**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT NAIROBI**
**Civil Appeal 303 of 1991**

**JOHN KARIUKI MAINA ……..…….…….. APPELLANT**

**VERSUS**

**MESHACK GATHERU ……...……. RESPONDENT**

**RULING**

This is an extremely old matter which actually began in 1981 before the lower court. The dispute has its genesis in a contract to rent a kiosk between the Appellant and the Respondent. The value of the subject matter giving rise to the dispute was Kshs.2,100/= at that time. That is the amount the court appointed arbitrator (District Officer, Thika) awarded to the Plaintiff (Respondent in this appeal) following several protracted attempts to resolve the dispute. The Award was filed in Court on 30th July, 1991. On 18th September, 1991 the Appellant filed an application in the lower court to set aside the Award. It was heard and dismissed with costs on 12th November, 1991, and the Appellant filed an appeal against that decision.

The appeal was heard on 5th October, 1994 by Hon. Owour, J (as she then was). On 13th November, 1996 the learned Judge delivered the Judgment dismissing the appeal on the grounds that it was incompetently before the Court. In her Judgment, Lady Justice Owour upheld the Preliminary Objection raised by the Respondent's Counsel, Mr Kamiro, that the Appellant had not sought leave, nor was any given to file the appeal, in terms of Order 45 Rule 17 of the Civil Procedure Rules, and accordingly, the appeal was incompetently before the court. The learned Judge observed as follows in her Judgment:

> **"As indicated above the application for setting aside the Award in terms of Order 17 (1) (e) was heard and dismissed. There is no indication whatsoever from the numerous proceedings that went on in the lower court that any leave was sought for and obtained. The appellant throughout the proceedings and protracted litigation in the courts, long Memorandum of Appeal and affidavits has not pointed out that he made any application for leave to file this appeal before this court. He reminded me that he was not a lawyer and that is why he had not done so. The Provisions of Order 45 Rule 17 (1) (e) are very clear. An appeal shall not be filed without leave of the court.**
>
> **Furthermore in terms of Rule 17 (2) the Judgment entered in terms of the Award is not in excess of the Award nor does it contravene the terms of the Award.**
>
> **I have no basis upon which to allow the appeal to proceed. As indicated by the learned Senior Resident Magistrate this litigation must come to an end. From 1981 the appellant has accumulated a big bill arising out of the original sum of 2000/=. It does not serve any purpose for his (sic) to accumulate any more costs and interests. I hereby uphold Mr Kamiro's preliminary objection and dismiss the appeal as being incompetent. Order accordingly".**

It is in respect of this Judgment that the Appellant has now come before this Court, to set aside the same. As I have noted before, that Judgment was delivered on 13th November, 1996. Now, some eight years later, on 7th September, 2004 the Appellant filed a Chamber Summons application seeking the following Order:

> ***"That this Hon. High Court at Nairobi be pleased to set aside the judgment which was entered in the above name civil appeal by the Hon. Justice E. Awour in order to warrant justice and orders for this appeal".***

The applicant has not indicated the provisions of the Civil Procedure Rules under which the application has been presented. I understand he is not an advocate, and has not consulted one, and I make no issue of any procedural lapses. However, in his affidavit in support of the application he has deponed that both the Magistrate and Judge who heard his application previously had been "corrupted" and that he had filed the report about the alleged corruption with the Kenya Anti-Corruption Authority.

As I could not discern any proper grounds in support of the application, I invited the Applicant to amend his application to outline concisely the grounds on which it was based. He did so, and filed an amended application on 10th May, 2005, outlining 11 long grounds which are essentially in the nature of an argument or submission, and again reiterating that the Judge had been corrupted.

Although I could not find any basis for this application, nor can I still discern any proper and arguable grounds which could form the basis of this application, I am duty bound to consider the same, as best as I can, on its merits.

So, let me begin with some comments on the delay in bringing this application. As I said before, this application to set aside the Judgment of this court was brought after eight years of the delivery of the Judgment. That in my view is an inordinately long time. There is no explanation for the delay. Where an applicant comes to the Court late it is incumbent upon him to explain the delay – indeed, as the Court of Appeal held in the ***Standard Ltd vs Wilson K. Kalya (C. A. 306 of 2002 – Nairobi),*** some explanation of the delay must be given. In ***Peter Kungu Waweru vs Stephen Karanja Waweru (C. A. Nairobi 389 of 1996)*** Omolo J A said the same thing. In his view a delay of 3 months was inordinate and not deserving of Court's discretion. More recently, in Benson Mbuchu Gichuki vs Evans Kamende Munjua (C. A. 79 of 2004 Nairobi) Deverell, Ag. J A agreed with Ang'awa, J that the application for review filed more than four years after the Consent Judgment was recorded, was inordinate.

I am satisfied, therefore, that this application, brought eight years after the judgment was delivered, without any explanation of delay, was inordinately late, and on that ground alone must fail, and is disallowed. However, in the event I am held to be wrong on that conclusion, let me consider the other grounds.

With regard to the main ground of the application – that the Magistrate and Judge were "corrupted", clearly there is no basis for that contention. It is most unfortunate that a dissatisfied litigant should personalize his loss, and make such unfair allegations when the facts here are so simple and straight forward. His appeal was dismissed for one reason and one reason only – that he had not obtained leave of the lower court to appeal. That is a requirement in our Rules. He did not comply with it, and the Judge found that his appeal was incompetent.

Now, on what grounds could I possibly set that Judgment aside? None, I am afraid. If he was dissatisfied with that Judgment, he had the option of filing an appeal to the Court of Appeal. Even to this day, he has not sought leave to appeal.

The jurisdiction of this court in dealing with applications for setting aside ex parte judgments in default of attendance is found in Order IXB Rule 8 of the Civil Procedure Rules which provides as follows:

> ***"Where under this order Judgment has been entered or the suit has been dismissed, the court, on application by summons, may set aside or vary the Judgment or order upon such terms as are***

***just."***

This is a wide discretion given to this court and is designed "to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice." (per HARRIS J. in ***Shah vs Mbogo*** (1967) E. A. 116 at page 123B cited in ***Pithon Maina vs Thuka Mugiria*** (1982 – 88) I KAR 171 at p. 172.

I am satisfied that there is absolutely no basis for this application, and I repeat what others have said, that all litigation must come to an end. This one definitely should. It is not in the public interest that litigation should go on forever, as this one appears to be so, and accordingly I dismiss this application with costs to the Respondent. Dated and delivered at Nairobi this 5th day of July, 2005.

**ALNASHIR VISRAM**

**JUDGE**