Ndubi v Standard Ltd (Civil Application 74 of 2019)
[2021] KECA 364 (KLR) (19 March 2021) (Ruling)

Alfred Mincha Ndubi v Standard Limited [2021] eKLR

Neutral citation: [2021] KECA 364 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPLICATION 74 OF 2019

PO KIAGE, F SICHALE & J MOHAMMED, JJA

MARCH 19, 2021

BETWEEN

ALFRED MINCHA NDUBI ..... APPLICANT

AND

STANDARD LIMITED ..... RESPONDENT

(An application for review of a ruling on an application for injunction pending the determination of an intended appeal from the judgment of the High Court of Kenya at Nyamira (Maina, J.) dated 23rd May 2019 In H.C.C.A No. 5 of 2017)

An advocate hurling intemperate and demeaning words at the court brought the profession of law and administration of justice to disrepute.

Reported by John Ribia

Civil Practice and Procedure *– reviews – review of decisions at the Court of Appeal – power of the Court of Appeal to review its own decisions – what was the extent of the power of the Court of Appeal to review its own decisions – Court of Appeal Rules, rule 32.*

Civil Practice and Procedure *– judgments – delivery of judgments by a bench of judges – whether each judge should write his or her separate judgment – whether a judgment or a ruling written by a single judge and the rest of the bench agreeing with it without delving into their own analysis amounted to a ground for review of that judgment – what was the form or content of concurring judgments – Court of Appeal Rules, rule 32.*

Brief facts

The instant matter was an application for review of a ruling rendered by the instant court on an application for injunction pending the determination of an intended appeal from the judgment of the High Court. The impugned ruling was delivered by two judges of the instant court as the other judge had since retired. The ruling dismissed the applicant's application that had sought an injunction pending appeal. The applicant submitted that the decision occasioned a great mistrial of his application and a great miscarriage of justice as

only one judge wrote the ruling, the other read it online and the third said nothing. He averred that had the two judges written their own rulings, the shortcomings/inadequacies of a single judge would have been filled. The applicant further stated that it was a cardinal principle that each ought to write their own separate ruling or judgment. According to the applicant, no ruling was delivered in the strict sense of the law as delivery online by Skype was a system completely foreign to Kenyan law.

Issues

i. What was the extent of the power of the Court of Appeal to review its own decisions?
ii. What was the form and content of concurring judgments?
iii. Whether a judgment written by a single judge while the rest of the bench simply stated that they concurred with that decision amounted to a ground for review of that leading judgment.

Held

1. Reviews were not provided for in the Court of Appeal Rules. They were not to be thought of as commonplace exercises to be sought as a knee-jerk response to decisions of the court that did not flatter a party's fancy. The Court of Appeal entertained applications for review only in exceptional circumstances where it was apparent that the usual principle of finality could work injustice. The Court of Appeal ought to be less inclined to revisit and review rulings made at interlocutory stages such as the one sought to be reviewed. The Court of Appeal existed to determine appeals and did not have the luxury of engaging in such applications. Therefore, the court ought not to grant the instant application.
2. On the merits of the instant application, whereas it was true that under rule 32(3) of the Court of Appeal Rules the statutory command was that each judge should render his or her own separate decision as a matter of course, there was room for single-judgments of the court to be given where the decision was unanimous and the presiding judge so directed. Where one judge delayed, died, or ceased to hold office or was unable to perform the function of his or her office because of the infirmity of mind or body, the rule required that separate concurring judgments should be given by the remaining members of the court.
3. Rule 32(3) of the Court of Appeal Rules did not prescribe the form or content of the concurring judgments and it was not uncommon for a leading judgment to be written in which the other judge or judges concurred by separate judgments. They could be as brief as a single sentence or could be full-fledged judgments complete with analyses of the law and a citation of authorities, it all depended on the subject.
4. In the ruling sought to be reviewed, what was in issue was a simple application for stay of execution pending appeal under rule 5(2)(b) of the Court of Appeal Rules. That was as simple a matter as could be. The law on it was so settled it was an old hat. The principles applicable were notorious and could be recited by rote. There was nothing novel or engaging about the application and there was no call to strike any new ground or blaze new trails. It was just an ordinary, unremarkable application. The complaint, therefore, that the judge who wrote the ruling did not go into any lengths to state her reasoning was misplaced and misconceived. The judge did not need to. There was nothing to add with any utility to what the previous judge had stated.
5. The applicant was misguided and misadvised in his assertion that the retired judge ought not have been part of the bench while his retirement was imminent. It was not in the applicant's place to organize and dictate to the court the manner in which it did its business. It was enough that the law maker did contemplate that judges could delay, die or cease to hold office (including by retirement) or be struck by debilitating infirmity and therefore be unable to write or sign judgments or rulings in applications or appeals they could have heard. That was why rule 32(3) of the Court of Appeal Rules kicked in and the two judges of the court who penned judgments upon the retirement of the other judge acted squarely within that rule. Therefore, there was no substance in the complaint.

6. The claim that the concurring judge restated but failed to properly apply the principles for stay of execution was a mischievous and mendacious claim. It smacked of discourtesy to the judge and to the court. The applicant and his counsel set out to deliberately besmirch the dignity of the court. If they thought there were errors of law committed, and there were none, the way to redress them was certainly not by an application for review.
7. There was concern at the tone and content of the grounds, the affidavit and the submissions of counsel. Counsel ought to remember that they owed the court a duty of courtesy and respect. It reflected terribly on counsel when they undertook a mission of hurling intemperate and demeaning words at the court with reckless abandon. Such a course did a great disservice to counsel and brought the profession of law and administration of justice to disrepute. Counsels ought to always remember that they were officers of the court and that respect and etiquette were marks of noble professionalism.

Application disallowed with costs.

Citations

Cases

Kenya

1. *Adopt A Light Limited v City Council of Nairobi* Civil Appeal 301 of 2010; [2019] KECA 726 (KLR) - (Explained)
2. *Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited* Civil Application 16 of 2012; [2014] KECA 872 (KLR) - (Mentioned)
3. *Mohammed Jawayd Iqbal (Personal representative of the Estate of the late Ghulam Rasool Janmohamed) v George Boniface Mbogua alias George Boniface Nyanja* Civil Appeal (Application) 242 of 2018; [2020] KECA 95 (KLR) - (Explained)
4. *National Bank of Kenya Limited v Ndungu Njau* Civil Appeal 211 of 1996; [1997] KECA 71 (KLR) - (Explained)

Statutes

Kenya

1. Appellate Jurisdiction Act (cap 9) section 3(2) - (Interpreted)
2. Court of Appeal Rules, 2010 (cap 9 Sub Leg) rules 5(2)(b); 31; 32(3)(4); 41; 42- (Interpreted)

Advocates

M/s Nyamurongi for the respondent

RULING

Ruling of Kiage, J A

1. This court (Okwengu & J Mohammed, JJ A) by a ruling dated April 3, 2020 and delivered under rule 32(3) of the *Court of Appeal Rules*, as the other judge, Githinji, JA had since retired, dismissed the motion dated July 9, 2019. By that application the applicant, Alfred Mincha Ndubi had sought an injunction pending appeal.

2. Now, instead of moving on to make every effort to have his appeal processed for hearing, as the core business of this court, indeed its *raison d'etre'*, by constitutional and statutory conferment, is the hearing and determination of appeals proper, the applicant has filed yet another interlocutory application. The motion dated April 16, 2020 and expressed as brought under section 3 of Act No 28 of 2015, *Appellate Jurisdiction* section 3(2) of cap 9, rules 31, 32 (3), (4), 41 and 42 of the *Court of Appeal Rules* seeks the following orders:

1) That the honourable court be pleased to certify this application as urgent and admit it for hearing of prayer 2 below *ex parte*.

2) That the honorable court be pleased to stay all recovery proceedings of the decretal sum paid to the appellant/applicant herein in PMCC No 76 of 2014 Nyamira pending the hearing and determination of this application inter-parties.

3) That the honourable court be pleased to review its decision delivered online on April 3, 2020 and particularly consider and contextualize submission by the appellant on the aspect of the appeal being rendered nugatory and allow the application for stay of execution on terms that are just and fair.

4) The honourable court be pleased to order for a re-hearing of the applicant's application dated July 9, 2019.

3. The eleven grounds on which the application is brought have a peculiar tinge and tone to them but I need not reproduce them here as their content is replicated in the supporting affidavit of the applicant sworn on April 16, 2020. In it he swore that he had applied for a stay of execution to stop recovery proceedings against him; he had been paid the money sought to be recovered more than 2 years previously and the recovery would occasion him "unreasonable hardship". He learnt of the delivery of the ruling therein online by Okwengu, JA and on visiting the www.kenyalaw.org website he did not find a ruling by Githinji, JA. Moreover, the ruling by Okwengu, JA had no analysis and merely concurred with the ruling of J. Mohammed, JA. He claimed that the ruling had serious errors apparent on the record; it never "considered, analyzed and contextualized" the reasons he gave for contending his appeal would be rendered nugatory; merely cited very good decisions but failed to apply them; failed to consider or weigh his hardships *vis- a-vis* those of the respondents and failed to mention that he had offered security.

4. The applicant further swore that the decision occasioned "a great mistrial" of his application and a great miscarriage of justice as only one judge wrote the ruling, the other read it online and the third said nothing. Had the two judges written their own rulings "the shortcomings/inadequacies of the single judge would have been filled". He went on to say that it is a cardinal principle that each judge must write his own separate ruling or judgment "for development of jurisprudence and to restore confidence in our judiciary". To him, no ruling was delivered in the strict sense of law as delivery online by Skype is "a system completely foreign to Kenyan Law".

5. Stating that the retiring of a judge is not an accident, he swore that it was not understandable why a judge who is staring at retirement should be allowed to hear matters that he/she will never determine. He went on thus:

> " That I know as a matter of fact that a bench of judges hearing a matter is not ceremonial, monumental or public relations exercise. The public have a legitimate constitutional expectation that all the minds of the judges sitting in a bench be utilized to determine a matter."

6. He concluded that the ruling having been rendered 8 months after the hearing of the application with 3 rescheduling, he had "a legitimate expectation that something concrete would come out" and that;

> " In my humble observation, the bench has had ample time for all of them to write their independent rulings. Coupled with the recess on covid-19 pandemic, the bench has had all the time to write well-reasoned independent rulings. The current ruling is an indictment

on the seriousness of the judiciary in the conduct of its business. Even if they were to arrive at the same conclusion, I, as the applicant deserved to see their independent and separate 'reasoning'."

7. And he prayed that his application which he declared was "in good faith" be granted (on interim stay I presume) lest the respondent should commence execution proceedings and the current application be rendered completely nugatory.

8. In opposing the application, the respondent's advocates M/s Nyamurongi filed "grounds of opposition", a document unknown to the procedure of this court which requires that a replying affidavit be filed. The grounds in a nutshell, are that there is no error apparent on the record; the complaints could be a basis for appeal not review; the ruling was perfectly sound and in accordance with rule 32(4). Githinji, JA having retired; online delivery of the ruling was proper in the context of the covid-19 global pandemic; the application raises no valid reasons and is a mere remonstration and personal attack on the integrity of the court and that the applicant has no basis for holding onto money previously paid to him.

9. Counsel for the applicant filed written submissions in which he stated that "this is an application for review of the ruling of J Mohamed, JA", who he improperly and sarcastically "lauds for finding time to write the ruling". He goes on to question the learned judge's finding that the appellant's appeal would not be rendered nugatory which he faults for "failing to contextualize the cultural sentimental value of ancestral land to a Kisii man". His submissions, which waxed lyrical, if fanciful, included:

> " Any Kisii man who loses his ancestral land loses his own identity because the community is organized along clan lines and those clans have their own societal values and history that is dear to the O'mogusii people. If one is displaced from his clan and gets alternative land elsewhere that man loses the normal touch with his clan and the new clan that he finds himself in, receives him with a measured dose of caution. The matrix becomes more complicated for his children who may find themselves marrying or getting married from/to clans where marriage engagements are disallowed by tradition."

10. He went on to dismiss the respondent's characterization of the application as a personalized attack. To him that submission was "unfortunate" and "meant to incite the court into believing that the appellant was a sore loser" yet he had raised "serious and fundamental issues that cannot be ignored". "He is not frivorous" (sic) because the "court should come out clear on the following issues ..."

11. The respondent's submissions were first that there is no error apparent on the face of the record for which he referred to *National Bank of Kenya Ltd v Ndungu Njau* [1997] eKLR which was cited with approval by this court in *Adopt A Light Ltd v City Council of Nairobi* [2019] eKLR. He retorted, on the basis of those authorities, that it cannot be a ground for review that the court proceeded on an incorrect proposition and reached an erroneous conclusion of law. He went on to urge that rule 31 cited by the applicant does not form a basis for the rehearing of the application that the applicant seeks. Moreover, the ruling of the court was lawful under rule 32(3) and complied with Gazette Notice No 3137 of the March 20, 2020 on practice direction during the Covid pandemic. He reiterated that various grounds on the application and paragraphs of the supporting affidavit demonstrated the applicant purport

> " to besmirch the character and dignity of the court".

12. I have taken time to consider this application and am very much in doubt that it was time well-employed. In context of highly constrained time and personnel constraints of this court, we can ill-

afford engagement with applications that are merely for polemical purposes but do little to advance the cause of justice by seeking the fast determination of the appeals proper pending before court.

13. I reiterate the constant refrain of this court that reviews are not provided for in our rules. They must never be thought of as common place exercises to be sought as a knee-jerk responses to decisions of the court that do not flatter a party's fancy. We entertain applications for review only in exceptional circumstances where it is apparent that the usual principle of finality might work injustice. As we stated very recently in *Mohammed Jawayd Iqbal (personal Representative of The Estate of The Late Ghulam Rasool Jammohamed) v George Boniface Mbogua* [2020] eKLR;

> "Equally, without doubt is the fact that the power to review, re-open and/or set aside judgments in concluded appeals is one that is exercisable only in exceptional circumstances. The court embarks on it cautiously, with circumspection and, we dare add, in the most compelling cases where the justice of the case patently demands that the court turn back and re-examine what is declared with finality. The burden to convince the court to do must lie with the applicant...." See also *Benjoh Amalgamated Ltd & another v Kenya Commercial Bank Ltd* [2014] .

15. I think that the court ought to be even less inclined to revisit and review rulings made at interlocutory stages such as the one sought to be reviewed herein. The court exists to determine appeals and does not have the luxury of engaging in such applications, and twice ever at that. On point of principle therefore, I stand disinclined to the grant of this kind of application.

16. On its merits, I find that whereas it is true that under rule 32(3), the statutory command is that each judge should render his own separate decision as a matter of course, there is room for single-judgments of the court to be given where the decision is unanimous and the presiding judge so directs. Where one judge delays, dies, ceases to hold office or is unable to perform the function of his office because of infirmity of mind or body, the Rule requires that separate concurring judgments shall be given by the remaining members of the court.

17. The rule does not prescribe the form or content of the concurring judgments and it is not uncommon for a leading judgment to be written in which the other judge or judges concur by separate judgments. They may be as brief as a single sentence or may be full-fledged judgments complete with analyses of the law and a citation of authorities, it all depends on the subject being treated of. In the ruling sought to be reviewed, what was in issue was a simple application for stay of execution pending appeal under rule 5(2)(b). This is as simple a matter as can be. The law on it is so settled it is an old hat. The principles applicable are notorious and can be recited by rote. There was nothing novel or engaging about the application and there was no call to strike any new ground or blaze new trails. It was just an ordinary, unremarkable application. The complaint, therefore, that Okwengu, JA did not go into any lengths to state her reasoning is misplaced and misconceived. The learned judge did not need to. There was nothing to add with any utility to what J Mohammed had stated.

18. As to Githinji, JA's sitting an appeal while his retirement was imminent, I think that, once again, the applicant is misguided and misadvised. It is not the applicant's place to organize and dictate to the court the manner in which it does its business. It is enough that the law maker did contemplate that Judges may delay, die cease to hold office (including by retirement) or be struck by debilitating infirmity and therefore be unable to write or sign judgments or rulings in applications or appeals they may have heard. That is why rule 32(3) kicks in and the two Judges of the court who penned judgments upon Githinji, JA's retirement acted squarely within the rule. There is no substance in the complaint.

19. I think that the claim that J Mohammed, JA restated but failed to properly apply the principles for stay of execution is a mischievous and mendacious claim. It smacks of discourtesy to the learned judge and to the court and I think, with respect, and without being incited, as indeed I cannot be, that the applicant and his counsel set out to deliberately besmirch the dignity of the court. If they thought there were errors of law committed, and I am quite certain there were none, the way to redress them, ever there a way, was certainly not by an application for review. See *National Bank of Kenya Ltd v Ndungu Njau*(*supra*).

20. I must again express my concern at the tone and content of the grounds, the affidavit and the submissions of counsel, some of which I have highlighted. Counsel must remember that they owe the court a duty of courtesy and respect. It reflects terribly on counsel when they undertake a mission of hurling intemperate and demeaning words at the court with reckless abandon. Such a course does great disservice to counsel and brings the profession of Law and administration of justice to disrepute. Counsel must always remember that they are officers of the court and that respect and etiquette are marks of noble professionalism.

21. It should be clear by now that this application was going nowhere. It is lacking in merit and I would dismiss it with costs.

22. As Sichale & J Mohammed, JJ A are of the same opinion, it is so ordered.

Concurring Ruling of Sichale, J A

1. I have had the advantage of reading in draft the ruling of Kiage, JA. I am in full agreement with his reasoning and conclusions and, therefore, have nothing useful to add.

Concurring Ruling of J Mohammed, J A

1. I have had the advantage of reading in draft the ruling of Kiage, JA. I am in full agreement with his reasoning and conclusions and, therefore, have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

P.O KIAGE

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this a true copy of the original

signed

DEPUTY REGISTAR