IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: GATEMBU, NYAMWEYA & JOEL NGUGI, JJ.A)

CIVIL APPEAL NO. 250 OF 2019

BETWEEN

PROF. PETER ANYANG' NYONG'O
& OTHERS.....APPELLANTS

AND

HON. ATTORNEY GENERAL.....RESPONDENT

(Being an appeal from the ruling and order of the High Court of Kenya at Nairobi (Sergon, J.) dated 16th November, 2018

in

HC. Misc. Application No. 24 of 2016)

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JUDGMENT OF THE COURT

1. This appeal arises from a ruling of the High Court **(*Sergon, J*.)** delivered on 16th November, 2018, by which the learned Judge reviewed and set aside his earlier ruling of 24th March, 2017. In the earlier ruling, the learned Judge had adopted for execution, against the respondent, a certificate of taxed costs issued by the East African Court of Justice (EACJ) in the sum of USD 256,802.24, together with interest, and had directed issuance of the requisite certificate under section 21 of the Government Proceedings Act.

2. The factual and procedural history is long but, in its broad outline, is not substantially contested. In a judgment dated 30th

March, 2007, the appellants were successful litigants against the

respondent in ***EACJ Reference No. 1 of 2006***. The bill of costs arising from that Reference was taxed in ***EACJ Taxation Cause No. 6 of 2008***, and by a ruling delivered on 19th December, 2008, costs in the sum of USD 2,033,164.99 were awarded to the appellants.

3. Dissatisfied, the respondent filed ***EACJ Application No. 4 of 2009*** in the EACJ First Instance Division. Among other things, that application sought for extension of time to file and serve an appeal out of time. That application was dismissed on 16th October, 2009, principally on the ground that the respondent had failed to satisfactorily explain the delay so as to warrant enlargement of time. The respondent pursued further steps in the EACJ Appellate Division, which, as the record shows, did not result in the relief the respondent sought.

4. Following those determinations, the appellants lodged and prosecuted a further taxation, culminating in ***EACJ Taxation Reference No. 5 of 2010*** (arising from ***EACJ Taxation Cause No. 2 of 2010***) and, on 23rd February, 2011, a certificate of costs was issued for USD 256,802.24. It is this latter certificate — distinct from the earlier taxed costs in ***Reference No. 1 of 2006*** — that lies at the heart of this appeal.

5. In the meantime, the appellants moved the High Court in ***Nairobi Misc. Application No. 415 of 2010***, seeking adoption for execution of the decree relating to the earlier taxation (USD 2,033,164.99). By a consent recorded on 30th September, 2010 before ***Rawal, J.*** (*as she then was*), the

decree was adopted and

the appropriate certificate issued under the Government Proceedings Act.

6. When payment was not forthcoming, the appellants instituted ***Nairobi High Court Misc. Application No. 173 of 2011 (Judicial Review)*** to compel the payment. In a judgment delivered on 15th December, 2011, ***Warsame, J.*** (*as he then was*) issued an order of mandamus compelling payment of the sums then due. Thereafter, payment was made and the parties executed a Discharge Voucher dated 14th August, 2012, whose terms expressly referenced and discharged claims arising from ***H.C. Misc. Application No. 173 of 2011*** upon receipt of USD 2,797,064.80.

7. Subsequently, by an application dated 15th December, 2015, the appellants moved the High Court in ***H.C. Misc. Application No. 24 of 2016*** seeking adoption for execution of the *second* EACJ certificate of costs, namely USD 256,802.24 plus interest from 23rd February, 2011.

8. The respondent opposed that motion, contending in substance that the appellants' costs had already been settled, and that the appellants were pursuing double recovery. After considering the affidavits and written submissions, ***Sergon, J.***, in a ruling delivered on 24th March, 2017, made a clear and central finding that there were two distinct taxation causes; that the settlement evidenced by the Discharge Voucher related to the earlier taxation; and that the originating motion before him

concerned the separate taxed costs under ***Taxation Reference No. 5 of 2010***. On that basis he allowed the appellant's application as prayed.

9. More than a year later, by a notice of motion dated 29th May, 2018, the respondent returned to the same court seeking a stay and review or setting aside of the ruling of 24th March, 2017, principally on the ground of alleged material non-disclosure and the asserted risk of being compelled to "pay twice". By the impugned ruling of 16th November, 2018, the learned Judge allowed the motion, reviewed and set aside his earlier orders of 24th March, 2017, and ordered that the matter be marked as settled.

10. The appellants were dissatisfied with that outcome and lodged the present appeal. In substance, the appellants' complaint is that the learned Judge misdirected himself in granting review where the respondent had not satisfied the statutory grounds for review; that the alleged "non-disclosure" did not fall within Order 45 of the Civil Procedure Rules; that there was no evidence of double payment; and that the learned Judge excused inordinate delay despite there being no explanation on record for the delay.

11. The impugned ruling was an exercise of judicial discretion. The applicable standard is, therefore, settled. As an appellate court, we are slow to interfere with the exercise of discretion by a trial judge. We may do so only where the trial court misdirected itself in law, misapprehended the facts, took into account irrelevant considerations, failed to take into account relevant considerations, or where the decision is plainly wrong (see ***Mbogo v Shah*** *[1968] EA 93*; ***United India Insurance Co.***

Ltd v East African Underwriters (Kenya) Ltd *[1985] EA 898*). Our review in this appeal is, therefore, anchored on the abuse-of-discretion standard.

12. The appeal came before us for plenary hearing on 22nd October, 2025. ***Ms. Olendo***, learned counsel, appeared for the appellants and relied on written submissions dated 30th January, 2020, which she orally highlighted. ***Mr. Munene Martin***, learned counsel, appeared for the respondent. He had not filed written submissions despite the directions of the Court and despite service of the appellants' submissions. In the interest of fairness, however, the Court indulged him to make oral submissions addressing the core points raised by the appellants.

13. In their submissions, the appellants contended that the respondent's application before the High Court was presented as one for review under section 80 of the Civil Procedure Act and Order

    45 of the Civil Procedure Rules, yet it did not meet any of the recognized grounds. Counsel emphasized that "material non-disclosure" is not, of itself, one of the statutory grounds for review; and that, in any event, the facts allegedly not disclosed were in fact disclosed, including the payment and the discharge voucher — whose relevance, counsel insisted, was that it concerned a different taxation stream. The appellants further submitted that the respondent's allegation of double payment was speculative, unsupported by any proof that the amount of USD 256,802.24 had already been paid, and that the learned Judge erred by acting on the bare possibility that payments "may not have been disclosed".

14. The appellants also strongly impugned the learned Judge's treatment of delay. They submitted that the motion for review was filed over a year after the ruling sought to be reviewed; that the

respondent gave no explanation in the supporting affidavit for that delay; and that the learned Judge nonetheless described the delay as excusable "in view of the explanation given", when no such explanation existed on the record. In that respect, counsel relied on authority for the settled proposition that review is a discretionary remedy which must be invoked without unreasonable delay, and that where delay is not satisfactorily explained, the jurisdiction to review is not available (see ***Pancras T. Swai v Kenya Breweries Limited [2014] eKLR***; ***Peter Wambugu Kariuki & 16 Others v Kenya Agricultural Research Institute [2018] eKLR***).

15. In response, the respondent's counsel urged that the basis of the review was that the appellants had already received payment pursuant to mandamus proceedings and had executed a discharge voucher, and that it would be unjust to compel the respondent to pay again. Counsel submitted that this constituted "sufficient reason" for review, and that the learned Judge was entitled to find that the respondent would suffer substantial loss if compelled to pay twice. On delay, counsel sought to support the learned Judge's exercise of discretion, though he was unable to point us to any specific explanation for the delay contained in the supporting affidavit or the High Court record. Counsel also maintained that the discharge voucher was broad in its terms and operated as a discharge of liability.

16. From the record and submissions, four issues arise for our determination: (i) whether the respondent established a

proper

basis for review under section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules; (ii) whether the learned Judge erred in finding that there was material non-disclosure and a risk of double payment; (iii) whether the Discharge Voucher dated 14th August, 2012 was, on the record, proof that the sum of USD 256,802.24 had been paid or discharged; and (iv) whether the application for review was brought without unreasonable delay or with a satisfactory explanation for the delay.

17. Section 80 of the Civil Procedure Act confers jurisdiction on a court to review its decree or order, but that jurisdiction is not at large. It is structured and limited by the rules. Order 45 of the Civil Procedure Rules, in turn, provides that review may be sought on discovery of new and important matter or evidence which, after due diligence, was not within the applicant's knowledge or could not be produced at the time; or on account of some mistake or error apparent on the face of the record; or for any other sufficient reason

— provided the application is made without unreasonable delay. In precise terms, Order 45, Rule 1 provides:

"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 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."

18. It is trite that review is not an appeal in disguise and cannot be used to re-open matters on the merits simply because a party is dissatisfied with the outcome. As this Court stated in ***National Bank of Kenya Ltd v Ndungu Njau***, ***Civil Appeal No. 211 of 1996 (Court of Appeal at Nairobi) [1997] eKLR***, an error or omission warranting review must be self-evident and must not require elaborate argument; and misconstruing a statute or reaching an erroneous conclusion of law is not a ground for review. See, also, ***Muyodi v Industrial and Commercial Development Corporation & Another [2006] 1 EA 243.***

19. Against that legal framework, the respondent's application for review was anchored, in substance, on the claim that the appellants had failed to disclose a previous settlement and were thereby pursuing double payment. Even assuming, without deciding, that "material non-disclosure" could, in an appropriate case, fall within the residual category of "any other sufficient reason", it still had to satisfy two core requirements. First, the factual premise of the non-disclosure had to be established, not speculated. Secondly, the alleged non-disclosed matter had to be of such character as to justify reopening the court's concluded determination.

20. The learned Judge did not make a definitive finding that the appellants had failed to disclose material facts. His holding was that the respondent's argument was "*plausible since there is evidence that previous payments may not have been disclosed*." With respect, review jurisdiction cannot properly be exercised on the basis that something "*may*" be the case. A party invoking section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules bears the burden to demonstrate, with cogent material, that the statutory threshold has been met.

21. More fundamentally, the alleged prior payment relied upon by the respondent could not constitute "discovery of new and important matter or evidence" within the meaning of Order 45. The alleged payment was not only within the respondent's knowledge; it was the respondent's own payment, made by its own offices, and documented through instruments in its custody. "Discovery" in Order 45 is directed at matters which, despite the exercise of due diligence, were not within an applicant's knowledge or could not be produced at the time of original litigation. A party cannot withhold or fail to deploy facts within its knowledge in opposition to an application, suffer an adverse ruling, and later rebrand those same facts as "newly discovered" so as to obtain a second bite at the cherry through review.

22. In this case, the respondent had full opportunity, when the application leading to the ruling of 24th March, 2017 was heard,

to place before the High Court any evidence showing that the USD 256,802.24 had already been paid, or that the discharge voucher

was intended to cover it. Indeed, the respondent did oppose the originating motion and did rely on the argument of prior settlement. That is precisely why the learned Judge, in the ruling of 24th March, 2017, squarely addressed the dispute and made a clear factual and legal finding that there were two separate taxation causes and that the payment relied upon related to the earlier one, not the later one.

23. Once the learned Judge had determined that question on the material placed before him, the respondent could not properly return through review without showing either (a) genuinely new evidence that was not within its knowledge and could not, with due diligence, have been produced; or (b) a self-evident error apparent on the face of the record. Neither was shown. The respondent produced no evidence demonstrating that the sum of USD 256,802.24 had been paid. Nor did it demonstrate any error apparent on the face of the record in the ruling of 24th March, 2017. Instead, in essence, the respondent argued that the learned Judge had erred in reaching the finding that there were two separate taxation causes and that the payment relied upon related to the earlier one, not the later one.

24. The respondent's principal submission at the hearing before us was, in essence, that because a substantial payment had been made in 2012 and a discharge voucher executed, the court should infer that all costs were settled and that the subsequent claim was an afterthought. But inference cannot substitute proof where a party seeks the exceptional remedy of review.

The question was not

whether the respondent had paid money in 2012; it is common ground that it did. The question was whether that payment included the distinct certificate of costs for USD 256,802.24 arising from ***Taxation Reference No. 5 of 2010***. No documentary trail was produced to demonstrate such inclusion, and the structure of the litigation history, as set out in the record, supports the conclusion that the payment related to the earlier taxation.

25. Delay provides a separate basis on which the impugned exercise of discretion cannot stand. The learned Judge expressly found that there was inordinate delay, but then excused it "*in view of explanation given by the applicant*." Yet, on our own perusal of the motion, the supporting affidavit, and the record, no explanation for the delay is discernible. Indeed, the respondent's counsel, when pressed in oral argument, was unable to point to any such explanation. A discretionary indulgence cannot be premised on reasons that do not exist on the record.

26. The requirement in Order 45 of the Civil Procedure Rules that the application be made "without unreasonable delay" is not ornamental. It serves the important values of finality, certainty, and orderly administration of justice. Review, being an exceptional jurisdiction, is particularly sensitive to delay. Where there is delay, it must be candidly explained, and the court must evaluate the explanation and the prejudice.

27. Where, as here, an application for review is brought after

evident delay, the burden lies squarely on the applicant to place before the court a satisfactory explanation for that delay. That requirement is

not a matter of form but of jurisdiction. Review is a discretionary remedy, but the discretion only arises once the statutory preconditions set out in section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules are met, including the requirement that the application be brought without unreasonable delay. The Court of Appeal has repeatedly emphasized that unexplained delay is fatal to an application for review. In ***Pancras T. Swai v Kenya Breweries Limited [2014] eKLR***, the Court held that where delay is not explained, the court has no basis upon which to exercise its discretion. The same principle was affirmed in ***Francis Origo & Another v Jacob Kumali Mungala [2005] eKLR*** and reiterated in ***Peter Wambugu Kariuki & 16 Others v Kenya Agricultural Research Institute [2018] eKLR***, where this Court underscored that review is not available as of right and that failure to explain delay disentitles an applicant to the remedy. In the absence of any explanation at all for the delay in bringing the application for review, the discretion to review was therefore not properly available to the learned Judge..

28. In the end, therefore, we are satisfied that the learned Judge misdirected himself in law by granting review without the respondent meeting the statutory thresholds under section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules; misapprehended the evidentiary record by proceeding on conjecture rather than proof; and excused inordinate delay on the basis of an explanation that does not appear in the record.

The

threshold for appellate interference with the exercise of discretion was, therefore, met.

29. The result is that the appeal succeeds. The ruling and orders of the High Court **(*Sergon, J.*)** delivered on 16th November, 2018 are hereby set aside. In their place, we substitute an order dismissing the respondent's notice of motion dated 29th May, 2018. For avoidance of doubt, the ruling and orders of the High Court delivered on 24th March, 2017 remain in force.

30. The appellants shall have the costs of this appeal.

31. Orders accordingly.

Dated and delivered at Nairobi this 6th day of February 2026.

S. GATEMBU KAIRU, FCIArb, C.Arb.

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF
APPEAL JOEL
NGUGI

.....
JUDGE OF APPEAL

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

Signed

DEPUTY

REGISTRAR.