oral evidence can change its terms and conditions regarding the seller and purchaser of the suit property;

c) That the 2nd applicant has not disclosed when the additional evidence sought to be adduced was made available to him

d) That once this Court has determined an appeal it has no residual jurisdiction to re-open, re-hear and then re-call its earlier decision and substitute it with another;

e) That there is no appeal pending in this Court as the same was determined on 17th January, 2019;

f) That the 2nd applicant does not allege fraud, bias or other injustice in urging for a review;

g) That to allow this application would be to open the doors to all and sundry to challenge the correctness of the decisions of this Court on the basis of arguments brought long after the respective judgment was delivered; that there would be no end to litigation; and litigation must come to an end.

h) That this is not a good case for this Court to re-open, re-hear and substitute with a new judgment as this Court is *functus officio* and cannot grant the orders sought; and

i) That the instant application ought to be struck out and/or dismissed with costs to the respondents.

4) It was the respondents' further submissions that the fundamental issue for consideration in the instant application is whether this Court has jurisdiction to set aside or review its own judgment and re-open litigation for further agitation; that the impugned judgment was not made in violation of the Constitution, rules of natural justice or common law for this Court to intervene by way of review; that all parties to the litigation were given a fair hearing, and had an opportunity to call all the witnesses required; and that no violation of any Constitutional provision was committed in the ELC or in the impugned judgment of this Court.

5) Furthermore, the respondent argued that this Court has no residual jurisdiction to re-open the appeal by way of review or any other mode; that it is a public policy principle that there must be an end to litigation; that when the instant application was filed on **1st April, 2019** there was no appeal pending before this Court as the appeal was concluded and judgment delivered on **17th January, 2019**; that the power to re-open and re-hear an appeal is not provided for in the Constitution and the Appellate Jurisdiction Act; that the provisions cited by the applicants do not cloth this Court with jurisdiction to review the impugned judgment or to grant the orders sought; that the orders sought by the applicants will take the litigation back to the High Court to take what the applicants term as 'fresh evidence' and write a new judgment which will be absurd as the litigation would move between the High Court and this Court; and that the litigation in respect of this matter ended on 17th January, 2019 when this Court delivered its judgment.

Determination.

6) We have considered the application, the affidavits, the rival submissions, the authorities cited and the law. The applicants urge this Court to exercise its residual jurisdiction and review its judgment in Civil Appeal No 113 of 2015.

7) A review of authorities from this Court on the issue will put the application in context. In **Standard Chartered Financial Services Limited & 2 Others vs Manchester Outfitters (Suiting Division) Limited (Now Known as King Woolen Mills Limited & 2 Others [2016] eKLR (the Standard Chartered Case**) this Court stated as follows:

> ***"We have deliberately quoted extensively from the Rai case, the Nguruman case and the Benjoh case in order to bring out the position that this Court has taken in the past and the reason for any deviations. From the analysis it is evident that although the facts in the Rai case were similar to the Benjoh case, to the extent that in both instances there was a motion seeking to reopen a concluded judgment of the Court, the new constitutional dispensation justified a departure from the Rai case as it called for an interpretation of the Court's jurisdiction in a manner that brings it into conformity with the principles of the 2010 Constitution, and gives allowance for the development of the law…<u>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.</u>[****Emphasis supplied]****.***

8) In **<u>Benjoh Amalgamated Limited & Another vs Kenya Commercial Bank Limited</u> [2014] eKLR** the scope of this Court's jurisdiction was aptly set out as follows:

> ***"57. Jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court).***
>
> **…**
>
> ***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."***

9) Further, in **<u>Kamau James Gitutho & 3 others v Multiple lcd (K) Limited & another</u> [2019] eKLR** this Court stated as follows:

> ***" …the residual jurisdiction of this Court to re-open its own decision is exercised with caution and only in exceptional cases. It follows therefore, that this residual jurisdiction can only be set in motion once the established threshold is met. In other words, the following must be demonstrated:***
>
> ***1) The decision in issue has occasioned injustice or a miscarriage of justice; and***
>
> ***2) The said injustice or miscarriage of justice has eroded public confidence in the administration of justice; and***
>
> ***3) No appeal lies against the decision in issue."***

10) Have the applicants in the instant application met the required threshold? We do not think so. The applicants in our view have not established that the impugned decision or any errors arising therefrom has occasioned injustice or a miscarriage of justice, or that the said injustice has eroded public confidence in the administration of justice.

11) At the heart of the dispute between the parties was the ownership of the suit property. In making its determination, this Court in the judgment sought to be reviewed considered the grounds of appeal raised by the respondents herein and the submissions made by both parties to ensure that there was no miscarriage of justice that was occasioned in this matter. This Court re-evaluated the evidence that was adduced in the High Court. This Court stated as follows in the impugned judgment:

> ***"We find that the learned judge did not properly consider and analyze the evidence before him but merely accepted the evidence of the respondents without weighing it…We are satisfied that fraud was established to the required standard and the trial judge was wrong in dismissing the appellants' suit. Accordingly, we allow this appeal, set aside the judgment of the trial Court and substitute therefore judgment in favour of the appellants."***

12) The applicants have not demonstrated that this Court erred in its application of the law to the facts and in finding that the suit property belonged to the respondents. The applicants seek to adduce new evidence to bolster their claim of ownership of the suit property and have urged us to set aside the impugned judgment.

13) In **<u>Daniel Lago Okomo vs Safari Park Ltd & Another</u> [2018] eKLR** this Court stated as follows:

> ***"We do not review judgments just because a losing litigant is unhappy and despondent. We have no jurisdiction to do so."***

14) We reiterate that while this Court has residual jurisdiction to review its decisions, this jurisdiction has to be exercised with great caution and circumspection. Accordingly, this Court will only exercise such powers in exceptional circumstances. The applicants have not satisfied this Court that their application falls within the exceptional circumstances or within the purview of promoting public interest or enhancing public confidence in the rule of law. Further, the applicants have not satisfied the Court that there is any new or important matter or evidence in support of their application for review. Accordingly, we find that there is no basis to warrant this Court's review of its judgment dated 17th January, 2019.

15) In the circumstances, we find that the application dated 28th March, 2019 has not met the requisite threshold to warrant the exercise of this Court's residual jurisdiction to review its decision.Accordingly, the application is devoid of merit and is hereby dismissed with costs.

Dated and Delivered at Nairobi this 6th day of November, 2020.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR