



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OKWENGU, GATEMBU & M'INOTI, J.J.A.)

CIVIL APPLICATION NO. 23 OF 2016

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

(Application to correct errors in the ruling of the Court of Appeal (Githinji, Okwengu & J. Mohammed, JJA.) dated 15th October 2017 in Civil Application No. 23 of 2016)

RULING OF THE COURT

Thomas Owen Ondiek (the 1st applicant) and his wife, **Eddah Amakobe Ingutia (the 2nd applicant)** are before this Court for the third time. In the present application they seek correction of what they perceive to be errors in the ruling of the Court dated 5th October 2017 in which the Court declined to review its judgment dated 29th October 2015. Although the applicants purport to base the application on **section 99** of the **Civil Procedure Act**, we shall treat the application as one under **rule 35(1)** of the **Court of Appeal Rules** because both provisions provide for what is commonly known as the *slip rule*.

The brief background to the application is as follows. At all material times the 1st applicant was an employee of **the 1st respondent, National Bank of Kenya Ltd**, at its Eldoret Branch. He was dismissed from employment for alleged involvement in money laundering following a complaint by a customer and search of his home and office by officers of the 1st respondent and of **the 2nd respondent, the Central Bank of Kenya**. Subsequently the 1st applicant lodged **HCCC No. 115 of 1999 (the first suit)** against the two respondents for wrongful termination of employment. The trial court found in his favour and directed the deputy registrar to compute his terminal benefits.

The 1st respondent, however, challenged that judgement in this Court and on 5th February 2016 the Court allowed the appeal and remitted the matter back to the High Court for retrial because the impugned judgment was neither signed nor dated. As it transpired, shortly after filing the first suit, the two applicants filed another suit, **HCCC No. 175 of 1999 (the second suit)** against the two respondents in which they contended that the 1st respondent's termination was malicious and claimed, among others, damages for loss of business, illegal search, defamation, compensation for seized goods, and payment of the 1st applicant's outstanding loan which he was subsequently unable to service.

The High Court dismissed the second suit, primarily on the ground that it was *res judicata*. The applicant's appeal to this Court, **Civil Appeal No. 182 of 2011**, suffered similar fate when on, 29th October 2015, the Court upheld the trial court's finding that the second suit was indeed *res judicata*. Undeterred, the applicants applied to this Court for review of its judgment arguing, primarily, that the principle of *res judicata* did not apply because the judgment in the first suit was a nullity and in any event that he subsequently withdrew the first suit, which had been remitted for retrial. By a ruling dated 5th October 2017, the subject of the present application, the Court found no basis upon which to review its judgment and dismissed the applicants' application.

In the application now before us the applicants contend that there is an error in the ruling of 5th October 2017 because it states that they applied for retrial of the second suit whilst they were merely seeking review of the judgment of 29th October 2015. They also point out evidence which they feel the Court did not consider in arriving at its decision. In their unusually lengthy written submissions in support of

the application, to which is annexed a long chronicle of the litigation and documentary evidence, including newspaper extracts, the applicants challenge the findings in the judgement of 29th October 2015 as regards the search in their home, as well as the applicability of the doctrine of *res judicata* which they feel has no room in this litigation. They add that the Court was biased against them.

The 2nd respondent opposed the application by a replying affidavit sworn by **Neala Wanjala**, its Manager, Legal Services. The deponent contended that the current application is an abuse of the process of the court and a disguised second attempt to review the judgment of 29th October 2015. She added that the jurisdiction of the Court to review its decisions is limited to exceptional circumstances which do not exist in the present application and that there was no error or mistake in the Court’s appreciation and application of the doctrine of *res judicata*.

We have carefully considered this application and its antecedents. **Rule 35 (1)** of the Court of Appeal Rules provides as follows:

“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 the application of any interested person so as to give effect to what the intention of the Court was when judgment was given.” (Emphasis added).

It is axiomatic that the jurisdiction of the Court under the slip rule is circumscribed and limited to correction of errors arising from accidental slip or omission, so as to give effect to the manifest intention of the Court when it made its decision. It is not the purpose of that jurisdiction to allow the Court to sit in judgment of the merits of its previous decisions. In **Mukuru Munge v. Florence Shingi Mwawana & 2 Others [2016] eKLR**, this Court stated as follows on application of the slip rule:

Besides the residual power to reopen a decided case, it must be pointed out that under rule 35 (1) of the Court of Appeal Rules, (commonly referred to as the slip rule), the Court has power to correct any clerical or arithmetical mistake in its judgment or any error arising therein from an accidental slip or omission. The Court may undertake that correction of its own motion or on the application of any interested person, and at any time whether before or after the judgment has been embodied in an order. The slip rule does not allow the Court to sit in judgment on its own previous judgment... Its purpose is to effect correction so as to give effect to the intention of the Court when it gave its judgment. (Emphasis added).

(See also **Raniga v. Jivraj [1965] EA 700** and **Lakhamshi Ltd v. R. Raja & Sons [1966] EA 313**).

We are satisfied that in the present application the applicants are inviting this Court to reconsider the merits of its decision and come to a different conclusion. That clearly is the purpose of the submission that the Court failed to consider some relevant evidence and misapplied the doctrine of *res judicata*. We see no clerical or arithmetic error or any other error of that nature that would justify invocation of the slip rule. In our view, granting this application will not give effect to the manifest intention of the Court as expressed in the ruling in question, which is that the second suit was *res judicata*. On the contrary, acceding to the applicants’ request will amount to overturning the Court’s clear intention and substituting it with an entirely different outcome which the applicants consider palatable to them. We are afraid that is not the purpose of the slip rule.

This application has no merit and is hereby dismissed in its entirety, with costs to the 2nd respondent. It is so ordered.

Dated and delivered at Nairobi this 19th day of March, 2021

H. M. OKWENGU

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR