



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 44 OF 2016

BETWEEN

HASSAN MUSAMBAYI MBARUKU.....APPLICANT

AND

NASHON ASEKA.....RESPONDENT

(Application to review the judgment or decision of the Court of Appeal at Kisumu (Musinga, Gatembu & Murgor, JJ.A.)

dated 27th May, 2016

in

CIVIL APPEAL NO. 96 OF 2015)

JUDGMENT OF THE COURT

1. On 27th May, 2016 this Court delivered its judgment in Civil Appeal No. 96 of 2015 between Hassan Musambayi Mbaruku and Nashon Aseka. The appeal arose from the judgment of Chitembewe, J. in H.C.C.C. No. 123 of 1998 at Kakamega. The dispute related to sale of a parcel of land known as ISUKHA/SHIRERE/3245 (“*the suit land*”).

2. The applicant (*the appellant in the said appeal*) alleged that although he had agreed to sell the suit land to the respondent, before the respondent had paid the entire purchase price he fraudulently caused the suit land to be registered in his name. He urged the High Court to order cancellation of the title to the suit land so that it reverts to him.

3. The High Court, in dismissing the applicant’s suit, established that the applicant had received from the respondent, the full purchase price, Kshs.160,000/=. The applicant preferred an appeal to this Court. The appeal was however dismissed. One of the grounds of appeal was that Chitembewe, J. had no jurisdiction to hear the suit since it was a land dispute and the learned judge was not a judge of the Environment and Land Court as established by the Constitution of Kenya, 2010.

4. This Court rejected that ground of appeal. The court took into consideration the fact that the High

Court suit was filed in 1998 and was partly heard before other judges of the High Court as at 2011 when Parliament enacted the Environment and Land Court Act. However, it was not until 5th October, 2012 that judges of the Environment and Land Court were appointed.

5. The Court cited **section 22** of the **Sixth Schedule** to the **Constitution of Kenya, 2010** which stipulates that:

“All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under the Constitution or as directed by the Chief Justice or the Registrar of the High Court.”

6. The Court held as follows:-

“(15) With regard to cases that were pending before the High Court in Kakamega, the appellant did not tell this Court when the Chief Justice issued the directive requiring judges of the High Court at Kakamega to cease hearing land cases that had been filed there before promulgation of the new Constitution. In the absence of such information, the suit having been filed in 1998, we have no basis of finding that Chitembwe, J. had no jurisdiction to hear and determine the suit. That ground of appeal is without merit and we hereby dismiss it.”

7. On 2nd June, 2016 the applicant, acting in person, filed a document entitled: **“NOTICE TO REVIEW.”** Subsequently, he filed an application dated 15th June, 2016 urging the Court to review and set aside its own decision or vary it or order a new trial.

8. The application was brought under **rules 2(6), 5(2), 29(1)(a) and (b), 35(2) and 57** of this Court’s Rules, as well as sections **3(1), 3(A), 3(B)** of the **Appellate Jurisdiction Act**. The application was made on grounds that there is an error apparent on the face of the judgment; that there is discovery of new evidence by the applicant that was not within his knowledge and could not be produced at the time of the hearing; and that it is in the interest of justice that the orders sought be granted.

9. In his affidavit in support of the application, the applicant stated, *inter alia*, that upon perusal of this Court’s judgment he had realized that there was an error on the face of the judgment because the heading showed that the judgment was from the decision of the High Court in HCCC No. 123 of 1998, instead of Kakamega Environment and Land Court, Civil Suit No. 482 of 2014. He stated that the case had been transferred from the High Court to the Environment and Land Court.

10. The new evidence that the applicant allegedly discovered was that according to Kenya Gazette Notice No. 14346 of 5th October, 2012 Chitembwe, J. had not been gazetted as a judge of the Environment and Land Court of Kenya and so under the provisions of **Article 166(1)(b) and 162(2)(b)** of the **Constitution** the learned judge had no jurisdiction to hear the case.

11. The applicant also faulted this Court’s finding that the suit land was not for agricultural purposes and therefore no consent of the area Land Control Board was required for its disposal. He sought to introduce a letter dated 13th June, 2016 from one G. S. Kilel, Assistant County Commissioner, Kakamega Municipality, which purports to show that the suit land is agricultural land.

12. For the aforesaid reasons, the applicant urged this court *“to review, rescind and or vary”* its decision of 27th May, 2016.

13. The respondent opposed the application for review. In his replying affidavit, he cited the provisions of **section 30(1)** of the **Environment and Land Court Act, 2011**, which states as follows:-

“(1) All proceedings relating to the environment or to the use and occupation and title to land pending before any Court or Local Tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established

under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.

(2) The Chief Justice may after the court is established refer part-heard cases, where appropriate to the court.”

14. The respondent further stated that pursuant to the said section, the Chief Justice, vide Gazette Notice No. 1617 dated 9th February, 2012, published practice directions relating to Environment and Land matters and directed, **inter alia**, that all part-heard matters pending before the High Court would continue to be heard and determined by the court. However any proceedings that would not have been concluded by the time Environment and Land Court is established would be moved to that court upon its establishment.

15. That after establishment of the Environment and Land Court, the judge who was posted to Kakamega never lasted for more than a month in that station. In the circumstances, parties agreed to have the suit finalized before the High Court. Thereafter the applicant, who was complaining about delay in finalization of the case, moved the High Court in fixing the hearing date and proceeded to call witnesses. In the circumstances, the applicant is estopped from arguing that Chitembwe, J. had no jurisdiction to finalize the hearing, the respondent contended.

16. Finally, the respondent argued that there was no error apparent in the face of the record; that this Court has no residual jurisdiction to re-open and review its judgment; that public policy demands that there must be an end to litigation.

17. The applicant and **Mr. Murunga**, learned counsel for the respondent, made brief submissions. We have taken into consideration their submissions and the depositions on record. We shall first consider whether this Court has jurisdiction to review its own decisions.

18. In **BENJOH AMALGAMATED LIMITED & ANOTHER v KENYA COMMERCIAL BANK LIMITED [2014] eKLR**, this Court, upon review of a number of decisions from various jurisdictions delivered itself as follows:-

“The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been conferred with the jurisdiction to re-open a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to, on the one hand, [are] the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost confidence of the public in the system of justice. 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.”

19. That same position was reiterated by this Court in **JIMNAH MWANGI GICHANGA v ATTORNEY GENERAL [2015] eKLR**. The Court held:-

“... 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 confidence in the rule of law.”

20. Considering the grounds upon which the applicant is urging this Court to exercise its residual jurisdiction of review of its own decisions, we are not persuaded that the required threshold has been satisfied.

21. In our judgment that is sought to be reviewed, we considered the issue of jurisdiction of Chitembwe,

J. to hear and determine the land matter that was before him. We reiterate that in the circumstances under which the learned judge finalized the part heard case, he had jurisdiction to do so. The High Court was seized of jurisdiction to hear land cases and the Constitution of Kenya, 2010, did not take away such jurisdiction in respect of cases that were partly heard under the repealed Constitution. The Gazette Notice issued by the Chief Justice on 9th February, 2012 was in conformity with **section 22** of the **Sixth Schedule** to the Constitution which is reproduced in paragraph 5 above.

“All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court.”

22. In **ISAAC OBIUWEVBI v CENTRAL BANK OF NIGERIA**, SC 266/2006 the Supreme Court of Nigeria, in considering the case of an employee of the respondent Bank who was suspended from his employment, held that jurisdiction of the court to entertain an action is determined by examining the law conferring jurisdiction at the time the suit is instituted and trial commences.

23. We do not find any merit in this application for review and consequently dismiss it with costs to the respondent.

DATED and DELIVERED at Kisumu this 16th day of December, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR