IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ,A)

CIVIL APPEAL NO. 223 OF 2013

BETWEEN

WILLIAM KOROSS (Legal personal representative of

ELIJAH C.A. KOROSS)……..……..…….APPELLANT

AND

HEZEKIAH KIPTOO KOMEN……..……..…1ST RESPONDENT

JONATHAN KIPKOROSS CHESANGUR……...2ND RESPONDENT

CHEBIATORI CHEMCHOR……...3RD RESPONDENT

JULIUS KIBET CHEROTICH……..……..4TH RESPONDENT

KIPSEREM ROTICH……...…..…..….5TH RESPONDENT

(Appeal from the judgment and decree of the Environment & Land Court at Kitale (J.R. Karanja, J.) delivered on 12th February 2013)

In

H.C. C.C NO. 89 OF 1997 (formally Kakamega HCCC No. 43 of 1998))

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JUDGMENT OF THE COURT

By a Notice of Motion dated 27th August 2015, filed under ***rule 1 (2)*** and ***rule 35*** of the ***Court of Appeal Rules, the applicant, William Koross (Legal representative of Elijah C.A. Koross)*** has sought orders that:-

a. *This Honourable court be pleased to correct errors apparent in its judgment in Eldoret Court of Appeal Civil Appeal No. 223 of 2013 dated and delivered at Nairobi on 6th March, 2015; to wit; the finding that the 2nd, 3rd , 4th and 5th Respondents were not parties to Kakamega High Court Civil Suit Number 43 of 1978 and substitute thereof with a finding that the 2nd, 3rd , 4th and 5th*

Respondents were parties, that is, defendants in Kakamega High Court Civil Suit Number 43 of 1978.

b. *That the words; " Those persons were never made parties to the proceedings," at page 3 line 25 of the said judgment be expunged from the judgment.*

c. *That the words, " By the defendant we mean the 1st respondent herein because the other respondents were never sued by the plaintiff, were never formally enjoined in the proceedings…" at page 10 lines 21 and 22 of the judgment be expunged from the judgment.*

Which application is made on 10 grounds but more pertinent being:-

1. *That the applicant, being dissatisfied with the said judgment, preferred an appeal to the Court of Appeal, being Eldoret Court of Appeal Civil Appeal No. 223 of 2013.*

2. *That judgment in the appeal was delivered in the applicant's favour on 6th March, 2015.*

3. *That in its judgment, the Court of Appeal erroneously observed that the 2nd, 3rd, 4th and 5thRespondents (the third party respondents) were not parties to Kakamega High Court Civil Suit Number 43 of 1978 whereas they had on their own motion been made defendants in the said suit on 23rd October, 1978.*

4. *That the ends of justice dictate that such error of fact be rectified by the honourable court to enable the applicant properly execute the decree issued by the high court.*

The application was supported by an affidavit of the same date sworn by the applicant himself where he deponed that in his plaint dated 22nd May, 1978, he had sued the 1st respondent, whereupon the 1st respondent had entered a defence and counterclaim dated 29th July 1978. Subsequent to that, he filed a reply to the defence dated 21st August 1978.

The applicant averred that by a Chamber Summons dated 6th October 1978, the third party respondents applied to join the proceedings as parties to the suit. The application was heard by Cotran, J. and on 23rd October 1978, the court allowed the third party respondents' application. On 2nd April 1980, Scriven, J. entered a judgment in favour of the applicant. Thereafter, the respondent's counterclaim was set down for hearing that was determined in their favour by Karanja J.R, J. on 12th February 2013 in ***Kitale HCCC No. 89 of 1997.***

The applicant further averred that he was dissatisfied with the decision of the Court and filed an appeal to this Court in ***Eldoret Civil Appeal No. 223 of 2013***. Judgment in respect of the appeal was delivered on 6th March 2015 in the applicant's favour. The applicant's complaint in respect of the judgment is that this Court erroneously found that the third party respondents were not parties to ***Kakamega High Court Civil Suit No. 43 of 1978,*** and later ***Kitale High Court Civil Suit No. 89 of 1997***, yet they had been made parties to the suit following the decision of Cotran, J, on 23rd October 1978. The applicant prayed that in the interest of justice; that this error in the judgment be rectified so as to enable him execute the decree against the third party respondents.

When the Notice of Motion dated 27th August 2015 came up for hearing, learned counsel ***Mr. Wafula*** holding brief for Mr. Onyancha for the applicant submitted that the application dated 6th October 1978, and the supporting affidavits showed that the third party respondents had sought to be enjoined in the suit. On 23rd October 1978, the application was allowed by the court, and the third parties were granted leave to join the proceedings. It was counsel's submission that both the plaint, and the defence that were filed, made reference to the third party respondents as parties, and further that, when they testified, the 3rd and 4th respondents testified as parties to the suit. Counsel concluded by stating that at all times the third party respondents were parties to ***HCCC No. 89 of 1997*** (formally ***Kakamega HCCC No. 43 of 1998***).

Mr. Ngigi, learned counsel for the 1st respondent, opposed the application and submitted that the action was originated by a plaint with only the applicant and the 1st respondent as parties to the suit. That despite the application to be joined as parties having been allowed by the court, the third party respondents failed to amend the plaint so as to join the suit as parties, and that this was fatal to the applicant's case. Furthermore, when the third party respondents testified, they did so as witnesses and not as parties. In as far as this application under ***rule 1 (2)*** and ***rule 35*** of this Court's rules was concerned, counsel submitted that the error complained of was not an omission or an accidental error, but concerned a substantive finding on the part of the Court which was that the third party respondents were not parties to the suit. The Court addressed its mind to the applicant's and the 1st respondent's case as outlined by the pleadings. Counsel urged the Court to dismiss the application as being devoid of merit.

Mr. Karani, learned counsel for the 2nd, 3rd and 5th respondents, associated himself with the submissions of Mr. Ngigi. He added that, much as the application of 23rd October 1978 was allowed, neither of the third party respondents were subsequently introduced as parties as they had failed to amend the proceedings as required. The third party respondents were not and are not parties to the suit in the High Court, and as a consequence could not be parties in the appeal.

Mr. Ondabu, learned counsel for the 4th respondent, associated himself with the submissions of Mr. Ngigi and Mr. Karanu. Counsel submitted that there was no mistake or error in this Court's judgment, and that no appeal was preferred in respect of Scriven, J's, judgment. Since there was no amended plaint on record, the amendment sought cannot be considered an error within the meaning of ***rule 35*** of the ***Court of Appeal Rules***. The application should be dismissed.

We have carefully considered the proceedings, the judgment, the arguments of parties in the light of the prevailing law, and find that what we are required to determine is whether the Court's conclusion that the third party respondents were not parties to the proceedings in ***HCCC No. 89 of 1997*** (formally ***Kakamega HCCC No. 43 of 1978***) was an error as contemplated within the meaning of ***rules 1(2)*** and ***35*** of this Court's Rules.

We will begin by considering what would amount to an error within the meaning of ***rule 35*** of this ***Court's Rules***.

Rule 35 stipulates;

> ***"(1) A clerical or arithmetical error in any judgment of the court or an 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.***
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> ***(2) An order of the Court may at any time be corrected by the Court, either of its own motion or the application of any interested person if it does not correspond with the judgment it supports to embody or, where the judgment has been corrected under sub rule (1), with the judgment as so corrected."***

In outlining what was meant by an error as contemplated by rule 35, this Court in the case of ***JKN vs HWN [2015] eKLR*** stated,

> ***"It is necessary to state that the rule is meant to correct an error on the face of the record; an error to be corrected is obvious. It must be manifest to the eyes of the Court. In other words an error on the face of the record does not require arguments or sworn depositions and lengthy submissions. A party wishing the Court to correct an error under rule 35 can just write to the Registrar of the Court pointing out the error and the Court may in many circumstances correct the error on its own motion or at the request of any interested party."***

The applicant herein requires this Court to find that the Court's observation in the judgment that the third party respondents were not parties to ***Kakamega High Court Civil Suit Number 43 of 1978***, and later ***Kitale High Court Civil Suit Number 89 of 1997***, was erroneous, and to rectify that to find that the third party respondents were parties to the suit.

In particular, the applicant bemoaned the Court's conclusion thus;

> ***"By the defendant we mean the 1st respondent herein because the other respondents were never sued by the plaintiff, were never formally enjoined in the proceedings and never filed any pleadings."***

Whether or not the third party respondents were parties to the suit is a matter of fact, and not a matter for conjecture. For the Court to have considered the status of the third party respondents in its judgment and to have arrived at the conclusion that they were not parties to the suit is a substantive determination, and not one that could by any stretch of imagination fall within the definition of an error or accidental slip as envisioned by ***rule 35*** of this Court's Rules.

We will also point out that, ***Article 164*** of the ***Constitution*** establishes the Court of Appeal, and ***Article 164 (3)*** sets out its jurisdiction, which is to hear appeals from the High Court, or any other tribunal as prescribed by Parliament. ***Section 3 (1)*** of the ***Appellate Jurisdiction Act*** further stipulates that the Court of Appeal shall have the jurisdiction to hear and determine appeals from the High Court in cases in which appeals shall lie to the Court of Appeal under any law. This Court having rendered a substantive decision on the status of the third party respondents is for all intents and purposes *functus officio*. What in effect the applicant is asking of this Court is that it should sit on appeal over a decision of the same Court. We find this to be untenable and contrary to the law.

In the circumstances, we are satisfied that the findings complained of cannot be considered errors within the meaning of ***rule 35***, and for the reasons aforestated, the application is dismissed with costs to the respondents.

It is so ordered.

Dated and delivered at Eldoret this 5TH day of FEBRUARY 2016.

D. K. MUSINGA

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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