IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MUSINGA & GATEMBU, JJ.A.)

CIVIL APPLICATION NO. 211 OF 2018

BETWEEN

FLORENCE SEYANOI KIBERA *also known as*

DOROTHY SEYANOI MOSCHION.....APPLICANT

AND

DEBORAH ACHIENG ADUDA.....1ST RESPONDENT

RENE JOHNY DIERKX.....2ND RESPONDENT

(An application for review of the Ruling of the Court of Appeal (Ouko, (P), Musinga and Gatembu, JJ.A) dated 8th March 2019

in

Civil Application No. 211 of 2018)

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RULING OF THE COURT

The widely quoted French political sociologist, Montesquieu, in his work ***'The Spirit of Laws'*** once wrote, **"There is no greater tyranny than that which is perpetrated under the shield of the law and in the name of justice."**

The Constitution has emboldened Kenyans by the expanded Bill of Rights and ease of access to justice. As we become more litigious as a nation, we must ask the question whether litigants are using the courts to promote the administration of justice or frustrate it? Pursuing a claim in bad faith and with no genuine belief in its merits, or for an improper ulterior motive is an abuse of the process of the court. As Lord Blackburn said many years ago, in an often-quoted passage in **Metropolitan Bank v Pooley** (1885) 10 App Cas 210,220-221, the court has the right to protect itself against the abuse of its process.

This is why we think this application is an abuse of the process of the court. On 8th November, 2017 the High Court **(K. Bor, J),** rendered a judgment whose effect was to restrain the applicant by an order of injunction from selling, leasing occupying or in any other manner dealing with **"the land described in the sale agreement dated 16th February, 2012 as subplot B measuring 1 acre to be hived off L.R. No. 5892/22 situated in Karen Nairobi County"** as a consequence of breach of contract of sale of the above property.

The learned Judge also issued an order of specific performance and directed the applicant to specifically perform and complete her obligations under the aforesaid sale agreement by;

> **"24..... subdividing and excising one acre from L.R. No. 5898/22 and transferring it to the respondent within 30 days of the date of the judgment failing which the Director of Surveys and the Registrar of Titles were directed to execute all the necessary documents and undertake the**

subdivision and excision of one acre from L.R. No. 5898/22 which is to be transferred to the joint names of the Plaintiffs herein. The costs of this exercise will be deducted from the balance of the purchase price.

25. .....paying the balance of the purchase price to the Defendant upon registration of the transfer of the 1 acre in the Plaintiffs' names".

Dissatisfied by the decision, the applicant took out a motion under **Rule 5(2) (b)** of the Rules of the Court, among other provisions, for temporary orders of stay of execution and injunction. In a ruling dated and rendered on 8th March, 2019, the Court **(Ouko,P, Musinga and Gatembu, JJ.A)** found no merit in the application and dismissed it. In accordance with the practice of the Court, rulings and judgments of the Court at Nairobi are delivered on alternate Fridays by a judge on duty.

On 8th March, 2019, the duty Judge, Makhandia, JA delivered that ruling dismissing the applicant's application. What followed was a barrage of prolonged attack of words, letters and in the media by the applicant and or her advocate on the persons of the four judges **(Ouko, P. Makhandia, Musinga and Gatembu, JJA).**

Simultaneously with the attacks, the applicant instituted the present motion, pursuant to **Rule 47(1)** and **(2)** of this Court's Rules, arguing that on 8th March, 2019 this Court delivered two rulings with respect to the applicant's notice of motion dated 18th July 2018; that the first ruling was delivered in the morning in open court by Makhandia, J.A whereby, the said application was allowed and the applicant directed to file the record of appeal within 14 days from the date of the said ruling; that subsequently, on the same day in the afternoon, a second ruling was delivered by Makhandia, J.A in chambers whereby the applicant's said application was dismissed for lack of jurisdiction.

In his submissions before us, Mr. Miyare, learned counsel for the applicant, argued that by dismissing the application for stay and injunction, the Court erroneously abdicated its jurisdiction and neglected to determine the application which was within its original jurisdiction; that the Court failed to consider the settled principles for the determination of applications under **Rule 5(2)(b**); and that in consideration of the aspect of arguability, the Court erroneously held at an interlocutory stage that there was no actual appeal filed by the applicant. It was further contended by counsel that in the ruling the Court collapsed the application into the case of **Nguruman Limited V Shompole Group Ranch & Anor,** Civil Application No. NAI 90 of 2013, which dealt purely with an order of stay of execution, while the applicant's application sought both stay of execution and injunction under prayer (c) and (d). He submitted that the Court found that there was no notice of appeal in respect of the judgment; that even though this Court may have been correct on the question of notice of appeal and the judgment, there were other prayers in the motion. However, in **Nguruman** (supra), the Court considered the application even though there was no notice of appeal against the decision challenged. That is because the Court did not lack jurisdiction pursuant to its inherent powers. Counsel maintained that there is a notice of appeal and the Court violated the applicant's right to be heard by rejecting her motion.

Mr. Oyomba, learned counsel representing the respondent, in opposing the application maintained that the Court, having found that it had no jurisdiction to determine the question of injunction and stay of execution under **Rule 5(2)(b)** it cannot determine this application. He submitted that the doctrine of finality of proceedings must always be upheld; that there is no provision in law that permits the re-opening and nullification of a decision of a finalized matter by the same court; that the only exception to the above principle is the "slip rule", pursuant to **Rule 35(1)(2)** of the Court of Appeal Rules; that to depart from the adherence to the slip rule would be a dangerous course to take; that the inherent powers granted by **section 3** of the Appellate Jurisdiction Act and **Rule 1(2)** of the Court of Appeal Rules are to be exercised within the course of the hearing of an appeal. Counsel denied the allegation that the Court issued two rulings, maintaining that the only ruling delivered on that day was the one dismissing the applicant's motion; and that the burden was upon the applicant to furnish proof of the existence of a second ruling allowing her application. He posited further that disagreement with the decisions of this Court on merit cannot be the basis of calling for the re-opening and reviewing of a final decision.

In consideration of the application, grounds in support, authorities and submissions, we reiterate the now well-known principles governing an application for review of a ruling or judgment of this Court. In **Menginya Salim Murgani V. Kenya Revenue Authority** Civil Application No. 4 of 2014, the Supreme Court held that:

"It is a general principle of law that a Court after passing judgment, becomes *functus officio* and cannot revisit the judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law."

In **Benjoh Amalgamated Ltd & Another V. Kenya Commercial Bank Ltd,** Civil Application No. Sup. 16 of 2012, this Court laid to rest the doubt hitherto encountered in deciding whether this Court, having ceased to be an apex court in 2010 could still insist that it had no jurisdiction to review its own final decisions. The Court expressed itself thus;

"…57. The 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).”

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“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.”

From the grounds proffered in the instant application, it is abundantly apparent to us that the application, in a roundabout and circuitous fashion, seeks to challenge the merits of the Court's ruling of 8th March, 2019 even though the applicant's main grievance all through has been the alleged existence of two separate and conflicting rulings in respect of her application. To try to challenge the decision of 8th February, 2019 in an application couched as if for a review, is in bad faith. The applicant, through her counsel, with no genuine belief in the merits of her application, opted to prosecute her case all over the place. We may also mention here that, as time is being wasted in sideshows the appeal which ought to be the applicant's main focus is yet to be filed.

Apart from failing to meet the threshold for review as laid down in the authorities cited, we find that the application was brought for an improper ulterior motive and is an abuse of the process of the court.

The applicant has not produced evidence to show that there was a ruling that was contrary to the one on record, dated 8th March, 2019 and signed by all the three members of the bench.

As it lacks substance, this application is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 24th day of May, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR