Case Number:	Civil Application 105 of 2018
Date Delivered:	19 Mar 2021
Case Class:	Civil
Court:	Court of Appeal at Kisumu
Case Action:	Ruling
Judge:	Hannah Magondi Okwengu, Fatuma sichale, Patrick Omwenga Kiage
Citation:	Mukesh Kumar Kantilal Patel v Charles Langat [2021]eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	Civil Appeal 105 of 2018
Case Outcome:	Application dismissed
History County:	Kisumu
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, KIAGE & SICHALE, JJ.A.)

CIVIL APPLICATION NO. 105 OF 2018

BETWEEN

MUKESH KUMAR KANTILAL PATEL.....APPLICANT

AND

CHARLES LANGAT.....RESPONDENT

(Being an application for stay of execution and review of the Judgment of the Court of Appeal at Kisumu ***(Makhandia, Kiage & Odek, JJ.A.)*** *dated* ***3rd October, 2019***

in

Civil Appeal 105 of 2018)

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RULING OF THE COURT

The sooner the habit of parties lightly seeking this Court's review of its judgments simply because they are dissatisfied with the initial outcome ceased, the better for all concerned. It should be recognized that a review is not an avenue for a litigant to get a second bite at the cherry before this Court. It is a residual power, meant to be strictly and cautiously exercised in exceptional circumstances where it will serve to obviate patent injustice, promote the public interest and enhance public confidence in the judicial process.

On 3rd October 2019, this Court siting in Kisumu (Makhandia, Kiage & Odek, JJ.A) delivered a judgment against **Mukesh Kumar Kantilal Patel**, the applicant. The Court allowed the appeal, set aside the judgment of the High Court which was in favour of the applicant and allowed the suit as was prayed in the Plaint filed by **Charles Langat**, the respondent. Therein he sought for an order for vacant possession of the premises known as SOTIK TOWNSHIP/667 (suit property), mesne profits and unpaid rent for 36 months from July 2011 to at the rate of Kshs. 50,000 per month. The respondent was also awarded costs of the appeal.

The applicant, by a motion dated 11th January 2021, has sought the following prayers *inter alia*;

2. THAT pending the hearing and determination of this application inter-parties this honourable court be pleased to grant an order of Stay of execution of the Judgment and Decree (sic) of this Honourable Court in KISUMU CCCA NUMBER 105 OF 2018 delivered on 3rd October 2019.

3. THAT this Honourable Court be pleased to Review/and or Vary its Judgment delivered on 3rd October 2019 in KISUMU CCCA NUMBER 105 OF 2018 and accordingly remit the proceedings to the superior Court with such directions as may be appropriate or make such necessary, incidental or consequential orders that are just and appropriate.

The motion is founded on ten grounds appearing on the face of it and is supported by an affidavit sworn by the applicant. It was

deposed that by a different suit known as **Kericho ELC No. 87 of 2012** (**ELC 87**) the applicant and another, Simon Shigali Muteshi (Simon) were sued by Kenya Commercial Bank (KCB) over the suit property and sought *inter alia*; a declaration that it was the legitimate owner of the suit property; a declaration that the applicant and Simon were trespassing on the suit property; vacant possession; and mesne profits.

Additionally, KCB filed a motion dated 1st November 2012 seeking; an interim injunction against the applicant, Simon and their servant from interfering with the suit property pending the hearing and determination of the application; immediate vacant possession of the suit property; and a permanent injunction restraining them from interfering with the suit property pending the hearing and determination of that suit. By a ruling delivered on 27th July 2013, Waithaka J, declined to grant the orders sought but ordered that *status quo* be maintained pending the hearing and determination of the suit.

The applicant claimed that while the respondent was aware of the pending matter in **ELC 87**, he went ahead and filed **Kericho ELC Number 37 of 2014** (**ELC 37**) which became the subject of the appeal. Both **ELC 37** and the appeal were heard and determined without the disclosure to the learned Judge of the existence of **ELC 87** and the order therein.

As this Court in effect ordered the applicant to surrender the suit property to the respondent, the applicant lamented that it conflicted with the *status quo* orders in **ELC 87**. He claimed that this conflict is concerning as it will create confusion should the respondent seek to execute the order in his favour. The applicant opined that had the details of **ELC 87** been disclosed to this Court, it would have made a different determination that would have been just and in the interest of both parties based on the disclosed facts. Therefore it is necessary, justified and in the interests of justice that this Court reconsiders and reviews its judgment to cure the conflict and confusion that now exists.

In opposition, the respondent asserted that the applicant had, since the delivery of the judgment on 3rd October 2019, initiated numerous vexatious applications aimed at denying him the fruits of his judgment. The current application is no different, as the applicant being the common party in **ELC 87** and **ELC 34**, had the onus of disclosing its existence to the Court. Further, the *status quo* orders issued in **ELC 87** are not binding on him as he was not a party to that suit. He pointed out that orders issued by this Court are superior to those issued at the High Court so the issue of conflict does not exist. Since litigation must come to an end, we were urged to dismiss this application with costs.

We have carefully considered the application, the response and the rival submissions filed. We would first dispense with the ill-advised stay application. It is trite that an application for stay by dint of **Rule 5(2)(b)** of the **Court of Appeal Rules** gives this Court discretionary powers to order stay of execution in order to preserve the subject matter of an appeal in order ensure its just and effective determination. This relief was strictly to apply to matters that are yet to be heard and determined with finality by this Court. It was not envisioned to apply once this Court has issued its final orders. Hence this Court has no jurisdiction to issue orders staying its final decision delivered on 3rd October 2019. This position was well articulated by the Court in **JENNIFER KOINANTE KITARPEI V ALICE WAHITO NDEGWA & ANOTHER [2014] eKLR**;

"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."

The second issue to consider is the applicant's plea to have this Court review/ and or vary its judgment delivered on 3rd October

2019. As to the second prayer, the jurisdiction of this Court to review, vary or rescind its decisions is residual in nature and not hinged on any written law or rules. It is Judge made law and is to be exercised cautiously only in exceptional circumstances, indeed compelling circumstances to avoid injustice, where it will serve to promote the public interest and enhance public confidence in the system of justice.

See **BENJOH AMALGAMATED LIMITED & ANOTHER V KENYA COMMERCIAL BANK LIMITED [2014] eKLR** and **MOHAMMED JAWAYD IQBAL (PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE GHULAM RASOOL JANMOHAMED) V GEORGE BONIFACE MBOGUA [2020] eKLR**.

The Supreme Court narrowed the scope of the circumstances when a court can exercise its residual jurisdiction to review, vary or rescind its decisions in **FREDRICK OTIENO OUTA V JARED ODOYO OKELLO & 3 OTHERS [2017] eKLR** as follows;

"[H]owever, in exercise of its inherent powers, this Court may, upon application by a party, or on its own motion, review, any of its Judgments, Rulings or Orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances shall be limited to situations where:

(i) the Judgment, Ruling, or Order, is obtained, by fraud or deceit;

(ii) the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;

(iii) the Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto;

(iv) the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of , a deliberately concealed statutory provision."

In the instant application, the reason proffered by the applicant for review is what he claims to be a conflict between this Court's decision and an interim order issued by the High Court. Given the hierarchy of our Courts, we think that the submission was embarrassing. This Court is superior to the High Court with powers to hear appeals emanating from it, as a quick reading on the provisions of

Article 164(3)(a) of the **Constitution** and **Section 3(1)** of the **Appellate Jurisdiction Act** would show. Invariably, the interlocutory orders issued by the High Court on *status quo* in **ELC 87** are superseded by the orders of this Court and as such there is no contradiction.

Furthermore, the said onus to disclose the existence of the order in **ELC 87** was on the applicant since he was a party to that suit. He therefore cannot turn and point the finger of blame at the respondent for his own failures. Not that such disclosure would have altered the outcome as rendered by this Court in a final merit based judgment. The applicant's plea for this Court to conform to an order issued by a lower court simply because the said order was favorable to him is mischievous and untenable. An application for review is not meant to afford a losing party a chance to re-litigate the matter in the hope of a better outcome.

Inevitably, we find that this application does not meet the threshold for review or variation. It is devoid of merit and is dismissed

with costs.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

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