IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, WARSAME & AZANGALALA, JJ.A)

CIVIL APPLICATION NO 39 OF 2015

BETWEEN

HARUN OSORO NYAMBUKI……APPLICANT

AND

PETER MUJUNGA GATHURU..……..1ST RESPONDENT

ESTATE BUILDING SOCIETY……2ND RESPONDENT

(an application for stay of execution of the judgment of the Court (Karanja, Warsame, & Kairu, JJ.A) dated 30th January 2015 and review and consequent setting aside of the judgment

in

Civil Appeal No 184 of 2004

****

RULING OF THE COURT

On 30th January 2015, this Court (Karanja, Warsame & Gatembu, JJ.A) delivered a judgment in which it allowed the 1st respondent's appeal. This Court ordered that 2½ acres of the suit property known as LR 12767/11 be transferred to the 1st respondent, and that the applicant signs all the necessary documentation to facilitate the transfer, failure to which the Registrar of the Court was authorized to facilitate the same. In the alternative, the applicant was directed to refund the respondent a sum of money equivalent of the current market value of the said property after valuation by a competent licensed land valuer.

The applicant is aggrieved with this order, and has filed the present application in which he seeks orders that:

a. ***There be a stay of execution of the judgment of this Court dated 30th January 2015; and***

b. ***This Court be pleased to review and consequently set aside or rescind the said judgment of the court.***

The background against which he seeks these orders is as follows: the appeal between the parties came up

for hearing before this Court on 30th October, 2014. The 1st respondent through his counsel proposed that the appeal be disposed of by way of written submissions. As the applicant's counsel was agreeable, the Court ordered that the 1st respondent files and serves its submissions within 14 days, with the applicant being granted a similar time frame to respond to those submissions. In addition, the respondent was granted a further seven days to respond to the applicant's submissions.

Thereafter, the respondent filed its submissions on 24th November 2014. The applicant claims that these submissions were never served on his advocates. When this Court sent out a notice of delivery of judgment on 19th January, 2015, the applicant elected to file and serve its submissions on 22nd January, 2015. By this time, the judgment had already been prepared. The applicant claims that sometime between 23rd January 2015 and 30th January 2015, his advocates were requested to collect their submissions from the registry. It therefore took them by surprise when in the judgment, the Court noted that it had had to prepare its judgment without the benefit of the applicant's submissions.

During hearing of this application, the appellant submitted to us that the fact that the Court prepared its judgment without the benefit of his submissions was a violation of his constitutional right to a fair trial as enshrined in Article 51 of the Constitution of Kenya and that failure of the registry to accept its documents was discriminatory and resulted in a violation of his rights under Article 50 of the Constitution. The applicant further relies on rule 27 of this Court's rules on the order in which parties to an appeal should address the Court. According to the applicant, if the Court had the opportunity to consider his submissions, it would have arrived at a different decision.

The respondent does not dispute the applicant's account of events. The respondent maintains that he filed his written submissions with the Court but inadvertently failed to serve them on the applicant. He however states that the Court would not have reached a different conclusion even if the applicant had filed his submissions. The respondent urged us to dismiss this application, stating that there must be an end to litigation, and further accuses the applicant of dilatory conduct in not filing its submissions in time.

The first order that the applicant seeks is a stay of execution of the judgment of this Court as provided for under rule 5(2)(b) of this Court's rules. That rule provides as follows:

> ***"(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—***
>
> **…**
>
> ***(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just."***

Rule 75 referred to above provides for the filing of notices of appeal with respect to appeals that are going to be ventilated in this Court. It is apparent from these provisions of the rules that this Court cannot grant an order of stay of execution of a judgment that has been made by this Court. In this regard, we agree with the holding of this Court in ***Jennifer Koinante Kitarpei v Alice Wahito Ndegwa & another [2014] eKLR (Civil Application No. Nai 18 of 2014)*** that:

> ***"An application under Rule 5(2)(b) presupposes that such stays of execution of judgments or proceedings are only applicable when an appeal has been filed, under Rule 75 and is pending in this Court. The application under Rule 5(2)(b) contemplates a stay of the judgment of the High Court or any tribunal authorized by law while an appeal is pending in this court and NOT a stay of a final judgment of this court. Therefore, once a final judgment has been delivered in respect of any substantive appeal, this court becomes functus officio. We find that this Court has no jurisdiction to entertain an application under Rule 5(2)(b) after a final judgment of this court has been rendered." (emphasis ours)***

We therefore cannot entertain this prayer by the applicant.

We now turn to consider if the applicant has made out a case for the review of the judgment of the Court. This application is brought under rule 1 (which provides for the inherent jurisdiction of the Court) and rule 57. Rule 57 in particular provides for the power of this Court to rescind its own orders. That rule provides:

> ***"57. (1) An order made on an application heard by a single Judge may be varied or rescinded by that Judge or in the absence of that Judge by any other Judge or by the Court on the application of any person affected thereby, if –***
>
> a. ***the order was one extending the time for doing any act, otherwise than to a specific date; or***
>
> b. ***the order was one permitting the doing of some act, without specifying the date by which the act was to be done, and the person on whose application the order was made has failed to show reasonable diligence in the matter.***
>
> ***(2) An order made on an application to the Court may similarly be varied or rescinded by the Court."***

Musinga JA in ***Nguruman Limited v Shompole Group Ranch & Another [2014][eKLR (Civil Application No.* Nai 90 of 2013 (UR 60/2013))** noted that the law does not contain any specific provision for review of this Court's final judgments. However, various decisions of this Court hold that the Court has residual jurisdiction to reopen appeals, albeit in very limited circumstances.

In ***Musiara Ltd V William Ole Ntimama [2004] eKLR (Civil Application No. 271 of 2003)*** it was held that:

> ***"The residual Jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the Jurisdiction to be exercised. There was a tension between a court having such residual Jurisdiction and the need to have finality in litigation, such that it was necessary to have a procedure which would ensure that proceedings would only be reopened when there was a real requirement for that to happen.***
>
> ***The need to maintain confidence in the administration of Justice made it imperative that there should be a remedy in a case where bias had been established and that might Justify the Court of Appeal in taking the exceptional course of reopening proceedings which it had already heard and determined. It should however be clearly established that a significant injustice had probably occurred and that there was no alternative effective remedy."***

In ***Chris Mahinda v Kenya Power & Lighting Co. Ltd [2005] eKLR (Civil Application No. Nai 174 of 2005)*** the Court reiterated that it had residual Jurisdiction to review, vary or rescind its decisions in exceptional circumstances.

In ***Benjoh Amalgamated Ltd & Another v Kenya Commercial Bank [2014] eKLR (Civil Application No. Sup 16 Of 2012),*** this Court stated that it has residual jurisdiction to review its own decisions to which there is no appeal to correct errors of law that have occasioned real injustice or miscarriage of justice. The Court set the parameters for review by rendering itself thus:

> ***"[57] As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court).***
>
> ***...***
>
> ***[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. <u>This is</u> <u>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</u>.*** (Emphasis added)
>
> ***[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.**

This finding was adopted with approval in ***<u>Jimnah Mwangi Gichanga V Attorney General</u> [2015] eKLR (Civil Application No. Nai 206 Of 2013)*** wherein this Court reiterated that:

> ***"... while this Court has residual jurisdiction to review its decisions, this jurisdiction has to be exercised cautiously and with circumspection. This Court will only exercise such powers in exceptional circumstances such as where it will serve to promote public interest and enhance public confidence in the rule of law."***

The question that we must now address is whether or not the applicant has satisfied the parameters that have been set out above, and whether a gross injustice was occasioned to him. In our view, the applicant has not satisfied this Court that his application for review falls within this purview. The fact that the Court was constrained to prepare a judgment without his written submissions did not materially affect the judgment of the Court; we remind ourselves that the duty of this Court when hearing an appeal is to re-evaluate and reconsider the evidence that was tendered at trial. There is no indication that even if the applicant's submissions were not on record, that the evidence tendered by him at the trial stage was not considered. As matters stand, there are no exceptional circumstances to warrant this Court's review of its judgment dated 30th January, 2015. This application is therefore devoid of merit, and we hereby order it dismissed with no order as to costs.

Dated and Delivered at Nairobi this 27th day of May 2016

W. KARANJA

.....

JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

<u>DEPUTY REGISTRAR</u>