REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, TUNOI & SHAH, JJ.A.)

CIVIL APPLICATION NO. NAI 59 OF 1998

BETWEEN

JAMES MWASHORI MWAKIO.....APPLICANT

AND

KENYA COMMERCIAL BANK LTD.....RESPONDENT

(Application for enforcement of Court of Appeal judgment in an intended appeal from a judgment of the Court of Appeal at Nairobi dated 3rd April, 1984

in

C.A. NO. 156 OF 1997)

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RULING OF THE COURT

We have before us a most intriguing application by which the applicant, Mr. James Mwashori Mwakio, a very common and frequent litigant in our courts, seeks "orders, not by for review of any judgment but for judgment to execute Court of Appeal judgment of 3rd April, 1984 disobeyed."

In the body of the Notice of Motion filed by the applicant he puts it this way:

> ***"James Mwashori Mwakio, the applicant, realizing that the Court of Appeal declined to write judgment on appeal 156/97 on the misconception that it was being requested to review a judgment, whilst in substance, it was being asked to enforce its judgment of 3rd April, 1984 disobeyed in the High Court, shall seek order that it writes true and fair judgment as for order V rule 20 on the 47 grounds of the Appeal, tackling each of the 16 petitions by giving solution and reasons therefore as per evidence given in the appeal record and the authority record considering the following 50 grounds:"***

When the said application came up for hearing on 4th May, 1998 we sought to know from the applicant, the rule(s) of this Court under which the application was brought. Mr. Mwakio referred us to rules 33, 34 and 35 of the Rules of this Court (the Rules). We sought to know this in order to decide

whether we have jurisdiction to hear such an application as is beforDeu ruisn.g the course of Mr. Mwakio's arguments it became clear to us that Mr. Mwakio believes that until a judgment of this court is formalized into an order the judgment remains open to challenge in the manner he is now purporting to do.

Rule 33 of the Rules requires that every decision of this Court, other than on an application made informally in the course of a hearing, shall be embodied in an order. Rule 34 of the Rules prescribes the method or format for drawing up of such orders and approval thereof if the draft is not agreed.Rule 35 refers to correction of errors. It is commonly known as "the slip rule". Because rule 33 mandates drawing up of a formal order, Mr. Mwakio urged, no judgment is perfected until such an order is drawn and that until that is done the judgment can be re-written truly and fairly. That belief or understanding of Mr. Mwakio is a grave misconception. He has been told often enough by this Court that a judgment or ruling of this Court is final and cannot be re-written, amended or varied, except under the provisions of "the slip rule."

Mr. Mwakio seeks re-writing of the judgment of this court delivered on 5th December, 1997 (he carefully mentions that he is not seeking a review thereof) on the basis that this court did not give him what he was seeking, namely, that he was seeking enforcement of the judgment of this court delivered on 3rd April, 1984 and which was `disobeyed' by the High Court.

It becomes necessary to find out what the judgment of this Court, of 3rd April, 1984, decided. Mr. Mwakio seems to be under the impression that that judgment finally decided his rights in his favour and that the High Court had no jurisdiction to go beyond the scope of that judgment. But that judgment did not finally decide anything. It simply remitted the proceedings to the High Court to proceed to trial in the usual way. The suit was then heard by Porter, J. in the High Court and that court dismissed the suit on 14th April, 1986.

The applicant appealed against the decision of Porter, J. and this Court (Platt, Apaloo and Masime, JJ.A.) in Civil Appeal No. 147 of 1986 dismissing that appeal said:-

> ***"The plain truth of the matter, as it seems to us, is that the appellant who is and has been unable to pay his just debt, has used the machinery of the Court to postpone, what to him, must be the day of reckoning. That day has now come and we have a duty to tell him so and in plain terms. Our conclusion is, that this appeal has no merit and should be dismissed with costs".***

The appellant did not accept that plain truth. Finally he filed in the superior court, in H.C.C.C. No. 2815 of 1980, an application seeking the following orders:

> ***"1.That the possession of L.R. No. 8707/7 on 30/9/1992 on purported Civil case 4699/89 was in violation of Court of Appeal injunction orders of 10/10/85 and 29/4/88 on this case.***
>
> ***2.That the sale documents were fraudulent.***
>
> ***3.That purported Civil case 4699/89 was filed with intent to dodge the provisions of the above mentioned injunction orders and was contrary to sections 43 and 44 of Cap 80.***
>
> ***4.That until the injunction orders of the Court of Appeal mentioned at (1) above were discharged any efforts to sell L.R.No.8707/7 were null and void.***
>
> ***5.That the secret sale of L.R. No.8707/7 on 15/10/1993 to Augustana Academy company Ltd by the Kenya Commercial Bank was null and void and that Augustana Academy Co. Ltd was aware that the sale was unlawful.***

6.That as the history of Civil case 2815/80 shows in the attached sworn Affidavit of J.M. Mwakio sworn on 9th day of December 1993, no single order has ever been made in his case by this Honourable Court of the Court of Appeal authorising sale of L.R. No.8707/7.

7.That the Defendant's accounts having been rejected by the Court of Appeal on 3/4/84 and 16/6/88 the Defendant has no grounds to sell L.R. No.8707/7.

8.That since Defendant's grounds of statutory sale were rejected by the Court of Appeal on 3/4/84, any attempt to sell LR No.8707/7 was null and void.

9.That statutory powers of sale can only be justified by default of mortgage documents and the defendant cannot prove any such grounds.

10.The sale was contrary to order XXI rules 30, 61(1) and (2) and rule 65 (1).

11.The defendant cannot prove correct accounts based on sums he has lent to the plaintiff, sums repaid, interest applied and correct precise balance as his account were found to be false by the Court of Appeal on 3/4/84 and on 16/6/88.

12.The sale was based on a proposal made by a private business man which was rubberstamped in High Court by a judge regarding defence lawyer as kinsman into Court order of possession contrary to all evidence that judge perused.

13.The plaintiff has filed application 99/90 which he hopes will be heard to settle contradiction between the findings of the Court of Appeal and its conclusions on 16/688.

14.Augustana Academy Co Ltd willingly co-operated to buy knowing it was unlawful."

That application came up for hearing before Pall, J as he then was. He dismissed the application saying:

"The application is that (inter alia) the sale of L.R. 8707/7 on 30.9.1992 was in violation of the Court of Appeal injunction orders of 10.10.1985 and 29.4.1988. The injunction order of 10.10.1985 was overtaken by the judgment in this case delivered on 14.4.1986. The applicant appealed against the said judgment in C.A.147 of 1986. The appeal was dismissed with costs.

Consequently the defendant/respondent was at liberty to exercise its power of sale.

The other order mentioned in the application was given on 29.4.1988. It was to preserve status quo until 10.5.1988.

On 16.6.1988 as a result of the applicant's appeal being dismissed with costs this injunction for status quo fell by the wayside.

The application is based on these two orders only which are already spent up. They were not in force when the respondent sold the suit property on 30.9.1992. I do not see any merit in the application. It is an abuse of the process of the court and it is vexatious. I therefore dismiss it with costs."

That order of dismissal by Pall, J was eventually challenged on appeal by the applicant and this court after giving the appellant a full hearing ruled on 5th December, 1997 as follows:

"The appellant must be told in no uncertain terms that no matter how many applications and suits he may institute in the courts seeking to recover the suit property, such attempts by him

would be futile and a waste of resources since the dispute relating to the suit property has been heard and finally determined by competent courts.

This appeal is indeed vexatious and amounts to an abuse of the process of the court.

We dismiss it with costs."

Undaunted by what was stated above the applicant brought the present application whereby he wants this court to say that what it held was erroneous and the judgment should be rewritten in a "true and fair" manner.

The appellant is, of course, a layman. He is not a lawyer. He harbours deep sense of grievance on the loss of his property which doubtless is a prime property. But he must know that this court has no jurisdiction to re-write an already delivered judgment in any other manner. Once this court has delivered its judgment it brings to finality that particular litigation between the parties, save for the limited application of the slip rule.

Even if the appellant knows this fundamental principle he does not wish to accept it. We are afraid he has to accept the principle. He must be told and we do so now, that he has come to the end of the road and if he does not desist from filing further applications or suits in connection with the present litigation his case would be referred to the Attorney General under the provision of Section 2 of the Vexatious Proceedings Act, Cap 41 Laws of Kenya, for seeking orders that he be declared a vexatious litigant.

This application is dismissed with costs.

Dated and delivered at Nairobi this 4th day of June, 1998.

J. E. GICHERU

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR