



IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPEAL NO. 144 OF 2013

BETWEEN

SHIKUKU MASON SITERA.....FIRST APPELLANT

EVERLYNE NAKHUNGU JUMA.....SECOND APPELLANT

AND

BEN KUMBUTI WASILWA.....RESPONDENT

(Appeal from the ruling and orders of the High Court of Kenya

at Eldoret (Ngenye, J.) dated 28th March, 2013

in

SUCC. CAUSE NO. 59 OF 2011)

RULING OF THE COURT

[1] On 20th July 2017, this Court (Musinga, Gatembu & Murgor, J.J.A.) delivered a judgment in Civil Appeal No. 144 of 2013 in which the learned Judges dismissed an appeal lodged by the applicants Shikuku Masoni Sitera and Everlyne Nakhungu Juma (hereinafter referred to as 1st and 2nd applicants). The applicants had appealed against the judgment of the High Court in which the High Court upheld an application lodged by the respondent, Ben Kumbuti Wasilwa for revocation of the grant issued in regard to the estate of the deceased, Wachenda Mason. The Court upheld the finding of the High Court that the deceased had sold and transferred Land Parcel known as Kakamega/Chekalini/238, and therefore the grant issued including the property as part of the estate of the deceased was obtained fraudulently and or by concealing material facts.

[2] By a notice of motion dated 16th August 2017, the applicants have now moved this Court under **Rule 35** of the Court of Appeal Rules for orders that the Court be pleased to review, vary and or rectify anomalies in the judgment delivered by the Court on 20th July 2017. The applicants contend that there is an error on the face of the record that has occasioned a miscarriage of justice.

[3] The error concerns the omission in regard to two land parcels; N.Kabras/Silunga/485 and N.Kabras/Silunga/134 in the agreement dated 24th December 1986 resulting in the judgment delivered by the Court on 20th July 2017 omitting land parcel N.Kabras/Silunga/134. The applicants contend that the omission has caused injustice. The applicants have filed written submissions wherein they fault the learned judge of the High Court for having revoked the grant issued on 12th May 2011 at the respondent's request when he was not a relative of the deceased. It is contended that the deceased was the 1st allottee of the land No.Kakamega/Chekalini/238 and that, that property remained as part of his estate and therefore an injustice was committed in revoking the original grant.

[4] The application is opposed by the respondent who maintains that this Court can only correct an arithmetical and or clerical error and that the applicants are seeking to have the substantive judgment reviewed, which is a matter that can only be done on appeal.

[5] The applicants has brought his application under Rule 35 of the Court of Appeal Rules. That Rule deals with correction of errors and states as follows:

“(1). A clerical or arithmetical mistake in any judgment of the Court or error arising therein from an accidental slip or omission, may at any time, whether before or after the judgment has been embodied in an order, be corrected by the Court either on 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.

(2). An order of the Court may at any time be corrected by the Court, either on its own motion or on the application of any interested person, if it does not correspond with the judgment it purports to embody or, where the judgment has been corrected under sub-rule (1), with the judgment so corrected.”

[6] It is evident from the applicant’s motion that the corrections sought to be made were neither clerical nor arithmetical corrections. Instead the applicant seeks to “review, vary and or rectify anomalies in the judgment that was delivered on 20th July 2017.” It is clear that such an application cannot fall under Rule 35 of the Court of Appeal Rules. Moreover, from the grounds stated on the applicant’s motion and the supporting affidavits, it is evident that the alleged error is an error of omission said to have originated from an agreement dated 24th December 1986 that was produced in evidence during the trial in the lower court resulting in the judgment and the transfer not reflecting land parcel No. N.Kabras/Silunga/134. That is a substantive issue concerning the propriety of the judgment. It cannot be dealt with by way of correction.

[7] In the case of ***Benjo Amalgamated Limited & Muiri Coffee Estate Limited vs Kenya Commercial Bank Limited [2014] eKLR***, this Court considered the power of the Court to recall, reopen and or review its own decision and concluded as follows:

“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.”

[8] In our view, the applicants have not satisfied the Court that there are any errors of law that have occasioned any injustice nor have they demonstrated that there is any public interest involved in their matter such as would justify the stringent conditions for the exercise of this Court residual power of review. In the circumstances, we find no merit in the applicant’s motion. It is accordingly dismissed with costs.

DATED and delivered at Eldoret this 20th day of September, 2018

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.