Ondiek & another v National Bank of Kenya Ltd & another (Civil Application E036 of 2024) [2025] KECA 859 (KLR) (16 May 2025) (Ruling)

Neutral citation: [2025] KECA 859 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPLICATION E036 OF 2024

JM MATIVO, GV ODUNGA & PM GACHOKA, JJA

MAY 16, 2025

BETWEEN

THOMAS OWEN ONDIEK ..... 1ST APPLICANT

EDDAH AMAKOBE INGUTIA ..... 2ND APPLICANT

AND

NATIONAL BANK OF KENYA LTD ..... 1ST RESPONDENT

CENTRAL BANK OF KENYA ..... 2ND RESPONDENT

(Being an application to review appeal judgement dated 29th October 2015, in Civil Appeal No. 182 of 2021, rulings on appeal no. 23 of 2016 dated 5th October 2017, 19th March 2021 and 16th December 2022)

RULING

1. By a Notice of Motion dated 24th June 2024, the applicants herein seek a plethora of reliefs, totalling of 41 based on some 25 grounds. The motion is expressed to be brought pursuant to Articles 10, 20(3), 47, 50 and 159 of *the Constitution*, section 3 of the *Appellate Jurisdiction Act*, Rule 1(2) of the Court of Appeal Rules, Order 45 1(b) (sic) of the Civil Procedure Rules, 2010 and sections 1, 1A, 3A. 80, 63(e) of the *Civil Procedure Act*.

2. From what we can gather from the rather convoluted prayers, the applicants seek that we pronounce ourselves on: the validity of judgement delivered by a suspended Judge; the validity of an unsigned and undated judgement; how the law firm of Oraro & Co Advocates obtained the judgement in Eldoret HCCC No 115 of 1999; and whether a party may substitute one judgement relied upon at the High Court with a different one in the Court of Appeal. The applicants seek that we declare what they term as unsigned judgement, invalid.

3. As we have stated above, the reliefs sought in the motion are 41 in number most of which seek reliefs which are declaratory in nature but revolving around the judgement by Nambuye, J (as she then was) in Eldoret HCCC No 115 of 1999.

4. The grounds in support of the application can be summarised to be that the said judgement was purportedly delivered by the learned Judge while she was under suspension and therefore the same was an illegal and an invalid judgement that could not be delivered on her behalf by another Judge (Dulu, J).

5. The application is supported by affidavits sworn by Thomas Owen Ondiek and Eddah Amakobe Ingutia, the applicants herein, in which it is contended, in summary, that Nambuye, J (as she then was) could not have drafted the said judgement because the learned Judge was on suspension at the time she was alleged to have drafted the same. The said affidavit ran into some 68 paragraphs, the substance of which was that the said judgement did not exist at the time it was alleged to have been drafted.

6. The application was opposed by a replying affidavit sworn by Chispus N. Maithyathe acting Head Commercial Transactions & Litigation of the 1st respondent in which it was averred: that this Court has already determined the issues raised in this application in Civil Appeal No. 182 of 2011, Civil Application No. 23 of 2016, Civil Application Nos. 23 of 2016 dated 19th March 2021 and 16th December 2023; that the applicants have abused the court process by instituting multiple court proceedings on the same issues in several different courts involving the same parties notwithstanding that the issues have been heard and determined and are therefore res judicata; that no substantive issue has been raised warranting review of this Court's decisions; that what is being attacked in this application is the judgement rendered by the trial court which was overturned by this Court on the ground that it was undated and unsigned and a retrial ordered, that instead of proceedings with the retrial as ordered, the applicants withdrew the suit, effectuating a conclusive determination of the matter, a position affirmed by the various decisions of this Court; that the issue of validity or otherwise of the said judgement has been conclusively determined by this Court; and that the application is unmerited and ought to be dismissed.

7. We heard the application on 12th March 2025 when the 1st applicant appeared in person on his own behalf and on behalf of the 2nd applicant while learned counsel, Mr Mbaluto, appeared for the respondents. Both parties relied on their written submissions with minimal highlighting. We have considered the submissions which we need not rehash in this ruling.

8. The history of the dispute between the parties herein has been set out in several decisions handed down by this Court. For the umpteenth time we set it out. The 1st respondent, National Bank of Kenya, terminated the 1st applicant's employment after a customer made allegations of money laundering against him and following a search of his office conducted by officers of the 2nd respondent, Central Bank of Kenya. Following that action, 1st applicant filed a suit against the respondents in the High Court (HCCC No. 115 of 1999) challenging his termination. The High Court found in his favour and directed the Deputy Registrar to compute his terminal dues. The 1st respondent was aggrieved and lodged an appeal in this Court (Civil Appeal No. 116 of 2012) and by a judgment dated 5th February 2016, the Court allowed the appeal and remitted the matter back to the High Court for hearing because the judgment in favour of the 1st applicant was neither signed nor dated. That suit was however discontinued.

9. The two applicants then filed a second suit, High Court Civil Case No. 179 of 1999 against the two respondents claiming damages for, inter alia, loss of business, illegal search of premises, defamation and payment of the 1st applicant's loan which he was unable to repay. That suit was dismissed on the grounds that it was res judicata. Dissatisfied with the decision, the applicants appealed to this Court

in Civil Appeal No. 182 of 2011 and by a judgment dated 29th October 2015, this Court upheld the decision of the High Court that the applicants' second suit was res judicata.

10. Undeterred, the applicants sought a review of the judgment of 29th October 2015 which application was dismissed as totally lacking in merit by a ruling dated 5th October 2017. The applicants filed, yet another application to correct alleged errors in the ruling dated 5th October 2017 which application suffered the same fate when it was dismissed on 19th May 2021. Once again, the applicants moved this Court vide an application dated 8th October 2021 seeking review of the judgment dated 29th October 205 and the ruling dated 5th October 2017. In its decision made on 16th December 2022, this Court dismissed the said application, holding that:

> "...we are satisfied that we cannot entertain the same because it is res judicata and does not disclose even a scintilla of special circumstances that would justify invoking the Court's residual jurisdiction."

As we have indicated at the beginning of this ruling, the decision which we are asked to pronounce ourselves on is the validity of the decision of Nambuye, J (as she then was) sitting as a High Court Judge in HCCC No. 115 of 1999. According to Article 164(3)(a) of *the Constitution* and section 3 of the *Appellate Jurisdiction Act*, appeals from the High Court lie to this Court. It cannot be denied that all deserving litigants have a right to approach the courts of law to vindicate their grievances. As was held by Madan, J (as he then was) in Official Receiver v Sukhdev Nairobi HCCC No. 423 of 1966 [1970] EA 243:

> "In a court of justice parties are entitled to be heard and to insist upon every possible objection. It would be wrong for this or any other court to refuse to hear an objection even if it appears meritless and tedious. Woe be to the day when this will be allowed to happen. It would be honourable to abdicate from the seat of justice than to allow such a performance of denial to take place. The court may disallow an objection, reject a motion or refuse a plea but it must never refuse to hear it. A court of law is for the preservation not usurpation of rights of the parties."

11. We also agree that the fact that a person is a zealot in pursuing what he thinks are his legal rights does not make him a vexatious litigant. See Moses Kipkolum Kogo v Nyamogo & Nyamogo Advocates [2004] 1 KLR 367.

12. However, the Court's power is subject to its jurisdictional remit.

This Court derives its jurisdiction from *the Constitution* and the law since Article 164(3) of *the Constitution* provides that:

(3) The Court of Appeal has jurisdiction to hear appeals from—

a. the High Court; and

b. any other court or tribunal as prescribed by an Act of Parliament.

13. Pronouncing itself on the extent of this Court's jurisdiction in the case of Twaher Abdulkarim Mohammed vs Mwathethe Adamson Kadenge & 2 others [2015] eKLR this Courtsuccinctly observed that:

> "Whereas Article 164(3) is the constitutional foundation of this Court's jurisdiction and in broad terms states, inter alia, that its jurisdiction is to hear appeals from the High Court,

no inference can be drawn contrary to all other textual and contextual evidence that it was the intention of the framers of *the Constitution* that all appeals whatsoever from the High Court would lie to the Court of Appeal."

14. As to when this Court gets seized of matters that it has jurisdiction over, in the case of Morris Ngundo vs Lucy Joan Nyaki & another [2015] eKLR this Court held that:

> " This being an appellate court, its jurisdiction is invoked first by the filing of the Notice of Appeal. Once a Notice of Appeal is filed, it is as good as an appeal having been filed. Rule 2 of the Court of Appeal Rules defines an appeal to include an intended appeal. It is thus trite law and there is a plethora of case law to the effect that this Court's jurisdiction is invoked by filing of a Notice of Appeal."

15. In Kali Security Co. Limited v Patrick Mureithi Civil Application No. Nai. 241 of 2003 this Court (Tunoi, O'kubasu & Waki) held on 15/7/05) that:

> "The jurisdiction of the Court of Appeal is conferred by statute and is precipitated by the filing of a notice of appeal which is the launching pad and time does not begin to run for the filing of the memorandum of appeal and record of appeal until the notice of appeal is lodged."

16. It is therefore clear that this Court only becomes seized of matters when a Notice of Appeal has been filed before it. An application not based on a notice of appeal sits on quicksand and must collapse. It follows that whereas, in carrying out its mandate as a first appellate court, this Court is enjoined to re-evaluate and analyse the evidence presented before the trial court and subject it to fresh scrutiny, that jurisdiction only comes into play where there is an appeal before the court. This Court cannot, under the guise of exercising its mandate review a decision of the High Court in the absence of an appeal filed or an intimation of an intended appeal, which intimation is by way of a notice of appeal.

17. We however appreciate that there is a very limited jurisdiction where an application to review or reopen this Court's decision is made but that jurisdiction is residual and has to be exercised with circumspection, and only in exceptional circumstances. In Benjoh Amalgamated & Another v. Kenya Commercial Bank Ltd [2014] eKLR this Court appreciated this when it held as follows:

> " 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)."

18. In the instant case, the application, which is a stand-alone application, is not hinged on any particular notice of appeal. It is expressed to be brought pursuant to a number of legal provisions. Articles 10, 20(3), 47 and 50 deal with national values and principles of governance, application of the Bill of Rights, the right to fair administrative action expressly donate jurisdiction to this Court to deal with the instant application. Article 159 provides for judicial authority. However, this Court (Kiage, JA) in

Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR took the view, a view we associate ourselves with, that:

> " I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost- effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."

19. As was held by the Supreme Court in Michael Mungai v Housing Finance Co. (K) Ltd & 5 others [2017] eKLR:

> "We hasten to add that before us is not an issue that can be wished away by the provisions of Article 159 of *the Constitution*, as mere technicalities. Before a Court of law can invoke Article 159 of *the Constitution* and focus on substantive justice, the Court must at the first instance be properly moved and there must be before it a legitimate and cognizable cause of action. In the case of Raila Odinga v I.E.B.C & Others (2013) eKLR, this Court said that Article 159(2)(d) of *the Constitution* simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court. We are unable to see before us a prima facie cause of action that can warrant invocation of Article 159 of *the Constitution* for the question, what is it that is before us" remains unanswered."

20. Section 3 of the *Appellate Jurisdiction Act*, provides that:

    1. The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law.

    2. For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.

    3. In the hearing of an appeal in the exercise of the jurisdiction conferred by this Act, the law to be applied shall be the law applicable to the case in the High Court.

21. Our understanding of section 3(1) is that this Court only hears appeals in cases in which appeals lie under a written law and it is only subject to that precondition that this Court exercises the power, authority and jurisdiction conferred by the Act as well as the power, authority and jurisdiction vested

in the High Court which term includes the courts of equal status to the High Court. Rule 1(2) of the Court of Appeal Rules, provides that:

> These Rules shall not limit or otherwise affect the inherent power of the Court to make any orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

22. The inherent power exercisable under the above provision, in our view, is only exercisable with regard to an appeal that is properly before the Court. It cannot be an avenue through which this Court usurps the power donated to other courts when such powers are not expressly conferred upon this Court. Order 45 of the Civil Procedure Rules, however does not apply to this Court whose powers of review are not based on the said Order but is a residual reserve that the Court draws upon in order to cure a manifest injustice and it is invoked cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice. The Civil Procedure Act is not the Act that donates jurisdiction to this Court and its application is only relevant where the Court is called upon to determine whether or not the decision appealed against was in consonance with its provisions. As regards the overriding objective in sections 3 and 3A of the Appellant Jurisdiction Act, Waki, JA in Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others Civil Application No. 327 of 2009 held that:

> " The provisions of sections 3A and 3B of the *Appellate Jurisdiction Act* [which are similar to sections 1A and 1B of the *Civil Procedure Act*] have been embraced positively by the court which will continue to apply them for the attainment of the goals envisaged by Parliament. The Court has, however, sounded a timely caution in all its decisions so far that the new provisions are not a panacea for all ills in civil litigation. The new thinking does not totally uproot well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application. The objective is to guard against "railway ticket judgments"- good for that day and train only."

23. It is clear therefore, that the provisions relied upon by the applicants do not donate the power to this Court to interrogate the judgement in Eldoret HCCC No 115 of 1999

24. Although it is indicated, in the title of the application that what is sought is a review of the judgements of this Court, the body of the application does not seek to review any particular decision of this Court. Rather, what is sought is that we pronounce ourselves on the validity of the judgement of the High Court. That is a jurisdiction that we do not have, absent a notice of appeal or an appeal. What the applicant seems to be seeking from us is that we grant a relief, by the backdoor, which this Court has, in its several previous decisions between the parties herein, declined to grant.

25. We take to mind the pronouncements of this Court in J M Mwakio v Kenya Commercial Bank Ltd. Civil Appeal No. 156 of 1997 that:

> " The appellant is a familiar figure in the Law Courts. He does not hesitate to institute litigation on any aspect of perceived breach of his rights. Whereas litigants are perfectly free to bring any number of suits they may so desire, they must understand that in doing so, they are bound to stick to the rules governing the conduct of litigation in courts...no consequence

that flows out of the enforcement of law can be said to cause injustice. Moreover, it is a cardinal principle in the administration of justice that it is in the interest of all persons that there should be an end to litigation...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 and it is dismissed with costs...."

26. Whereas in this application we are not called upon to pronounce ourselves on the proprietary of making an application for review of a decision made on review by this Court, we certainly hold that it would amount to an abuse of this Court's process if a party were to make an application for review of an earlier decision based on the same grounds as or substantially similar grounds as or grounds that ought to have been taken up in an earlier application which, but for want of diligence or negligence, was not taken up. As the Supreme Court held in Kenya Section of the International Commission of Jurists v. the Attorney- General and two Others, Sup. Ct. Crim. App. No. 1 of 2012 at para. 36:

> " The concept of 'abuse of the process of the Court' bears no fixed meaning, but has to do with the motives behind the guilty party's actions; and with a perceived attempt to manoeuvre the Court's jurisdiction in a manner incompatible with the goals of justice."

27. Consequently, we find no merit in this application which we hereby dismiss with costs.

28. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 16TH DAY OF MAY, 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C. Arb, FCIArb.

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR