IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. 69 OF 2017

KIPLAGAT KOTUT ..... APPLICANT

VERSUS

ROSE JEBOR KIPNG'OK ..... RESPONDENT

(*An application for setting aside in total the judgment and order made and/or delivered by the court on 14th June, 2016*

in

ELDORET COURT OF APPEAL CIVIL APPEAL NO. 31 OF 2015)

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RULING OF THE COURT

[1] This is an application for the main orders that:-

> ***"1. .....***
>
> ***2. .....***
>
> ***3. .....***
>
> ***4. Judgment of this honourable court delivered on 14th June, 2016 by Justice D. K. Maraga, D. K. Musinga and A. K. Murgor in Court of Appeal, Civil Appeal No. 31 of 2015 be reviewed and or set aside with all its consequential orders.***
>
> ***5. the Court of Appeal Civil* No. 31 of 2015 *be re-admitted for hearing afresh or de novo."***

The application is supported by the grounds on the body of the application, the supporting affidavits of the applicant and the annexed documents.

The grounds of the application are summarised in the body of the application as follows;-

> ***"(a) A Judge who did not preside over and or heard the appeal wrote the judgment.***
>
> ***(b) A Judge who presided over and heard the appeal did not give his Judgment on the matter.***
>
> ***(c)The Court of Appeal did not make a determination and pronounce a decision on all the grounds and or issues canvassed before it."***

[2] The applicant states in supporting affidavit, amongst other things, that he was denied the benefit and decision of Justice Gatembu and that by having a Judge who did not hear a matter write a Judgment and by having a Judge who heard the matter not delivering his verdict violated his rights to fair hearing. The applicant further states in the grounds of the application that the application raises issues of public interest as to whether a Judge who did not hear a matter could write a Judgment and one who did hear a matter failed to write a judgment.

[3] The respondent states in the relevant parts of the replying affidavit that there are no exceptional circumstances raised to warrant re-opening of the matter, the issues raised are purely clerical errors which Court can correct *suo moto* to give effect to its Judgment; the court's residual jurisdiction and power is limited to correction of errors and omissions and does not include re-opening and re-hearing of concluded matters and, that, the Court has residual power to correct the error to give effect to its judgment without re-opening the matter.

[4] The dispute between the parties related to the sale of land title **No. Plateau/Plateau Block 2 (Uasin Gishu)** 63 measuring 8.027 hectares. The applicant herein filed a suit in the High Court in 2011 alleging that the respondent herein had by an agreement dated 31st January, 2000 sold the entire land to the applicant for a consideration of Shs.700,000; that he had paid the entire purchase price, and, in addition paid the loan due to Agricultural Finance Corporation; that a consent to transfer the land had been given by the Land Control Board on 11th January, 2001 and that the respondent had refused to transfer the land.

He sought the equitable relief of specific performance. The respondent in her defence and counter-claim admitted the agreement of sale but averred that the applicant did not pay Shs.70,000/= and that the consent of the Land Control Board was fraudently obtained. By the counter-claim, the respondent sought judgment for a declaration that the sale was a nullity and that the applicant should be refunded his deposit.

The Environment and Land Court (Munyao Sila, J.) upon hearing the evidence held that the agreement of sale was unenforceable for the reason that the consent of the Land Control Board was applied for and obtained outside the six months of the agreement. The learned Judge nullified the sale and ordered the applicant to give vacant possession of the land.

[5] The applicant filed Civil Appeal No. 31 of 2015 in the Court of Appeal against the judgment. The cause list showed that the appeal was to be heard on 18th February, 2016 by Maraga (as he then was); Musinga & Gatembu JJA. However, the typed coram sheet prepared for the appeal showed that the bench to hear the appeal comprised of Maraga, Musinga & Murgor, JJA.

The appeal was heard on the scheduled date and a judgment, which is annexed to the application, delivered on 14th June, 2016 dismissing the appeal. The copy of the judgment annexed to the application is the original typed copy signed by Maraga, Musinga and Murgor, JJA. It was certified as true copy of the original by the Deputy Registrar of the Court on 14th June, 2016 – that same day that the judgment was pronounced.

The respondent has annexed another certified copy of the judgment delivered on 14th June, 2016 showing that the judgment was pronounced by Maraga, Musinga and Gatembu, JJA. It has a certificate which is signed but it does not bear the stamp of the Court.

At the hearing of the appeal, Mr Korir, learned counsel for the applicant, orally submitted partly thus:

> ***"The judgment referred in the replying affidavit was never delivered. We do not know about the other judgment."***

On his part, Mr Kibii, learned counsel for the respondent stated in reply;

> ***"I appeared in the appeal. Bench was Maraga, Musinga and Gatembu, JJA. Murgor, JA was not there."***

[6] The application is not based on any statutory law. Rather, the application is based on the residual jurisdiction of this Court to re-open concluded appeals as enunciated in several cases including **Benjoh Amalgamated Limited & Muiri Coffee Estate Limited v Kenya Commercial Bank Limited [2014] eKLR (Benjoh case)** and **Standard Chartered Financial Services Limited & 2 Others v Manchester Outfitters (Suiting Division) Limited (now known as King Woollen Mills Limited & 2 Others [2016] eKLR.** In the latter case, this Court said in part at para. 52 of the Judgment.

> ***"… this Court is clothed with residual jurisdiction to re-open 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."***

In that case the Court quoted a passage in Benjoh case thus:

> ***"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".***

[7] Section 5(1) of the Appellate Jurisdiction Act empowers the Rules Committee to make rules for regulating the practice and the procedure of the Court of Appeal and **Section 5(3)** provides that Rules made under that section may fix the number of judges of the Court who may sit for any purpose provided that -

> ***"(i) an even number of judges shall sit, which, for the purposes and of any final determination by the Court other than the summary dismissal of an appeal, shall not be less than three; and***
>
> ***(ii) any determination of the Court on any matter (whether final or otherwise) shall, where more than one judge sits, be according to the opinion of a majority of the judges who sit for the purpose of determining that matter."***

Further, **Rule 35(1)** of the **Court of Appeal Rules, 2010** provides:

> ***"A clerical or arithmetical mistake in any judgment of the Court or any error arising therein from an accidental slip or omission may at any time, whether before or after judgment has been embodied in an order, be corrected by the Court, either of its own motion or the application of any interested person so as to give effect to what the intention of the Court was when judgment was given".***

[8] The records of the Court show that despite the error in the Coram sheet indicating that the appeal was to be heard by Maraga, Musinga and Murgor, JJ.A. the appeal was in fact heard by Maraga, Musinga and Gatembu, JJ.A. as indicated in the cause list. However, whilst the records of Musinga, JA. and Gatembu, JA. are available, the records of Maraga, JA. could not be immediately availed by the registry. This is the record which in practice contains the original typed and signed judgment of the Court.

Nevertheless, the certified copy of the original typed judgment annexed to the application which shows that Maraga, Musinga and Murgor, JJ.A. signed the judgment of the Court has not been impugned. Indeed, the respondent maintains that the signing of the judgment by Murgor, JA was a clerical error which this Court should correct on its own motion.

Although there is a copy of the same judgment indicating that the judgment was made by Maraga, Musinga and Gatembu, JJ.A. that copy is not signed by the three judges nor does it bear the Court stamp verifying that it is a true copy of the original.

[9] Moreover, the two records available do not show, nor do the parties allege, that there were proceedings subsequent to the pronouncement of the judgment at which the judgment as signed was corrected either pursuant to Rule 35 (1) by the Court on its motion or on application of any party.

It follows that the copy indicating that Gatembu, JA. and not Murgor, JA. made the judgment is not the formal copy of the judgment of the Court. Whilst it is a matter of public notoriety, which the Court can take judicial notice of, that Maraga, Musinga, Gatembu and Murgor, JJ.A. were stationed at Kisumu at the time, this Court differently constituted cannot infer without any information of the circumstances under which Murgor, JA. signed the judgment, that the judgment correctly reflects the views of Gatembu, JA. nor can the Court at this stage correct the judgment. Morever Gatembu, JA. was not present when the judgment was pronounced. The records show that it is Musinga, JA. who read the judgment of the Court.

[10] The applicant has demonstrated that Gatembu, JA. who was a member of the Court which heard the appeal did not sign the unanimous judgment of the Court and that another judge who did not hear the appeal signed the judgment instead. This is a factor which goes not only to the competence of the Court which delivered the judgment but also to the principles of substantive justice. We hold that this breach, albeit inadvertent, constitutes a singular exceptional circumstance justifying the re-opening of the appeal in exercise of the Court's residual jurisdiction.

The other grounds relied on by the applicant relate to errors of law or fact which are not exceptional in nature and which do not justify the re-opening of the appeal.

[11] For the reasons in the preceding paragraph,

(i) The application is allowed;

(ii) The judgment of the Court delivered by Maraga, Musinga and Murgor, JJ.A. on 14th June, 2016 is set aside;

(iii) Civil Appeal No. 31 of 2015 is re-opened and shall be heard de novo;

(iv) The costs of this appeal shall be costs in the re- opened appeal.

DATED and delivered at Eldoret this 17th day of May, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

…….……..…

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR