IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & AZANGALALA, JJ.A)

CIVIL APPEAL NO. 43 OF 2015

BETWEEN

MATE GITABI ....APPELLANT

AND

JANE KABUBU MUGA alias

JANE KABURU MUGA ....1ST RESPONDENT

PHYLIS CIAMATI MWIRICHIA...2ND RESPONDENT

ELISIUS NJOKA MWIRICHIA..3RD RESPONDENT

ELIPHA MBUBA NJUE...4TH RESPONDENT

*(Being an appeal from the High Court of Kenya at Meru (**Makau, J**) dated 2nd July, 2015*

in

Meru HCCC No. 2 of 2005 (O.S)

****

RULING OF THE COURT

Before us is a Notice of Motion dated the 13th day of July, 2016 and lodged in the court's sub-registry at Nyeri on the 24th day of August, 2016. It substantively seeks one relief with an attendant prayer for costs, namely:-

> ***"1. That the Honourable Court be pleased to review its judgment delivered on 6th April, 2016 and order that the suit against the first respondent had abated and therefore no orders can be made in respect of land parcel number Magumoni/Mukuuni/1674 and the same should remain in the names of the deceased Jane Kabubu Muga."***

It is brought pursuant to **Sections 3A** and **3B** of the **Appellate Jurisdiction Act Cap 9** of the **Laws of Kenya** and all other enabling provisions of the law and has a supporting affidavit. It was opposed

informally purely on points of law only.

In a brief submission before us, learned counsel Mr. Cheruiyot holding brief for Mr. Mutuma for the applicant, submitted that there is an apparent error on the face of the judgment delivered by the court on the 6th day of April, 2016 in so far as it purported to include land parcel No. Magumoni/Mukuuni/1674 (the suit property) registered in the names of the now deceased (the deceased) first respondent, Jane Kabubu Muga alias Jane Kaburu Muga, which land parcel had long been excluded by the High Court on account of the abatement of the High Court suit against the deceased. second, that it is not only prudent for this Court to correct this glaring error on the face of the record, but the court also has jurisdiction to make the correction it has been invited to make.

In response to the above submissions, learned counsel Mr. Ashford Gerrad Riungu admits that the deceased Jane Kabubu Muga passed on in the year 2009 and that the High Court acknowledged this fact in its judgment when it observed that the suit against the deceased had abated. The above admission notwithstanding, learned counsel **Mr. Riungu**, submits that the applicant stands nonsuited on his application as there is no power donated to the court to revisit its own judgment under the provisions of law cited by the applicant. Second, **Article 164** of the **Kenya Constitution, 2010** which donates the appellate jurisdiction to the court does not vest this court with the power to review; and third, that as the applicant failed to avail herself of the inherent power of the court donated under rule 1(2) of the rules of the court and rule 35 (1) on the correction of errors, there is no other provision under which the Court can revisit its judgment of 6th April, 2016 and exercise its discretion in favour of the applicant with regard to the relief sought.

In reply to the respondents' submissions, learned counsel Mr. Cheruiyot reiterating his earlier submission that the court has jurisdiction to correct the error apparent on the face of the record, added that failure to cite the correct procedural provision of law is no bar to the court granting the relief sought especially where entitlement to the relief requested for has been demonstrated to exist like in the application under review.

Our invitation to intervene on behalf of the applicant has been invoked under the provisions of sections 3A and 3B of the Appellate Jurisdiction Act (supra). These are the provisions of the law that enshrine the overriding objective principle in Civil Litigation. It is now trite that the overriding objective principle exists to enable the court achieve a fair, just, speedy proportionate, time and cost saving disposal of cases before it; but it does not operate to uproot established principles and procedures. Second the principle also emboldens the court to be guided by a broad sense of justice and fairness. Third, also to give the court greater latitude in considering technicalities which might hinder the attainment of ends of justice (see the case of **City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the estate of Halima Wamukoya Kasabuli versus Orient Commercial Bank Limited Civil Application No. Nai. 302 of 2008 (UR. 199/2008) & Kariuki Networks Limited & Another versus Daly & Figgis Advocates Civil Application No. Nai. 293 of 2009** among numerous others.

In view of the above principles, we agree with **Mr. Riungu's** submission that the provisions of law cited by the applicant do not donate the express power to review. The main thrust that these of the provisions however, has been strengthened by **Article 159(2)(d)** of the **Kenya Constitution 2010,** which enjoins courts of law to lean towards the rendering of substantive justice without undue regard to technicalities of procedure.

However, it is now trite that the application of the overriding objective and the provision of Article 159(2)(d) do not operate as an open license for parties to derogate from the adherence to laid down court procedures. Both provisions are intended to be invoked sparingly especially where there is demonstration that allowing the technicality to hold, would be tantamount to allowing such a technicality to trump the primary objective of dispensing substantive justice to the parties and thereby amount to an impediment to Justice. **(see Jaldesa Tuke Dabelo versus IEBC & another [2015] eKLR) & Raila Odinga & 2 Others versus IEBC and 3 Others [2013] eKLR).**

When considered in the light of the above rival submissions, it is our considered view that sending the

applicant away empty handed from the seat of justice in an instance where there is clear demonstration that even the High Court had taken note of the abatement of the suit against the deceased long before the appeal was even filed and determined, would amount to an affront to substantive justice.

As correctly observed by Mr. Riungu, no other provision was cited by the applicant save the omnibus phrase "**and any other enabling provisions of law**". Mr. Riungu opines that rule 1(2) and 35(1) of Rules of the Court were available but since they were not invoked we have no jurisdiction to intervene.

Rule 1(2) of the court provides:-

> ***"1(2) Nothing in these rules shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.***

In **Equity Bank Limited versus West Link NBO Limited [2013] eKLR, Musinga JA, was explicit that:-**

> ***"Inherent power is the authority possessed by a court implicitly without its being derived from the Constitution or Statute. Such power enables the judiciary to deliver on their constitutional mandate. It is the natural or essential power conferred upon the court irrespective of any conferment of discretion"***

The Supreme Court went further in the case of **Board of Governors Moi High School Kabarak & another versus Malcolm Bell [2013] eKLR** to add, *inter alia,* that:-

> ***"--- Inherent powers are endowments to the court such as will enable it to remain standing, as a constitutional authority and to ensure its internal mechanisms are functional; it includes such powers as enable the court to regulate its internal conduct, to safeguard itself against contemptuous or disruptive intrusion from elsewhere, and to ensure that its mode of discharge of duty is consionable, fair and just ---- but does not extend to the assumption of jurisdiction which it does not otherwise have."***

Rule 1(2) of the rules of the Court (supra) therefore enshrines the inherent power of the court. There is nothing in it and the case law assessed above that suggests that a party can only avail himself/herself of such inherent jurisdiction where it has been formally invoked. In our view, the correct position would be that the inherent power donated to the court vide the **rule 1(2)** of the rules of the court procedures is a ready handmaiden of justice which may be invoked formally or the court may invoke it on its own motion as the case may be. It is therefore our finding that we have jurisdiction to tap on the inherent jurisdiction of the court to vest ourselves with the necessary authority to intervene on behalf of the applicant in the peculiar circumstances of the application under review, notwithstanding the failure to formally cite the relevant provision.

The next issue for our determination is the procedure to be followed in so intervening. Is it by way of review or by way of a correction under **rule 35** of the Rules of the court. In our view, Rule 35 is most appropriate as it provides:

> ***"35. (1) 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 the 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.***

The error sought to be corrected was well captured by the learned trial judge at paragraph 18 of the judgment thus:-

> ***"I now turn to the other issue raised by the defendants, that; is this suit abated as against the 1st***

defendant. It is not in dispute that the 1st defendant is deceased and that she died on 13th November, 2009 as her defence exhibit D1. No application was made to substitute the legal representative of the deceased as a party to this suit. Consequently, and in light of the provisions of Order 24(4)(1) of the Civil Procedure Rules 2010, I am in agreement with counsel for the defendants that the suit as against the 1st defendant has abated and since the 1st defendant was the registered owner of Land Parcel No. Magumoni/Mukuuni/1674 no order can be issued as against the said parcel of land.

It is clear to us that the above finding and orders was overlooked by this Court in its judgment of 6th April, 2016. The ends of justice demand that the error found at page 11 line eleven (11) from the top should be corrected to read "**those subdivisions are of no effect with the exception to the subdivision with regard to Land Parcel No. Magumoni/Mukuuni/1674",** the suit property. This is because no order was issued to affect the suit property as demonstrated above.

The final order on page 12 line 8 from the top is accordingly varied to read that the judgment and the decree of the High Court at Meru given on 2nd July, 2015 is partially set aside and substituted with an order that the appellant's suit Before the High Court is partially allowed as prayed with the exception of the exclusion of parcel number **Magumoni/Mukuuni/1674** the suit property, from the resulting decree. The parties shall bear their own costs.

Ruling delivered under **Rule 32** of the rules of this Court on account of the retirement of F. Azangalala J.

DELIVERED and **DATED** at **NYERI** this 5th day of April 2017.

P. N. WAKI

....

JUDGE OF APPEAL

R. N. NAMBUYE

....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR