



REPUBLIC OF KENYA



KENYA LAW
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**Naushad Company Limited v Mwabonde (Civil Appeal
161 of 2017) [2023] KEHC 703 (KLR) (6 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 703 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 161 OF 2017**

OA SEWE, J

FEBRUARY 6, 2023

BETWEEN

NAUSHAD COMPANY LIMITED APPELLANT

AND

RASHID MOHAMED MWABONDE DEFENDANT

RULING

1. The Notice of Motion dated 30th August 2021 was filed herein by the appellant on 1st September 2021. It is expressed to have been brought under Articles 27, 48, 50(1) and 159 of the Constitution of Kenya, Sections 1A, 1B, 3, 3A, 63(e) and 80 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, and Order 51 of the Civil Procedure Rules for orders that the Court be pleased to review, set aside and/or vary the judgment delivered herein on March 12, 2021; and that the costs of the application be in the cause.
2. The application was premised on the grounds that the Court (Hon Nyaga Njagi, J) lacked the jurisdiction to determine this appeal, the same being an appeal concerning work-related injuries for purposes of the Work Injury Benefits Act, No 13 of 2007 (WIBA). The appellant averred that no prejudice will be suffered by the respondent as he will be in a position pursue his claim in the right forum.
3. The application was supported by the affidavit sworn by Mr Peter Omwenga Mwebi, Advocate, who is on record herein on behalf of the appellant. He averred that it was by error and omission on their part that this appeal proceeded to full hearing on September 3, 2020 and thereafter for judgment on March 12, 2021 without the issue of the Court's jurisdiction being considered. He further adverted to the decision of the Supreme Court in Law Society of Kenya v Attorney General & Another [2019] eKLR to support his posturing that the appeal ought to have been filed before the Employment and Labour Relations Court, it being the Court with the jurisdiction to entertain WIBA matters.



4. Thus, it was the submission of Mr Omwenga that there is an error apparent on the record of the Court to warrant review of the judgment dated March 12, 2021. He added that no prejudice will be suffered by the respondent as he can still pursue his claim in the right forum in compliance with the law.
5. The application was resisted by the respondent, and a Replying Affidavit in that respect sworn by Mr Origi, Advocate, on November 6, 2021. He asserted that the learned judge had the jurisdiction to hear and determine the appeal and therefore that the application is ill-conceived, misguided, incompetent and an abuse of the court process. He further averred that, at the time the primary suit was instituted, tried and determined, key provisions of the WIBA were not operational as the same had been declared unconstitutional; and that the operation of the Act was stayed pending the hearing and determination of the appeal. He also mentioned that the primary suit was therefore never tried under WIBA but was founded on the common law tort of negligence. To that end, he submitted that the High Court had jurisdiction to hear appeals arising from work injury claims.
6. Mr Origi also pointed out that, if anything, it was the appellant who instituted the appeal in the wrong forum and therefore should be penalized in costs should the Court find that a justification has been made for review. He otherwise impugned the application, terming it an attempt by the appellant to have his appeal allowed through the backdoor.
7. The application was canvassed by way of written submissions, pursuant to the directions given on February 22, 2022. Thus, Mr Omwenga filed the appellant's written submissions herein on March 2, 2022 in which he proposed a single issue for determination, namely, whether the Court had the jurisdiction to determine this matter. He relied on Shanzu Investments Ltd v Commissioner of Lands [1993] eKLR and Auto Selection (K) Ltd & 2 Others v John Namasaka Famba [2016] eKLR for the proposition that the Court has unfettered discretion to review its own judgments and orders provided there is sufficient cause for doing so.
8. Mr Omwenga then made reference to Section 80 of the Civil Procedure Act, Section 52(2) of the WIBA as well as Order 45 of the Civil Procedure Rules to demonstrate that sufficient cause has been shown to warrant review; the appellant having shown that neither the lower court nor the appellate court had the requisite jurisdiction to entertain the dispute. Accordingly, Mr Omwenga urged that the appellant's application be allowed and concluded his submissions by relying on Boniface Waweru Mbiyu v Mary Njeri & Another [2005] eKLR in which Hon Ojwang, J (as he then was) held that:

“Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the Court, the matter thus filed is so defective as to be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its status as a nullity.”
9. On his part, Mr Origi relied on his written submissions filed on May 12, 2022. He reiterated his stance that the suit was instituted before the lower court on August 18, 2011 while the magistrate's court had jurisdiction to adjudicate work-injury claims. He explained that the High Court had on March 4, 2009 declared Section 16 of the WIBA unconstitutional; and that, although an appeal against that decision was made to the Court of Appeal, no stay of execution of the order of the High Court was made. He added that, up until the matter was finally resolved by the Supreme Court on December 3, 2019, work-injury claims could and were instituted and litigated in court. He made reference to West Kenya Sugar Co Ltd v Tito Lucheli Tangale [2021] eKLR for a discussion on this point and to underscore his submission that the judgment of the trial court was therefore validly entered.



10. In respect of the appeal, Mr. Origi urged the Court to note that the issue of jurisdiction of the trial court was never raised as a ground of appeal; and therefore that there is nothing in the judgment of the appellate court that is amenable to review for purposes of Order 45 of the Civil Procedure Rules. Thus, Mr Origi saw mischief in the application and posited that its intention is simply for the appellant to evade payment of costs to the respondent. He observed that the application was only filed after the appellant was served with the Notice of Taxation. He therefore prayed for the dismissal of the said application with costs.
11. In the light of the foregoing, the only issue for determination is the question whether the plaintiff has made out a good case for review. Needless to say that the Court is vested with the powers to review its decisions, but only in accord with the strictures of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides: -
Any person who considers himself aggrieved—
 - (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
12. In the same vein, Order 45 Rule 1(1) of the Civil Procedure Rules, provides as follows: -
Any person considering himself aggrieved—
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
13. It is plain therefore that an application for review must, of necessity, be restricted to discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made; or some mistake or error apparent on the face of the record; or for any other sufficient reason. It is also a prerequisite that an application for review be made without unreasonable delay.
14. The appellant’s contention, as per paragraph of the Supporting Affidavit is that:
“...by error and omission on their part and that of the counsel, the matter was allowed to proceed to full Hearing on September 3, 2020 where parties were granted directions to file their respective written submissions and Judgment was thereafter delivered on March 12, 2021 without the issue of the court’s Jurisdiction being considered...”
15. It is clear therefore that the application is not premised on the ground that there was discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed



or the order made; or on account of some mistake or error apparent on the face of the record. It is however manifest from paragraph 7 and 9 of the appellant's written submissions that its application was premised on there being "any other sufficient reason" for review; and therefore the question to pose is whether the issue of jurisdiction is sufficient reason for review.

16. Needless to underscore the fact that jurisdiction is primordial and that a court of law ought not to take any step in a matter unless is seized of the requisite jurisdiction. In the *Owners of Motor Vessel "Lillian S" vs Caltex Oil (K) Ltd* [1989] KLR 1 the Court of Appeal held that:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction." (Per Nyarangi, JA)

17. While it is true that the issue of jurisdiction can be raised at any stage of the proceedings, including on appeal, I am far from convinced it is a proper subject for review; particularly in a situation where the impugned decision is that of a court of concurrent jurisdiction. The proper course, in such circumstances, would be to appeal instead. Indeed, it is noteworthy that at paragraph 11 of his written submissions, counsel for the appellant suggested that the appellate court committed an error of judgment. He submitted thus:

"...the court erred in fact in failing to hold that the court did not have jurisdiction to handle claims relating to work-related injuries as provided for in the *Work Injury Benefits Act* No 13 of 2007..."

18. In the circumstances, a review, even on the ground of error apparent on the face of the record would be unwarranted. I find succour in the decision of the Court of Appeal in *Julius Ochieng Oloo and Another v Lilian Wanjiku Gitonga* [2019] eKLR, in which it was held:

"...lack of jurisdiction by the court making the ruling/order is not an error apparent on the face of the record, but rather an error of judgment that goes to the merit of the decision. Such an error can only be corrected by an appellate court..."

19. Indeed, in *Pancras T Swai v Kenya Breweries Limited* [2014] eKLR, the Court of Appeal held: -

"...In *Francis Origo & another v Jacob Kumali Mungala* (CA Civil Appeal No 149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. This court stated:-

"our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the respondent."



We think Bennett J was correct in *Abasi Belinda v Frederick Kangwamu and another* [1963] EA 557 when he held that:

“a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal...”

20. Likewise, in *Muyodi v Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243, the Court of Appeal reiterated the point that

“An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us...”

21. In the premises, it is my finding that the application dated August 30, 2021 is utterly devoid of merit. It is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 6TH DAY OF FEBRUARY 2023.

OLGA SEWE

JUDGE

