Export Processing Authority v Lowdan Exporters (EPZ) Limited (Civil Appeal (Application) E113 of 2022) [2025] KECA 249 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KECA 249 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL (APPLICATION) E113 OF 2022

SG KAIRU, P NYAMWEYA & KI LAIBUTA, JJA

FEBRUARY 21, 2025

BETWEEN

EXPORT PROCESSING AUTHORITY ..... APPELLANT

AND

LOWDAN EXPORTERS (EPZ) LIMITED ..... RESPONDENT

(An application for a stay of execution and review of the judgment and decree of this Court (Gatembu, Murgor & Laibuta JJ.A) delivered on 28th July 2022)

RULING

1. Lowdan Exporters (EPZ) Ltd (hereinafter "the applicant") was the respondent in this appeal lodged by Export Processing Authority (hereinafter "the appellant"), and judgement on the said appeal was delivered by this Court (Gatembu, Murgor & Laibuta JJ.A) on 26th July 2024. The applicant now seeks stay of execution of the said judgment; review and setting aside of the judgment; and an order that the substantive suit be transferred back to the Environment and Land Court (hereinafter "the ELC"), with leave to the applicant to file its reply to defence and defence to counterclaim and, thereafter, be determined on its merit. The prayers are in a Notice of Motion application dated 26th August 2024 which is supported by two affidavits, one sworn on even date and the other on 26th September 2024 by Nazlin Badrudin Alibhai Punjab, a director of the applicant company.

2. The deponent avers that the applicant is the registered proprietor of the properties known as LR Nos. MN/VI/4798 and MN/VI/4799 (hereinafter "the suit properties) with respect to which adverse orders were issued against the applicant in the said judgment. She asserted that the applicant was not aware of the appeal in this Court, nor was it given a chance to respond or participate at the hearing. It was her further assertion that the applicant got to know about the existence of the appeal and judgment through a publication in one of the daily newspapers, whereupon it engaged its current advocates, Ms. Maulidi O. A Law Advocates, to get a copy of the judgment in order to get proper information and

appraisal on the import and purport of the judgment and how it affected its proprietary rights over the subject properties.

3. Additionally, that upon perusal of the court file, it was noted that there was no affidavit of service showing service of the Notice of Appeal or service of the Memorandum and Record of Appeal directly upon the applicant since there was no notice of address for service for the intended appeal. The deponent asserted that the applicant was never notified of the existence of the appeal either by the Court, the appellant, or its advocates, who ceased acting for them in the ELC. Moreover, as a result of the judgment, the applicant has been ordered to execute all the requisite documents to facilitate surrender of lease in respect of the suit properties in favour of the appellant within 30 days from the date of order, and failure to which the Deputy Registrar is to execute the requisite instruments of surrender in favour of the appellant. She contended that the judgment in all intents and purposes divested their rights to the ownership of the suit properties of which they had been in possession and occupation for over a period of 10 years, without giving them an opportunity to be heard or defend themselves, which was an affront to their rights as enshrined in Articles 40 and 50 of the *Constitution*.

4. According to the applicant, the firm of Aziz & Associate Advocates did not have instructions to proceed with the matter on its behalf, and it was a mistake for the firm to purport to receive documents on their behalf and not forward the same for instructions, and to further attend Court sessions and "not utter a word". Therefore, that it would only be fair and just for the applicant to be served personally with the Notice of Appeal, Record of Appeal and any other pleadings for them to mount an appropriate defence or response to the appeal, and that the mistakes, errors and blunders of the firm of Aziz & Associates should not be visited on it. With regard to the proceedings in the ELC, the applicant averred that they were halted for a while to allow for negotiations initiated by the appellant together with the Kenya Ports Authority and the National Land Commission over the acquisition of the suit properties, which it believed would be successfully completed. However, that the further proceedings including the judgment in the ELC were not brought to their attention, and it was thus equitable, just and proper for this Court to vary and set aside its judgment of 26th July 2024 and refer the matter to the ELC for hearing.

5. In opposition to the application, the appellant filed a replying affidavit sworn on 2nd September 2024 by Meyner Ashitiva, its Corporation Secretary, who deponed that this Court lacked jurisdiction to recall, reopen, review and set aside its judgment delivered on 26th July 2023 in the manner pleaded or at all, and is *functus officio*. Further, that the jurisdiction of this Court under Rule 5(2) (b) of the *Court of Appeal Rules*, 2022 is only available upon filing a Notice of Appeal from the decision of the trial Court, and not otherwise as pleaded and sought herein. In addition, that the applicant has failed to discharge the duty of laying out the foundational facts or evidentiary basis to establish the injustice or miscarriage of justice, or point out the apparent error on the face of the judgment for correction under the slip rule so as to impel this Court to exercise its rare discretion and residual jurisdiction to review the judgment dated 26th July 2024. Therefore, that the applicant was inviting this Court to sit on appeal of its own judgment of 26th July 2024 and give them a second bit at the cherry by remitting the matter to the ELC.

6. The appellant asserted that the firm of Aziz & Associates Advocates filed the suit in the ELC on behalf of the applicant, and remained on record throughout the subsistence of the suit and the appeal in this Court. Further, that the applicant was consistent in failing to attend Court despite being served with hearing notices and other court process in the ELC and in this Court. The appellant detailed the history of the attendances in the ELC and noted that the applicant's suit therein was dismissed for non-attendance and want of prosecution, and the appellant's counterclaim which was undefended upheld, which decision had not been appealed or set aside. Therefore, there would be no useful purpose served

by reopening and setting aside the judgment of this Court for the applicant to file and serve the reply to the defence and defence to the counterclaim in the ELC.

7. In addition, that the Notice of Appeal dated 29th July 2022 was duly served upon the applicant's then advocate on 5th August 2022 through their email azizadvocates@gmail.com which was on all their pleadings, as well as the Record of Appeal on 14th November 2022, and whose receipt was acknowledged by the said advocates, as were the case management conference notice given by the Deputy Registrar of this Court. However, that on 18th and 26th July 2023 when the appeal came up for case management conference, the applicant's advocates did not attend despite having acknowledged service by email. Lastly, that this Court served the parties with a hearing notice through their email addresses on 21st February 2021 fixing the appeal for hearing on 13th March 2023, and the applicant's advocate logged into the Court's virtual session and followed the proceedings without addressing the Court. The appellant argued that the applicant was at all material times given the opportunity to be heard but did not take it, and that, therefore, could not turn around and assert that its constitutional rights to be heard was violated so as to form a ground for review of the judgment of this Court of 26th July 2024.

8. We heard the application on 3rd October 2024 through this Court's virtual platform. Learned counsel Mr. Edward Ambala, holding brief for Mr. Maulidi appeared for the applicant; while learned counsel Mr. Cyprian Wekesa, holding brief for Mr. Edmond Wesonga appeared for the appellant. The two counsel highlighted their respective written submissions dated 26th September 2024 and 10th September 2024 respectively. We have considered the application, the response thereto, the rival submissions and the applicable law. Two issues fall for our determination. The first issue is whether we have jurisdiction to grant a stay of execution of the judgment of the Court delivered on 26th July 2024 under Rule 5(2) (b) of the *Court of Appeal Rules* of 2022. Although the applicant sought this prayer in its application, its counsel did not make any submissions thereon. The appellant on the other hand submitted that this Court, having delivered its judgment in the appeal is *functus officio*, and does not have jurisdiction under Rule 5(2)(b) of the *Court of Appeal Rules*, 2022 to reopen the appeal and grant a stay of its judgment, as stated by this Court in *Dickson Muricho Muriuki v Timothy Kagondu Muruiki & 6 others* [2013] eKLR.

9. The extent of the jurisdiction of this Court under Rule 5(2) (b) was explained by this Court in *Mukesh Kumar Kantilal Patel v Charles Langat* [2021] eKLR as follows:

> " 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 to 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;
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> > " 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*."

10. While emphasising that Rule 5(2)(b) confers power to this Court to hear interlocutory applications pending the hearing and determination of the main appeal and does not confer power to this Court to entertain any application on the merits or otherwise of a suit after judgment, this Court also further explained in *Dickson Muricho Muriuki v Timothy Kagondu Muruiki & 6 others* [2013] KECA 543 (KLR) as follows:

> " 20. On the issue of whether this Court has jurisdiction to stay execution of its orders or stay any proceedings after the final delivery of its judgment and pending the hearing and determination of an intended appeal to the Supreme Court, we are of the view that once this Court has pronounced the final judgment, it is *functus officio* and must down its tools. In the absence of statutory authority, the principle of *functus officio* prevents this Court from re-opening a case where a final decision and judgment has been made. We bear in mind that in the new constitutional dispensation, most cases will end at the Court of Appeal and it is inadvisable for this Court to be able to issue stay orders after delivery of its judgment. We remind ourselves that the principle of *functus officio* is grounded on public policy which favours finality of proceedings. If a court is permitted to continually revisit or reconsider final orders simply because a party intends to appeal to the Supreme Court or the Court may change its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding. The structure of the Kenyan courts is that there must be finality of proceedings at the Court of Appeal in those cases where certification to the Supreme Court has not been granted. Allowing this Court to issue stay orders after judgment would be detrimental to the concept of finality in litigation within hierarchy and structure of the Kenyan courts."

11. We are in agreement with the above holdings, and find that we are *functus officio* in so far as any further proceedings in this appeal are concerned, and particularly so since the applicant has not brought any evidence of any intended appeal to the Supreme Court. We say so bearing in mind that the jurisdiction of this Court to entertain any application after its final judgment as granted by the Article 163(4)(b) of the *Constitution* is restricted to certification of matters that ought to proceed on appeal to the Supreme Court. Consequently, we have no jurisdiction to stay execution of the judgment of this Court delivered on 26th July 2024.

12. The second issue for determination is whether we can review and set aside the judgment of the Court delivered on 26th July 2024. The applicant's counsel submitted that the applicant has shown sufficient cause to warrant the setting aside of the judgment, as it was not aware of the appeal, secondly it is not contested that the firm that was served with the pleadings in the appeal herein did not make any effort to defend it or even utter a single word in court. It is thus trite that the mistakes of counsel should not be visited on the client, and reference was made to the holding in *Itute Ingu & Another v Isumael Mwakavi Mwendwa* (1994] eKLR.

13. The appellant's counsel, while citing the decision by this Court in *Standard Chartered Financial Services Limited & 2 Others v Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited & 2 Others* [2016] eKLR, submitted that the solitary ground for review raised by the applicant, being that it was not afforded an opportunity to be heard in the appeal as it was not

aware of the existence of the appeal, did not meet the threshold required to be demonstrated, namely that the judgment in issue has occasioned injustice or a miscarriage of justice, and that said injustice or miscarriage of justice has eroded public confidence in the administration of justice. Counsel submitted that the applicant was represented by Aziz & Associates Advocates in this Court and in the ELC, and relied on the holding by this Court in the case of *Saulo Kandie v James Kwambai Cheruiyot* [2019] eKLR, submitting that if an opportunity to be heard was given but not taken up, the party failing to take up the opportunity could not later claim that its right to be heard were violated.

14. It is trite law that, under Rule 37 of the *Court of Appeal Rules* of 2022, this Court may correct a clerical or arithmetical mistake in any judgment of the Court or any error arising therein from an accidental slip or omission, either of its own motion or upon application, so as to give effect to the intention of the Court when judgment was given. Other than in these circumstances, the review jurisdiction of this Court may be exercised only in exceptional circumstances as held in *Benjoh Amalgamated Ltd v Kenya Commercial Bank Limited* [2014] eKLR:

> " The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and, in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and, on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection, and only in cases whose decisions are not appealable (to the Supreme Court)."

15. In *Mukesh Kumar Kantilal Patel v Charles Langat* (*supra*), this Court also held that the jurisdiction of this Court to review, vary or rescind its decisions is residual in nature, and is to be exercised cautiously only in exceptional circumstances to avoid injustice, where it will serve to promote the public interest and enhance public confidence in the system of justice. It is the applicant's assertion that the judgment it seeks to be reviewed falls under exceptional circumstances. This Court is asked to find that its judgment adversely affects the applicant while it was not given an opportunity to canvass its case in the appeal proceedings.

16. In the present application, it is not contested that the applicant was represented by an advocate who failed to attend court or participate at the hearing of both the suit in the ELC and the appeal in this Court.

    The applicant blames its erstwhile firm of advocates for its predicament. We however note in this respect that not only were the alleged mistakes by its advocates condoned by the applicant from the time of the hearing of the suit in the ELC, but also that Rule 23 of the *Court of Appeal Rules* of 2022 specifically requires a notice of change of advocates to be filed where a party to an application or appeal changes his or her advocate, or, having been represented by an advocate, decides to act in person.

17. In this regard, this Court noted in *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others* (2015) eKLR that there is a corollary to the hallowed maxim that mistakes of counsel should not be visited on a client, which is that legal business must be conducted efficiently, and in this particular case with finality. In addition, there should be sufficient demonstration that non- compliance with any prerequisites provided for in the applicable rules was due to the advocate's fault, which the applicant has not demonstrated to our satisfaction. We therefore find that there are no extraordinary circumstances that would warrant this Court to review its judgment.

18. We accordingly find no merit in the application dated August 26, 2024, which is hereby dismissed with costs to the appellant.

19. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF FEBRUARY, 2025

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

Dr. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

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

signed

DEPUTY REGISTRAR