IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME, & ODEK, JJ.A) CIVIL APPEAL

(APPLICATION) No. 121 of 2010

BETWEEN

PHILLIP MUCHIRI MUGO.....RESPONDENT/APPELLANT

AND

MBEU KITHAKWA ..... APPLICANT/RESPONDENT

(Being an application for review of the judgment and orders of the Court of Appeal at Nyeri (Visram, Koome & Odek JJA) dated 30th June 2014

in

Civil Appeal No. 121 of 2010)

****

RULING OF THE COURT

1. This is an application for review of the judgment of this Court delivered on 30th June 2014. The application is dated 11th February, 2015 and was filed on 13th February, 2015. The suit property in dispute between the parties as per the impugned judgment of this Court is **Inoi/Kerugoya/769**.

2. In a judgment dated 30th June, 2014, this Court arrived at the following determination and made orders as follows:

> **"15. It is apparent that more than 12 months had lapsed since the death of the plaintiff on 18th May, 2006, to the date when the High Court issued its orders on 17th October, 2008. By virtue of operation of law, the suit filed by the plaintiff as Nyeri HCCC No. 111 of 1990 had abated. Order 24 rule 3 (2) provides that:**
>
> **"where within one year no application is made to substitute a deceased plaintiff by a legal representative, the suit shall abate as far as the deceased plaintiff is concerned…and on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff".**
>
> **16. On our part, we are convinced that had the fact of death of the plaintiff been disclosed to the learned Judge (Makhandia, J.), he would have arrived at a different decision and declared that Nyeri HCCC No. 111 of 1990, had abated and the Judge would not have conducted ex parte hearing without a legal representative for the estate of the deceased plaintiff. For these reasons, we allow the appeal and set aside the Ruling of the High Court dated 17th October, 2009, and the consequential orders and actions taken pursuant thereto. We substitute in its place an order that the Nyeri High Court Civil Suit No. 111 of 1990, be and is hereby declared as having abated by virtue of the death of the original plaintiff, Mugo Kithakwa, on 18th May, 2006. Each party is to bear his own costs in this appeal."** (Emphasis supplied)

3. In this matter, the applicant is aggrieved by the determination and final orders of this Court as stated in the judgment delivered on 30th April, 2014. Dissatisfied, the applicant has filed the instant Notice of Motion seeking review of the judgment and the orders of this Court. The application for review is supported by an affidavit deposed by the applicant himself.

GROUNDS FOR REVIEW

4. The grounds in support of the review as stated on the face of the Motion and in the supporting affidavit are:

> ***(i) There is an error on the face of the judgment of the court that the trial court was not aware that the plaintiff had died.***
>
> ***(ii) That the applicant has disclosed new evidence that had not been placed before this Court when the appeal was being heard.***
>
> ***(iii) That the applicant stands to suffer irreparable loss if the orders of this Court in Nyeri Civil Appeal No. 121 of 2010 are not reviewed.***

5. The respondent in a replying affidavit dated 24th June, 2019 opposes the application for review. He deposes that when the appeal was heard, all material disclosures were made including that the original plaintiff was dead. That the death of the original plaintiff was raised and considered by this Court in its judgment. That if the issue of death was not brought to the attention of the trial court, then it is the applicant who should have disclosed it to court before the learned Judge made *ex parte* orders of 17th October, 2008. That the orders of 17th October, 2008 were *ex parte* and it is in the *ex parte* order that the learned Judge erred in transferring the suit property to the applicant. That it is the applicant who did not disclose to the trial judge that at the time the *ex parte* order was made, the original plaintiff's body was lying in a mortuary. That this material fact was disclosed to this Court which considered it in its judgment delivered on 30th June, 2014. That there is no new evidence that has been disclosed that was not before this Court when the appeal was heard and determined.

6. The respondent further deposes that there is no error of law that has been disclosed; and that there is no failure or miscarriage of justice that has been occasioned by the judgment of this Court. That at any rate, the application for review was filed on 13th February, 2015 after a delay of eight (8) months after this Court had delivered its judgment. That equity aids the vigilant and not the indolent.

7. At the hearing of the instant application for review, learned counsel ***Mr. Turunga Ithagi*** appeared for the applicant. Learned counsel ***Mr. W. K. Arusei*** and ***Ms. Juliah Kiget*** appeared for the respondent.

APPLICANT'S SUBMISSIONS

8. Counsel for the applicant relied on the contents of the supporting affidavit and grounds stated on the face of the Notice of Motion. He emphasized that after the delivery of the impugned judgment of this Court, the judgment was served upon the Registrar of Titles who issued a new certificate of title for the suit property. That there now exist two titles over the suit property. That the title of the applicant has never been cancelled.

9. In addition, the applicant urged that there is new evidence that was not disclosed to this Court when the appeal was heard. That on 21st August, 1995, before the High Court (Angawa, J.) a consent order was recorded by the parties settling the dispute between them. That the decree dated 5th October, 1995 arising from the consent order was deliberately omitted during the hearing of the appeal. That the entire judgment of this Court delivered on 30th June, 2014 was premised on whether the trial court knew that the original plaintiff was dead. If indeed the suit had abated, then this Court ought to have held that the consent order recorded on 21st August, 1995 is the valid order settling the dispute between the parties. That the decree issued on 5th October, 1995 is the valid decree settling the dispute between the parties.

RESPONDENT'S SUBMISSIONS

10. Counsel for respondent submitted that the present application has not reached the threshold for review of any judgment. That a court can only review its decision to correct an error of law. That the applicant has not pointed out any error of law; that there is no evidence the impugned judgment breeds any injustice; that there is nothing incorrect in the judgment of this Court; that this Court correctly set aside the *ex-parte* proceedings which had been conducted by the trial judge without the applicant disclosing that the original plaintiff was dead; that during the ex-parte proceedings, it is the applicant who should have disclosed the death of the original plaintiff; and he failed to do so and thus misled the trial judge into proceeding *ex parte* to issue orders against a deceased party.

11. On the merits of the instant application, it was submitted that no new evidence has been disclosed to this Court to warrant review of its judgment. The death of the original plaintiff and the decree dated 5th October, 1995 were matters well within the knowledge of the applicant. In any event, if the applicant is aggrieved by the decision of this Court, he should apply for certification and leave to appeal to the Supreme Court.

12. In conclusion, counsel submitted the judgment of this Court has been implemented and the instant application has no merit.

ANALYSIS and DETERMINATION

13. An issue that was canvassed by the parties in their oral submissions is the jurisdiction of this Court to review its judgment. The jurisdiction of this Court to review its judgment is well settled. (See **Standard Chartered Financial Services Limited & 2 others -v- Manchester Outfitters (Suiting Division) Limited (Now Known as King Woollen Mills Limited & 2 others [2016] eKLR).** This Court in **Benjoh Amalgamated Limited & another -v- Kenya Commercial Bank Limited [2014] eKLR** expressed thus:

> **"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."

14. In the instant appeal, a ground urged for review of the judgment of this Court is that there is an error on the face of the judgment; that the trial court was not aware that the plaintiff had died; that the applicant has disclosed new evidence that had not been placed before this Court when the appeal was heard; that the new evidence is the decree dated 5th October, 1995 which was deliberately omitted in the record of appeal; that the applicant stands to suffer irreparable loss if the orders of this Court in **Nyeri Civil Appeal No. 121 of 2010** are not reviewed.

15. The respondent in opposing the instant application submitted that no new evidence has been disclosed to this Court to warrant review of its judgment; that no error of law has been pointed out to this Court; that if the applicant is aggrieved by the decision of this Court, he should apply for certification and leave to appeal to the Supreme Court. That there has been inordinate delay of eight (8) months in filing the instant application for review.

16. We have considered the submissions by both learned counsel as well as the grounds in support of and opposition to this application. This is an application for review of the judgment of this Court. It is not in all cases that this Court will review its judgment. The grounds for review are: errors of law that have occasioned real injustice or failure or miscarriage of justice thereby eroding public confidence in the administration of justice.

17. In **National Bank of Kenya Limited -v- Ndungu Njau [1997] eKLR,** it was stated that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. That a review cannot simply be raised on the basis that a different court would have reached a different conclusion on the same facts or because the court misinterpreted the provisions of the law.

18. In this matter, the applicant submitted that he has disclosed new evidence that was not before this Court when the appeal was heard and determined. The new evidence is that the decree dated 5th October, 1995 was deliberately omitted by the respondent from the record of appeal; that a further new evidence is that the original plaintiff was deceased; that the registrar of land has issued a new title over the suit property and there now exist two titles over the same property.

19. We have considered the alleged new evidence. The death of the original plaintiff is a fact that was known and disclosed to this Court during the hearing of the appeal. The death of the original plaintiff was never disclosed to the trial Judge when he proceeded to hear the applicant's application ex-parte and made orders on 17th October, 2008 against a deceased party. Moreover, even if we were to go with the applicant's argument that the Judge was aware of the death of the original plaintiff, that does not change anything as the law is the suit had abated by that time. This Court in its judgment delivered on 30th June 2014 expressly considered the legal effect of death of the original plaintiff and determined that the suit before the trial court had abated.

20. On the consent order recorded in court on 21st August, 1995 before Angawa, J. and the resultant decree dated 5th October, 1995, the ruling of the trial court Makhandia, J. (as he then was) dated 26th February, 2009 shows that the learned judge considered the consent. The issue of consent and decree recorded in court is thus not an item of new evidence that has been recently discovered by the applicant.

21. Further, we observe that the suit property referred to in the consent order is **Inoi/Kerugoya/763**. It is not apparent whether this is the same parcel of land as **Inoi/Kerogoya/769** which was the suit property in Civil Appeal No. 121 of 2010. Further, the consent recorded in court refers to an arbitration award. The arbitral award and the contents thereof have not been attached to the affidavit in support of the instant application. We are thus unable to decipher the relationship between land parcel **Nos. Inoi/Kerogoya/769** and **Inoi/Kerogoya/763** and the award and the impugned judgment of this Court. Accordingly, we are not satisfied that there is any new cogent evidence disclosed or put forward by the applicant in this application.

22. The instant application is also based on the contention that there is an error of law in the judgment of this Court delivered on 30th June, 2014. The applicant has not pointed to us any self-evident error of law that is being alleged. We find this ground for review has no merit.

23. The upshot is that the application to review the judgment of this Court delivered on 30th June 2014 in **Civil Appeal No. 121 of 2010** has no merit. The Notice of Motion dated 11th February, 2015 be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 8th day of November, 2019

W. KARANJA

…….

JUDGE OF APPEAL

M. K. KOOME

……..

JUDGE OF APPEAL

J. OTIENO ODEK

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR