



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A)**

**CIVIL APPEAL (APPLICATION) NO. 60 OF 2018**

**BETWEEN**

**USHAGO DIANI INVESTMENT LIMITED ..... APPLICANT**

**AND**

**JABEEN MANAN ABDULWAHAB .....RESPONDENT**

*(Being an application for review of Judgment of the Court of Appeal at Malindi (Visram, Karanja & Koome, JJ.A) delivered on 11<sup>th</sup> October, 2018*

*in*

*Civil Appeal No. 60 of 2018)*

\*\*\*\*\*

**RULING OF THE COURT**

1. In its application presented to the Court on 24<sup>th</sup> December 2018, the applicant, Ushago Diani Investment Limited, seeks review of the judgment of the Court delivered on 11<sup>th</sup> October 2018. In the application in which provisions of the Civil Procedure Act and the Civil Procedure Rules that do not apply to this Court are invoked, the applicant, which was the appellant in the appeal, asserts that following the judgment of the High Court, it was ousted from the suit premises and lost colossal amount of money as a result of the eviction; that its position has not been determined especially whether to assume occupation of the suit premises; that the Court omitted to express itself on the rights of the applicant to reenter or remain in the suit property; that it is in the interest of all the parties that the judgment clearly spells out the rights of the applicant as regards the suit premises.
2. In his affidavit in support of the application, John Bradley, a director of the applicant, deposes that the shareholders of the applicant are not certain of their current position despite the judgment of this Court given on 11<sup>th</sup> October 2018 in which the applicant partially succeeded in setting aside part of the judgment of the High Court; that review is sought in order “to determine the residual rights over the suit premises”; that he has tried executing the judgment of the Court without success; that it is not clear from the judgment whether the applicant should regain possession of the premises and if not, the recourse available to the applicant; that it is in the interest of all the parties in the matter that the judgment of this Court be reviewed “to clearly spell out the rights of all the parties over the structures on the suit premises and the use thereof.”; and that the Court did not determine whether the applicant could recover any damages for wrongful attachment and sale of its property.
3. In opposition to the application, the respondent, Jabeen Manan Abdulwahab, deposed in her replying affidavit that the judgment sought to be reviewed upheld a determination by the High Court that she is the registered owner of the suit property known as Kwale/Diani Beach Block 1/1463; that all issues in the appeal were addressed by the Court; that the avenue available to the applicant, if it is dissatisfied with the judgment of this Court, is to prefer an appeal to the Supreme Court of Kenya; and that the present application is incompetent.
4. During the hearing of the application, learned counsel **Mr. D. Ondego** holding brief for **Mr. Omwoyo** for the applicant, relied entirely on the application and supporting affidavit and had nothing to add. He urged us to allow the application.
5. On his part, learned counsel for the respondent, **Mr. C. Njenga**, referred to the replying affidavit in opposition to the application and submitted that the application is devoid of merit; that the applicant is seeking to introduce an entirely new cause of action that was not the subject of the appeal; that the application is brought under provisions of the Civil Procedure Rules that are not applicable to the Court; and that the application is baseless and should be dismissed.

6. We have considered the application, the affidavits and the arguments. In its suit before the High Court, the applicant sought a permanent injunction to restrain the respondent from dealing with the suit property; a declaration that the respondent was under an obligation to transfer the property to the applicant; an order directing the respondent to transfer the property to the applicant; and damages for fraud and or misrepresentation.

7. The applicant's suit was based on the grounds that the promoters and shareholders of the applicant, of which the respondent was one, had agreed on a joint-venture to develop a shopping complex on the suit property; that it had been agreed that the respondent would transfer the property to the applicant but that she had reneged on the agreement to transfer the property; and that the respondent, through fraud and misrepresentation, induced the applicant into investing on the suit property.

8. In her defence, the respondent denied the claims and asserted that she had made her contribution towards the venture in cash; that the cash she contributed was substantially applied in the construction of the complex on the property; and that it had never been agreed that she would transfer the property to the applicant. She counterclaimed for rent accrued on the basis that a resulting tenancy had been created over the property.

9. In its judgement delivered on 20<sup>th</sup> April 2018, the High Court found that the respondent is the registered proprietor of the property and determined that there was no agreement that the respondent was to transfer the property to the applicant; allowed the respondent's counterclaim and assessed and awarded the respondent Kshs.5,208,000.00 as accrued rent. The applicant appealed to this Court.

10. In its judgment delivered on 11<sup>th</sup> October 2018 (the subject of the present application for review), this Court identified two issues for determination. First, whether there was an agreement between the parties that the respondent would transfer the suit property to the applicant. Second, whether the respondent was entitled to rent over the suit property. On the first issue, the Court upheld the determination by the High Court that there was no such agreement and declared that the respondent "is and was at all times the owner of the suit property."

11. On the second issue, the Court overruled the High Court and held that the respondent was not entitled to rent over the suit property. In the result, the Court pronounced:

***"We hereby set aside the High Court judgement dated 20 April 2018 in regard to rent payable and substitute the same with an order dismissing both of the appellant's suit and the respondent's counterclaim with no orders as to costs."***

12. Given that the applicant's suit was dismissed, we are unable to understand the complaint by the applicant that it "tried executing the judgment...without success". The judgment did not confer on the applicant anything capable of executing. The complaints that: there is an "apparent slip and/or omission in the judgement", and that the judgement does not clearly spell out the rights of the appellant over the property have no basis. The complaint that the Court did not determine whether the applicant could recover any damages for wrongful attachment and sale of its property has also no basis as it was not a matter either before this Court or the High Court.

13. As the Court stated in the case *Benjoh Amalgamated Ltd vs. Kenya Commercial Bank Limited [2014] eKLR*, the residual jurisdiction of the Court to review its own decisions "should be invoked with circumspection". In that case, the Court, after reviewing decisions from different jurisdictions on the question of review had this to say:

***"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)."***

14. This, therefore, is not a proper case for the exercise of the Court's limited jurisdiction to review its decision. As we have endeavored to demonstrate above, the issues that were before the High Court and by extension before this Court on appeal were conclusively and finally determined in the judgment of this Court delivered on 20<sup>th</sup> April 2018. As stated by the Supreme Court in *Menginya Salim Murgani vs. Kenya Revenue Authority [2014] eKLR*:

***"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."***

See also the decision of this Court in of *Peterson Ndung'u, Stephen Gichanga Gituro, N. Ojwang, Peter Kariuki, Joseph M. Kyavi & James Kimani vs. Kenya Power & Lighting Company Ltd [2018] eKLR*

15. We therefore agree with counsel for the respondent that the applicant is seeking to make out a new case on the basis of an application for review. There is no merit in the applicant's application dated 21<sup>st</sup> December 2018 presented to this Court on 24<sup>th</sup> December 2018. It is dismissed with costs to the respondent.

Orders accordingly.

***Dated and delivered at Mombasa this 19<sup>th</sup> day of December, 2019.***

**D.K. MUSINGA**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, (FCIArb)**

.....

**JUDGE OF APPEAL**

**A.K. MURGOR**

.....

**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the original.*

**DEPUTY REGISTRAR**