



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: AZANGALALA, OTIENO-ODEK & KANTAI JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 217 OF 2002

BETWEEN

REPUBLIC APPLICANT/APPELLANT

AND

THE DISTRICT COMMISSIONER, SIAYA RESPONDENT

JOHN AGORO MURUTO INTERESTED PARTY

Ex-PARTE NICHOLAS OLUOCH LUANDA

(Being an application to review and set aside the Ruling and Order of this Court dated 25th November 2009 by Hon. Justices of Appeal S.E.O. Bosire, E.M. Githinji and J.W. Onyango-Otieno)

in

Civil Appeal No. 217 of 2002)

RULING OF THE COURT

1. The application before this Court is by way of Notice of Motion dated 6th March, 2012. The application is brought under Section 3, 3A and 3B of the Appellate Jurisdiction Act and rule 42 of the Rules of this Court. The prayer in the Motion is for review and setting aside the ruling and orders of this Court delivered on 25th November, 2009 by the Honourable Justices of Appeal S.E.O. Bosire, E.M.Githinji and J.W.Onyango Otieno.
2. On 25th November 2009, this Court made the following orders:

“This appeal was set down for hearing before us this morning. However, the interested party John Agoro Muruto who is the effective appellant is reported to have died way back in 2003. The hearing of the appeal has been adjourned twice in the past that is on 15th June 2005 and on 18th June 2009, to enable substitution to be made but until now no substitution has been done. Under Rule 96(1) of the Court's Rules, such substitution should have been made within one year after his demise. In the circumstance, this appeal has abated we mark it as having abated pursuant to Rule 96(2) of this Court's Rules. We make no order as to costs.”

3. The main ground in support of the application is that the learned Justices of Appeal made an error by holding that the present appeal had abated when the main appellant, Nicholas Oluoch Luanda, is not deceased; that the person who is deceased is John Agoro Muruto who was an interested party in the suit and the deceased is not the appellant in this matter. It is stated that neither the appellant nor the respondent in this appeal have died, they are alive and are keen to prosecute the appeal. That the effective appellant, who is Nicholas Oluoch Luanda, remains aggrieved with the ruling and order of the High Court made in Kisumu Misc. Civil Application No. 29 of 1996 and is still available, willing and ready to pursue his appeal.
4. The affidavit in support of the present application is deposed to by Nicholas Oluoch Luanda who deposes that he filed the present appeal against the respondent, the District Commissioner - Siaya and that while the appeal was pending John Agoro Muruto was included in the proceedings as an interested party. The deponent states that he is the effective appellant and in 2003 it came to his attention that John Agoro Muruto, the interested party had died. That when the appeal was set for hearing on 25th November 2009, this Court issued orders declaring the appeal as having abated due to the death of John Agoro Muruto who was the interested party. The deponent avers that he is the effective appellant and he is still alive and the learned Justices of Appeal made a fundamental error of fact by declaring that the appeal had abated when he is still alive; that the issues raised in the appeal are still alive and subsist; that it is in the interest of justice and fairness that the orders made by this Court on 25th November, 2009 be reviewed and set aside and the appeal be allowed to proceed to full hearing.
5. At the hearing of the application learned counsel Mr. Antony Odhiambo Wasuna appeared for the applicant while Ms Janet Langat appeared for the respondent.
6. Counsel for the applicant reiterated the grounds in support of the application and the averments in the supporting affidavit. It was emphasized that it was the interested party who died and not the applicant/appellant who is still alive. Counsel submitted that Rule 35 of the Rules of this Court gives jurisdiction to this Court to review and set aside the Order made on 25th November, 2009. Rule 35 (1) stipulates *inter alia* that any error arising in the judgment of the court from an accidental slip or omission may at any time be corrected by the Court whether before or after judgment. Under Rule 35 (2), an order of the Court may be corrected by the Court if it does not correspond with the judgment it supports to embody. It was submitted that there is an apparent error in the Order and the learned Justices of Appeal made an accidental slip when it was held that John Agoro Muruto was the effective appellant yet he was only an interested party; that the error is that Nicholas Oluoch Luanda is the effective appellant and he is still alive. In addition, Counsel submitted that Rule 35 (1) of the Rules of this Court permit the Court to correct an order if the same does not correspondent with its own judgment. Finally, the applicant cited the case of ***Benjoh Amalgamated Limited & another - v- Kenya Commercial Bank Limited (Civil Application No. Sup. 16 of 2012)*** wherein the residual jurisdiction of this Court can be invoked to prevent miscarriage of justice. The applicant also cited the case of ***Jasbir Singh Rai & 3 others - v- Tarlochan Singh Rai & 3 others, Civil Application No. NAI 307 of 2003 (154/2003 UR)*** in support of the present application. Counsel submitted that the appellant has a right to have his day in court and to have the appeal heard and determined on merit.
7. Counsel for the Respondent Ms. Janet Lan'gat, while supporting and conceding the application, submitted that Rule 35 of the Rules of this Court otherwise known as the "slip rule" allows the Court to correct an error in an order or judgment of the court. She submitted that the proceedings that led to the filing of the appeal are available and the issues are still alive.
8. We have considered the submission by the applicant as well as the concurring submission by the respondent. In the case of ***Benjoh Amalgamated Limited & another - v- Kenya Commercial Bank Limited (Civil Application No. Sup. 16 of 2012)***, this Court stated, at paragraph 57, as follows:

“the jurisprudence that emerges from the case-law ...shows that where the court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen 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 are, on the one hand, 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...”

9. In the case of **Somani's - v- Shirinkhanu (No. 2) {1971} EA 79**, it was stated as follows:

“....This Court has always refused invitations to review its own decisions except so as to give effect to its intention at the time the judgment was written. To depart from this rule would in my opinion be to adopt a most dangerous course. The only exception I can envisage is where the applicant has been wrongly deprived of the opportunity of presenting his argument on any particular point, which might lead to the proceedings being held to be null and void...”

10. We note that Sections 3A and 3B of the Appellate Jurisdiction Act make provision for the overriding objective principles. In **City Chemist (NBI) Ltd. & 2 others - v- Oriental Commercial Bank Ltd. Civil Application No. 302 of 2008**, this Court stated that the overriding objective was tailored to enable the Court deal with cases justly and fairly. Further, the right to be heard as enshrined in the rules of natural justice, is part and parcel of Kenya's legal system. The applicant in this matter filed his appeal and he has not been heard due to the Order abating the appeal. In **Hastings Irrigation (K) Ltd. - v- Standard Chartered Bank Ltd. & 2 others (1987) KLR 532 and Ruithibo vs Nyingi (1984) KLR 505** it was stated that this Court has inherent jurisdiction under Rule 1 (3) to make such orders as may be necessary for the ends of justice.

11. Guided by the above cited judicial decisions and the provisions of Sections 3A and 3B of the Appellate Jurisdiction Act and Rules 1 (2), 35 and 42 of the Rules of this Court, we find that there is an apparent error in the Order made on 25th November, 2009. Rule 1 (2) of the Rules of this Court provides, *inter alia*, that nothing in the rules shall limit or otherwise affect the inherent power of the court to make such orders as are necessary for the ends of justice. This Court has jurisdiction under Rules 1 (2) and 35 of the Rules of this Court to correct the error in the Order made. It is not in dispute that Nicholas Oluoch Luanda is still alive and the proceedings before this Court were instituted by him as the appellant. The error on the face of the Order is that the learned Judges of Appeal made the Order dated 25th November 2009 declaring the abatement of the appeal pursuant to the death of John Agoro Muruto who was not the effective appellant in the matter. Further, the Order made on 25th November, 2009 does not correspond with the facts wherein the deceased was the interested party and not the appellant. Having found that there is an apparent error in the Order made, we hereby allow the application for review and set aside in entirety the Order made by this Court on 25th November 2009. We order that Civil Appeal No. 217 of 2002 be and is hereby restored and the registry is directed to give it a hearing date on priority basis. There shall be no order as to costs.

Dated and delivered at Kisumu this 10th day of December, 2014.

FESTUS AZANGALALA

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

SANKALE ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR