



IN THE COURT OF APPEAL

AT NYERI

(CORAM: G.B.M. KARIUKI, F. SICHALE & S. Ole KANTAL, JJA)

CIVIL APPEAL (APPLICATION) NO. 73 OF 2015

BETWEEN

GRACE KAMENE M'BERECE.....APPELLANT/RESPONDENT

AND

JOYCE RIGIRI W/O DAVID MBOGORI..1ST RESPONDENT/APPLICANT

JOHN MBOGORI.....2ND RESPONDENT/APPLICANT

(An Appeal from the Decree of the High Court of Kenya at Meru (Njoroge, J.) dated 22nd October, 2015

in

E. L. C. NO. 86 of 2012)

RULING OF THE COURT

On 28th March 2017, **Joyce Rigiri w/o David Mbogori**, and **John Mbogori** (the applicants) made an application to this Court by way of Notice of Motion dated 21st March 2017 seeking orders that this Court be pleased to review the judgment delivered on 29th June 2016 by this Court (P. N. Waki, R. N. Nambuye & P. O. Kiage, JJA) in Civil Appeal No. 73 of 2015 in which the two applicants were the respondents and **Grace Kamene M'berece**, the respondent in this application was the appellant.

The grounds on the face of the application for making the application are stated to be that there was a mistake or error apparent on the face of the record or a sufficient reason for review in that the "Chief Magistrate's court Case No. LDT 24 of 2002 was overlooked; it was contended that if the said case had not been overlooked, the outcome of the judgment sought to be reviewed would have been different. This is the matter that Joyce Rigiri w/o David, the 1st applicant has emphasized in her affidavit in support of the application which does not bear the date it was sworn.

The respondent, Grace Kamene M'berece, in her affidavit in reply to the application has refuted the assertion that there was a mistake or error on the face of the record or that the Chief Magistrate's court LDT 24 of 2002 was overlooked. The respondent avers in her affidavit that this Court considered the Chief Magistrate's court case No. 24 of 2002 which adopted the decision of the Meru Central Land District Tribunal case No. 54 of 2000.

When the application came up for hearing on 18th October 2017, learned counsel **Mr. A. G. Riungu** appeared for the applicants and learned counsel **Mr. Muia Mwanzia** appeared for the respondent.

Mr. Riungu relied on his written submissions filed on 11th July 2017 and submitted that the application was premised on Rule 35 of the Court of Appeal Rules and Article 159 (2) (d) of the Constitution of Kenya (2010), and Sections 3A and 3B of the Appellate Jurisdiction Act, Chapter 9 of the Laws of Kenya. Mr. Riungu further submitted that the decisions in **VALLABHDAS KARSANDAS RANIGA VS. MANSKJ KHALAL JIVRAJ & ANOTHER [1975] EA 700** and **BENJOH AMALGAMATED LIMITED VS. MUIRI COFFEE ESTATE LIMITED VS. KENYA COMMERCIAL BANK LTD [2014]eKLR** support the view that this Court can review its decisions where there is an error or mistake in its decision apparent on the face of the record or where there is a sufficient reason for review.

Mr. Mwanzia, on his part, opposed the application and relied both on the respondent's affidavit filed in reply to the application and on his

written submissions filed on 17th October 2017. It was Mr. Mwanzia's contention that there are no circumstances on the basis of which this Court can invoke its residual jurisdiction to review the judgment delivered on 22nd October 2015. Counsel submitted that nothing turned on the case No. LDT 24 of 2002 as the elders had no jurisdiction to entertain the matter. At any rate, this Court discussed it in the judgment sought to be reviewed. Muia Mwanzia referred to this Court's decisions in **NGURUMANI LIMITED VS. SHOMPOLE GROUP RANCH & ANOTHER [2014] eKLR** and **BENJOH** (supra) which were also referred to by the respondent's counsel.

We have carefully perused the application and the written submissions and the authorities referred to and have duly considered counsel's highlighting of the written submissions.

In the judgment sought to be reviewed, this Court examined the issue of running of time in adverse possession which was germane. The burden to show that time stopped to run reposed on the party whose title to the land was the object of the adverse possession claim. The Court was alive to this fact and examined whether any effort had been made to bring evidence on board to show whether continuity of time had been interrupted. The Court stated as follows in that regard:-

“Based on the foregoing, we are unable to discern from the record any tangible effort on the part of the respondents (i.e the applicants in this application) to stop time from running. Moreover, neither of the parties herein made an effort to make the outcome of Meru District Land Tribunal Case No. 24 of 2002 at the Chief Magistrate's court at Meru known to this Court or the High Court for that matter.”

It is clear that the issue put forward in this application as “a mistake or error on the face of the record” is misplaced. If a party through indolence or incompetence fails to adduce evidence in support of its claim and then loses the suit, such party cannot be allowed to later come to court to seek to reopen a concluded matter under the guise of review by seeking to do what such party had opportunity to do but failed to do on account of indolence or incompetence.

In Benjoh's case (supra), this Court set out the parameters to be had regard to in an application for review such as the one now before us and we therefore see no need of seeking “to re-invent the wheel”, as it were. The Court stated in Benjoh's case in paragraphs 25, 26, 28, 39, 61 and 62 of its judgment thus:-

“26. The basic philosophy inherent in the concept of review is acceptance of human fallibility and acknowledgement of frailties of human nature and sometimes possibility of perversion that may lead to miscarriage of justice. In some jurisdictions, courts have felt the need to cull out such power in order to overcome abuse of process of court or miscarriage of justice.

28. In this Court, save for the slip rule embedded in rule 35 of the Court of Appeal Rules which enables the Court to effect its manifest intention in a judgment or order, there is no apparent jurisdiction to review orders or judgments. And even in exercise of its inherent jurisdiction in the application of the slip rule, it seems that the Court could not travel beyond correcting errors in the judgments. Sir Charles Newbold in Lakhamshi Brothers Ltd v. Raja & Sons case (1966) E.A. 313 reiterated the words of the predecessor of this court in Raniga v. Jivraj [1965] EA 700 (K) where the court stated that;

“a court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied beyond doubt, as to the order which it would have made had the matter been brought to its attention.”

39. It seems clear that prior to the 2010 constitution, this court took the position that the court did not have jurisdiction to review its own decisions and that the only power it had with regard to review was in relation to the slip rule under rule 35 as afore-stated and further that its inherent power under rule 2(1) is exercisable in hearing appeals. In effect, therefore, the court in a Bench of five reiterated the law as stated in Rafiki Enterprises Ltd. v. Kingsway & Automart Ltd (supra). The above exposition of the law shows clearly that this Court held that it lacked jurisdiction to review its decisions prior to the current 2010 Constitution when it was a Court of final resort.

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.

62. This Court will be reluctant to invoke its residual jurisdiction of review where, as here, there is laches or where legal rights of innocent third parties have vested during the intervening period which cannot be interfered with without causing further injustice. It will not entertain review of decisions made before the 2010 Constitution came into being.”

In light of the above, the application is bereft of any merit. It does not show that there was any error of law that has occasioned a failure of justice that needs to be corrected. Residual jurisdiction of this Court is exercised sparingly and only where there is miscarriage of justice. That is not the case here. We dismiss it with costs to the respondents.

Dated at Nairobi this 20th day of December, 2017.

G. B. M. KARIUKI SC

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR