Waiganjo v Unga Group Limited (Civil Application E036 of 2023) [2024] KECA 289 (KLR) (8 March 2024) (Ruling)

Neutral citation: [2024] KECA 289 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPLICATION E036 OF 2023

F SICHALE, FA OCHIENG & WK KORIR, JJA

MARCH 8, 2024

BETWEEN

JONATHAN M WAIGANJO ..... APPLICANT

AND

UNGA GROUP LIMITED ..... RESPONDENT

(An application for review of the Orders and Ruling of this Court (Ouko, Karanja, & Musinga, JJ.A.) dated 29th January 2021 in Civil Application No. 89 of 2018)

RULING

1. Before us is a notice of motion dated 11th July 2023 wherein the applicant, Jonathan M. Waiganjo, seeks, among other orders, that there be a stay of the ruling in respect of the application dated 26th September 2018, and that the Court reviews the pending ruling in the application dated 26th September 2018. The application is premised on the grounds on its face as well as those contained in an affidavit sworn on the date of the application by the applicant.

2. The respondent is Unga Group Limited.

3. In support of his application, the applicant avers that the respondent filed an application dated 26th September 2018 seeking to strike out his appeal for being filed out of time. It is the applicant's case that he was never served with the application seeking to strike out his appeal and it subsequently proceeded to hearing in his absence. He is apprehensive of the outcome of that particular application and is before us seeking to arrest the delivery of the ruling and is additionally asking this Court to review the impending ruling so that his appeal can be heard and determined on its merit. He also prays that there be a stay of all consequential orders that might emanate from the pending ruling. And in his further affidavit sworn on 17th October 2023, the applicant reiterated the averments made in the supporting affidavit and denied being served with the application to strike out his appeal, through his postal address. His prayer is that he should not be condemned unheard as he only delayed for 5 days

in filing the appeal that was sought to be struck out through the respondent's application dated 26th September 2018.

4. The application is opposed through a replying affidavit sworn on 14th July 2023 by the respondent's counsel, Anne Halwenge Odwa. According to counsel, the application is incompetent, an abuse of the court process and ought to be dismissed. She deposes that no legal provision has been cited to invoke the Court's jurisdiction and that the orders sought are ambiguous in nature. Counsel avers that the Court already issued its ruling on 29th January 2021 in respect to the application dated 26th September 2018 striking out the notice of appeal, hence there would be nothing to stay. Counsel further avers that the application has been made late in the day and is an afterthought since no basis has been laid to warrant a review of the ruling. It is counsel's position that the impugned application was duly served on the applicant through the postal address provided in the notice of appeal dated 1st August 2018, hence his non- participation in the proceedings was by choice. Counsel consequently prayed for the dismissal of the application with costs stating that allowing the application would be prejudicial to the respondent timewise and financially.

5. When the application came up for virtual hearing on 14th November 2023, the applicant appeared in person while Ms Odwa represented the respondent. The applicant had filed written submissions dated 17th October 2023 whereas the respondent had filed written submissions dated 4th September 2023.

6. In his submissions, the applicant relied on the case of George Philip M. Wekulo v. The Law Society of Kenya & Another (2005) eKLR to argue that an order of stay would ordinarily be issued where the Court's decision is yet to be implemented or is in the course of implementation. The applicant submitted that the Court ought to grant him leave to appeal out of time and such leave should operate as stay of the pending ruling in the application dated 26th September 2018. He submitted that he was condemned unheard in respect to the respondent's application hence the principles of natural justice were violated. The applicant maintained that he was never served and that he even visited the offices of the respondent's counsel seeking service but this was never done. He therefore urged us to exercise our discretion in his favour and grant him the orders sought.

7. On her part, Ms. Odwa submitted that this Court can neither entertain nor grant the orders being sought for the reasons that no legal provision has been cited to invoke the Court's jurisdiction and that the applicant has instead relied on the Civil Procedure Rules which rules are not applicable in this Court. Counsel argued that the orders sought in the application are ambiguous as it is impossible to establish whether the stay sought is in respect to the execution of the judgment or the ruling in the respondent's application for striking out the applicant's appeal. According to counsel, granting a stay order would be in vain as the ruling in the application dated 26th September 2018 which the applicant seeks to stay had already been delivered. Concerning the applicant's prayer for the review of the said ruling, counsel submitted that the prayer should be declined as the conditions for review set under Rule 37(1) of the Court of Appeal Rules and in Benjoh Amalgamated & Another v. Kenya Commercial Bank Ltd [2014] eKLR have not been met. Counsel therefore urged us to dismiss the application.

8. From the prayers in the applicant's notice of motion, we can only speculate that the same is brought pursuant to rules 5(2)(b) and 37(1) of the Court of Appeal Rules because, as correctly submitted by the respondent's counsel, the application is stated to be brought under the Civil Procedure Rules, and those rules are indeed not applicable to proceedings before this Court. In this regard, we wish to refer the applicant to the decision in Abote v. Kawaka & 4 others [2022] KESC 36 (KLR) where the Supreme Court advised that a party must always, in clear and uncertain terms invoke the specific legal

provision upon which he desires a court to exercise its discretion absence of which an application faces the risk of being struck out. In that regard, the Court stated that:

> " As already settled by this Court in Suleiman Mwamloe Warrakah & 2 other v Mwamloe Tchappu Mbwana & 4 Others, Petition No. 12 of 2018 [2018] eKLR and Daniel Kimani v Francis Mwangi Kimani & Another, SC Application No. 3 of 2014 [2015] eKLR, in seeking to invoke a court's jurisdiction, a litigant must invoke the relevant constitutional or statutory provisions. We have in that regard often stated that, it is not for this Court to speculate on jurisdiction and assign to each appeal a jurisdiction not specifically invoked by a party. An appellant should therefore in an appeal, specify such jurisdiction with clarity to enable both the Court and the parties opposing the appeal to understand and know what type of appeal is before them. As we stated in Cordisons International (K) Limited v Chairman National Land Commission & 43 others, SC Petition No. 14 of 2019; [2020] eKLR without such specificity, such an appeal is one for striking out."

9. Even though we were at pains in elucidating what the present application is all about, upon addressing our minds to the pleadings as lodged by the parties and the accompanying submissions, we conclude that the issues for determination are: whether a case has been made to warrant an order of stay; whether a case has been made to warrant an order of review; and, who should bear the costs of this appeal.

10. The application that is of interest to the applicant was dated 26th September 2018 and serialized as Civil Application No. 89 of 2018. As per the undisputed averment of counsel for the respondent, this Court delivered its ruling in regard to that application on 29th January 2021. It follows therefore that there are no proceedings to be stayed or a ruling whose delivery can be arrested. Perhaps what the applicant seeks is a stay of execution of the ruling, whatever that implies. We note that the learned Judges concluded the ruling by stating that:

> " For these reasons, we allow the application and order that the notice of appeal be and is hereby struck out with costs."

11. The import of the foregoing is clearly conveyed by the wordings.

In simple terms, the applicant's notice of appeal was struck out. Neither the applicant nor the respondent was asked to do a thing by the Court save for the award of costs. Furthermore, once the ruling was delivered, the applicant ceased having the permission for invoking this Court's jurisdiction under Rule 5(2)(b) as that jurisdiction can only be invoked once there is a valid notice of appeal on record. In this case, there cannot be such a notice of appeal as the only thing the applicant can do is to seek a review of the ruling of this Court. For the stated reasons, a prayer for stay orders of whatever nature cannot stand.

12. The other prayer in the application is presumed to seek review of the ruling dated 29th January 2021. Generally, this Court's power to review its own rulings and judgments is provided for under Rule 37(1) of the Court of Appeal Rules, 2022 which states that:

> " A clerical or arithmetical mistake in any judgment of the Court or any error arising therein from an accidental slip or omission may, at any time, whether before or after the judgment has been embodied in an order, be corrected by the Court, either of its own motion or on the application of any interested person so as to give effect to the intention of the Court when judgment was given."

13. The cited provision is what is commonly referred to as the "Slip Rule". The import and operationalization of the powers to review under the Slip Rule were explained by the Court in Sanitam Services (E.A.) Limited v. Rentokil (K) Limited & Another [2019] eKLR as follows:

> "As we have stated, the Supreme Court while considering a slip rule under a provision of the *Supreme Court Act* found that the slip rule did not confer upon any court jurisdiction or powers to sit on appeal over its own judgment or to extensively review such judgment as to substantially alter it. The Court of Appeal Rules, particularly Rule 35 thereof allows for correction of errors in the same manner and in a similar situation as the said provision of the *Supreme Court Act*. The slip rule does not allow or permit a court to give an order which alters the judgment or orders made earlier. It is for purposes of correcting clerical errors and giving effect to the judgment of the court."

14. The Supreme Court on its part in the case of Fredrick Otieno Outa v. Jared Odoyo Okello & 3 others [2017] eKLR pointed out that the errors to be corrected under the Slip Rule must be those that are so obvious and whose correction cannot lead to any controversy or a change in the substance of the judgment. In that regard, the Court while referring to section 21(4) of the *Supreme Court Act* stated that:

> " This Section as quoted, embodies what is ordinarily referred to as the "Slip Rule". By its nature, the Slip Rule permits a Court of law to correct errors that are apparent on the face of the Judgment, Ruling, or Order of the Court. Such errors must be so obvious that their correction cannot generate any controversy, regarding the Judgment or decision of the Court. By the same token, such errors must be of such nature that their correction would not change the substance of the Judgment or alter the clear intention of the Court. In other words, the Slip Rule does not confer upon a Court, any jurisdiction or powers to sit on appeal over its own Judgment, or, to extensively review such Judgment as to substantially alter it. Indeed, as our comparative analysis of the approaches by other superior Courts demonstrates, this is the true import of the Slip Rule."

15. Our review of the application, shows that what the applicant seeks is not what is envisioned under Rule 37(1) of the Court of Appeal Rules. He has not pointed out any apparent error, whether clerical or arithmetic, that the Court could have committed in its ruling of 29th January 2021. Instead, he wants the Court to reopen an already determined matter and overturn the decision of the Court. This would amount to an interference with the substance of the ruling and is outside the authority to review, permitted by the Slip Rule.

16. On the question of substantive review, we have no doubt that under sections 3A and 5 of the *Appellate Jurisdiction Act* as read with Rule 1(2) of the Court of Appeal Rules, 2022, this Court is clothed with inherent power to make such orders as may be necessary to meet the ends of justice. These provisions were appreciated by this Court (differently constituted) in Benjoh Amalgamated Limited & another v. Kenya Commercial Bank Limited [2014] eKLR and also resonates with holding of the Supreme Court in Fredrick Otieno Outa v. Jared Odoyo Okello & 3 others (supra). It is also a matter of judicial consensus that in very limited circumstances a court may undertake a substantive review of its judgment which goes beyond the borders of the miniscule jurisdiction granted by the "Slip Rule". However, for a court to breach the walls of the "Slip Rule", a party seeking such review must prove the existence of factors affronting the administration of justice in the impugned decision or demonstrate that there is no right of appeal.

17. In Fredrick Otieno Outa v. Jared Odoyo Okello & 3 others (supra), the Supreme Court highlighted the circumstances under which this special and limited jurisdiction of substantive review can be exercised by stating that:

> " Such circumstances shall be limited to situations where:
>
> i. the Judgment, Ruling, or Order, is obtained, by fraud or deceit;
>
> ii. the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;
>
> iii. the Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto;
>
> iv. the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision."

18. We shall apply the stated jurisprudence to the instant application in order to determine if the applicant has met the conditions for review of the impugned ruling. The applicant's main ground for seeking review is that he was not served with the application dated 26th September 2018 which led to his notice of appeal being struck out. The respondent countered this allegation by annexing to its replying affidavit, an affidavit of service through registered post and receipts of payment to the postal service provider. The respondent further averred that the only address of service indicated by the applicant in his notice of appeal was the postal address. The applicant, without denying the correctness of the indicated postal address, averred that he visited the office of the respondent's advocate to seek clarity on the application but he was chased away and not served.

19. We have looked at the notice of appeal that was struck out. On the face of it, the applicant indicated his address of service to be 2971-30100 Eldoret. This is the same address that was used by the respondent to serve the applicant through registered post. From the record, the applicant was therefore duly served and a return of service lodged in Court. Furthermore, from the applicant's deposition that he visited the office of the respondent's advocate seeking service, it would appear to us that the applicant knew of the existence of the application dated 26th September 2018.

20. Based on the foregoing reasons, the applicant cannot therefore plead fraud or deceit, the only grounds that his application alluded to, albeit not directly. In the end, the prayer for review lacks merit and is hereby declined.

21. The upshot of the foregoing is that the notice of motion dated 11th July 2023 is without merit and is dismissed in its entirety.

22. As for the costs of the application, we note that the applicant is a former employee of the respondent and he was acting in person. It is this set of circumstances that moves us to depart from the norm that costs follow the event. We are therefore inclined to order that the parties bear their own costs of the application.

23. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 8TH DAY OF MARCH, 2024

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR