IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, KIAGE & KANTAI, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 242 OF 2018

BETWEEN

MOHAMMED JAWAYD IQBAL

(Personal representative of the Estate of the

late ***Ghulam Rasool Janmohamed*)..... APPELLANT**

AND

GEORGE BONIFACE MBOGUA *Alias*

GEORGE BONIFACE NYANJA.....RESPONDENT

(An appeal from the judgment and decree of the Environment and Land Court at Milimani (Bor, J.) dated 31stMay, 2018

in

ELC No. 1107 of 2013)

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RULING OF THE COURT

In his much-acclaimed classic text titled Common Sense Rules of Advocacy for Lawyers (2004, Capital. Net) the American lawyer Keith Evans includes in his appendix a letter from Roland Boyd a senior lawyer to his son who was just about to join the profession. Titled '*How to Succeed as a Lawyer'* and first published in the November 1962 issue of the Texas Law Journal, the letter outlines some 21 Steps to Success, each a plea to the young lawyer to remember them if he is to have a long, happy and successful career. In addition to such practical wisdom as 'a lawyer's integrity being of vital concern to the Community, 'the end does not justify the means', 'to be a good lawyer you must first be a good man' (or woman!) the senior Boyd admonishes the junior to "Remember, no people have ever developed a better method of settling disputes among men, than our judicial system." He then offers this explanation;

> ***"It was developed by the legal profession, it has been through fire, millions of times, although not perfect, it is still the 'best' there is .... Always defend the system. When you lose a lawsuit, don't try to tear the courthouse down."***

Unfortunately, we see way too many attempts in recent times by lawyers, advocates who are officers of the court, trying to "tear the courthouse down." Not so much by chisel and hammer, but by intemperate and wholly unjustified attacks on the integrity, competence and learning of judges, laced with wild speculation and dark imaginings all dripping from the sour grapes of having lost a case. It would seem that for a certain crop of advocates, justice can only be served if the cases they present before court prevail and, if they do not, it is open season for attacks on the Judges whose impartiality they question with abandon, and with scant regard for truth, the dignity of their offices, or the interests of justice.

Take this case. On 8th November 2019,a bench of this Court as presently constituted rendered a reasoned 44-page judgment allowing the appeal by **Mohammed Jawayd Iqbal** (Iqbal) against George Boniface Mbugua alias **George Boniface Nyanja** (Nyanja). In so doing, we set

aside the judgment and decree of the Environment and Land Court at Milimani (Bor, J.) that had allowed a claim by Nyanja for specific performance, and ordered that the suit property known as **L.R. No. 1/387** situate along Ngong Road in Nairobi be transferred to him by Iqbal. The latter's counterclaim claiming "rent for the period 1986 to 2011 amounting to **Kshs. 25,020,000** and **Kshs. 200,000** per month till judgment is entered", together with interest at court rates and costs, was dismissed by the trial court. We allowed it and, as the Judge had not calculated the damages that Iqbal would have been entitled to had he succeeded on it, we remitted the case to the Environment and Land Court under **Rule 31** of the **Rules of this Court** for assessment of the same by a judge of thatcourt other than Bor, J.

We would have thought that our engagement with the said appeal rested there but, alas, we were wrong. By a motion dated 4thDecember 2019, expressed as brought"*pursuant to Article 48 & 159(2)(d) of the Constitution of Kenya, 2010, sections 3A and section 3 of the Appellate Jurisdiction Act, section 3 of the Judicature Act and Rule 1(2) of the Court of Appeal Rules, Rule 31(2) of the Court of Appeal Rules and All other enabling provisions of law"*, Nyanja sought various prayers, the ones relevant to this ruling being;

> ***"3. THAT the judgment dated and delivered on 8th November 2019 be re-opened, reviewed, re-examined, declared a nullity, set aside and the Appeal be dismissed or heard afresh.***
>
> ***4. THAT the Appeal be dismissed and/or remitted back for rehearing before a differently constituted bench."***

We make no reference to the prayers seeking relief pending hearing of the application as they stand spent.

The application was said to be made on more than a dozen grounds and "*other[s] to be adduced at [its] hearing*" which can be summarized as that; this Court allowed the appeal and made draconian orders for assessment of damages; Iqbal had rushed to extract the order with a view to executing it; he was apprehensive that were Iqbal to assert ownership rights over the property it would cause confusion; that we ordered that Nyanja's application for security for costs be heard together with the appeal "*under unclear and suspicious circumstances"*; our decision violated Nyanja's rights by awarding unpleaded mesne profits/damages; he was not heard on those issues so there can be no finality; there is apparent error on the face of the record (including referring to "a repealed law of contract," trashing undisputed evidence and expunging evidence of proof of payment, entertaining a time-barred claim for rent; ignoring an earlier observation of the trial court that full purchase price was paid; granted orders *in vacuo*; erred in holding that completion documents were not delivered; entertaining fresh arguments or submissions in excess of jurisdiction and rewriting contract on rescission; awarding an admission of payment of the Kshs. 500,000; finding the contract repudiated yet Iqbal in his original counterclaim was willing to complete; and ordering unsought order of assessment of damages/mense profits/rent); our decision was vitiated by '*utmost bias'*; our analysis demonstrated "outright bias and misrepresentation of proceedings" indicating "premeditation" leading to "reasonable apprehension of [our] lack of impartiality"; we ignored Nyanja's submissions and authorities; we denied him a fair hearing; and, the impugned, erroneous and unconstitutional decision will create confusion in the justice system.

Those grounds were repeated verbatim in paragraph 15 of the affidavit sworn by Nyanja on 4th December 2019. He repeated other grounds in paraphrase and also swore at paragraph 17 thus;

> ***"THAT the judgment is vitiated by over bias (sic) on the part of the Judges <u>who failed to understand the</u> <u>dispute</u> resulting in glaring errors and omissions." (Our emphasis)***

Nyanja's advocate **Peter Gichuki King'ara,** whose firm is indicated as having drawn and filed Nyanja's affidavit, himself swore a supporting affidavit on the same date. He swore at paragraphs 5 to 7, in sometimes halting and confusing grammar as follows;

> ***"5. THAT from the onset, the said judge were very bias against me (sic) and did not allow me the time to argue my appeal, the honourable justice of appeal Kantai was especially hostile to me and would not allow me to argue my appeal but kept interrupting me incessantly yet the court had only granted me 15 minutes to argue both the appeal and the application.***
>
> ***6. THAT to my knowledge the honourable justices of appeal Hon. Mr. Asike Makhandia JJ.A, Hon Mr. P.O. Kiage JJA had been transferred to Kisumu to man the Court of Appeal there but were strangely sitting in Nairobi for the Appeal and they seemed quite intent to force the parties to argue the same. A true copy of the Press release showing their transfer in hereby annexed at pages 23-24 and marked PGK1.***
>
> ***7. THAT I have been an advocate in litigation for the last 28 years and from my experience it was quite clear that the bench had some pre-conspicuous (sic) about this appeal and were determined to hear it at all costs."***

He swore further that what he hailed as "our meticulous submissions and authorities" were not considered and at paragraph 11;

> ***"11. THAT the conduct of the judges on the hearing was rude and demeaning to me and it was evidence they had a predetermined mind and were not impartial in their conduct of the matter, I am prepared to me (sic) cross-examined on this issue***

so that I can set the record straight."

The deponent repeated the claims of our having breached natural justice by not giving Nyanja a fair hearing and not being impartial and that the judgment contains errors on the face of the record and "should not be final but a nullity."

In opposition to the motion, Iqbal swore a replying affidavit on 13th February 2020 in which he swore that the application is unmerited, baseless and frivolous and a clear display of the applicant's attempt to play lottery with the court process. He swore that Nyanja had made deliberate and frantic exercise of disparaging the integrity of the Judges of this Court; had filed a notice of appeal to the Supreme Court on 15th November 2019 which he subsequently withdrew on 3rd December 2019; that he had been advised that this Court lacked jurisdiction to entertain review applications, and the application was an abuse of process seeking to have this Court sit in judgment on its earlier decision.

Next, Iqbal swore that Nyanja's application was riddled with a myriad of falsehoods and misrepresentations of fact as follows;

"a. The applicant is not registered as the proprietor of the suit property as alleged or at all as evidenced by the official search conducted by the respondent on 11th November 2019 and 30th January 2020. Annexed herein and marked as annexture MJI-3 are copied of the said searches.

b. Contrary to the applicant's averment, the respondent in its counterclaim sought for damages for the rental income on the suit property from the year 1986 to date, which orders were granted by this honourable court in its judgment entered on 8th November 2019.

c. The orders of the trial court in the Ruling dated 4th February 2015 on the application dated 16thMarch 2013 was made at the interlocutory stage prior to the hearing of the evidence from both parties. The court did not have the benefit of testing the evidence and as such could not come up to a conclusive finding on whether the purchase price was paid in full.

d. The issue if mesne profit was canvassed at the trial court and evidence was led in that regard. The respondent presented a valuation report dated 16thNovember 2016 and called a witness. Mr. Moses Murithi Mwangi to support the respondent's claim for mesne profit."

He went on to give the background of facts leading to the application and then embarked on a blow-by-blow traverse of the averments in the affidavit in support of the application, stating that the application for security for costs was filed long after the Case Management Conference and fixing of the appeal for hearing but we nevertheless heard it; termed unfair and unfortunate Nyanja and his advocate's making of grievous allegations against Judges so as to craft a ground for review on the basis of alleged bias and impropriety which they never raised at the hearing; Nyanja was afforded ample opportunity to argue his case and had filed detailed submissions; payment of the purchase price was the crux of the entire suit; termed as "utterly false" the claim that Nyanja had been registered as proprietor at any time during trial or pending appeal; it was untrue that the damages awarded were not sought; the Court acted within jurisdiction and "considered all facts and evidence in a rational and just matter"; and repudiation of the contract was canvassed at length at the trial and appeal. He concluded by swearing;

"30. THAT in its totality, the application is devoid of merit, marred with speculation and tantamount to an abuse of court process. The applicant is clearly seeking to make a mockery of the court process and laid down procedures of this honourable court.

31. THAT it is the interest of justice that litigation comes to an end."

Nyanja swore a further affidavit on 6th December 2019 stating that immediately after he filed this application, Iqbal hastily move to claim ownership of the suit property and threatened forceful eviction of the tenants therefrom. The issue of physical possession and ownership of the property is all that the further affidavit dealt with.

In readiness for the hearing of the application, counsel for the parties filed written submissions. The firm of **Prof. Ojienda & Associates**, appointed on 4th February 2020 to act alongside and lead firm of **Gichuki Kingara & Co. Advocates** for Nyanja, filed submissions on 19th February 2020. Repeating the claim that we "relied on repealed law of contracts" and "issued orders *in vacuo*," they contended that Nyanja was as a result aggrieved hence the motion, absent which he will suffer grave injustice. Counsel cited ***BENJOH AMALGAMATED & ANOR vs. KENYA COMMERCIAL BANK [2014] eKLR, NGURUMAN LTD vs. SHOMPOLE GROUP RANCH & ANOR [2014] eKLR***; ***JIMNAH MWANGI GICHANGA vs. ATTORNEY GENERAL [2015] eKLR*** on what this Court has referred to as a *residual jurisdiction* to review, vary or rescind its decisions. It does so in exceptional cases and even so cautiously and with circumspection where it will serve to promote the public interest and enhance public confidence in the rule of law. Also referred to were two English cases ***ISAACK vs. ROBERTS [1981] 3 ALL ER 140*** where the Privy Council held that breach of natural justice justified the jurisdiction to review its decision, and ***TAILOR*** & ***ANOR vs. LAWRENCE & ANOR [2003] QB 528*** where the Appeal Court found a jurisdiction to reopen a case to redress a significant injustice where there was no alternative effective remedy.

The submissions then addressed the background, which we have already set out, and also the question whether conservatory orders of stay and/or injunction should issue pending the hearing of the motion. We think that this latter aspect of the submissions is overtaken by events as we have already heard the motion proper.

Turning to the merits of the application, counsel submitted that the Court's jurisdiction to reopen, review or set aside its judgment has been acknowledged in the cases already referred to as well as ***HARON OSORO NYAMBUKI vs. PETER MUJUNGA GATHURA & ANOR [2016] eKLR*** and ***CHRIS MAINDA vs. KENYA POWER & LIGHTING CO. LTD [2005] eKLR.*** With the principles enunciated therein in mind, Nyanja's learned counsel sought to persuade us that there were in our judgement errors of law and conclusions of fact that would lead to a miscarriage of justice against him along the lines in the grounds in support of the motion. In particular it was submitted that we made grave errors of law and conclusions of fact which have occasioned a miscarriage of justice on the issue of the contract of sale and making the order of assessment of damages by the Environment and Land Court, yet they were not pleaded. The submissions thereafter listed the same alleged errors as are contained in the application and supporting affidavits. It was finally submitted that there are no other remedies or appeals available to Nyanja because the Supreme Court would only entertain an appeal upon certification that it raises a question that is of great public importance, which was doubtful.

On their part, the firm of **Ahmednasir Abdullahi & Co. Advocates** for Iqbal filed submissions in which they characterized the application as "frivolous and at times very cantankerous" that "cries in for dismissal" for being an abuse of the process of the Court and solely designed to delay this 4 decade plus dispute between the parties. They proposed two issues, namely; whether this Court has the jurisdictional authority to review its judgments, and whether Nyanja has made a case for us to review or set aside our judgment.

On the first issue, counsel was of the view that the issue is settled, but unsatisfactorily, and that the Court does have the power, but it is one to be unleashed in the most exceptional of circumstances, not to give a party a second bite at the cherry. They made reference to basically the same decisions cited by Nyanja's advocates which bring to the fore the tension between the "*principle of finality*" and the "*justice principle*" before positing that the case law on the subject is clearly divisible into three jurisprudential epochs adding that their preferred position is the first pre-2010 Constitution one, in which the Court had firmly held that it had no jurisdiction to review is judgments. See ***JASBIR SINGH RAI & 3 OTHERS Vs. TARLOCHAN SINGH RAI & 4 OTHERS [2007] eKLR; MUSIARA LIMITED vs. WILLIAM OLE NTIMAMA [2004] eKLR*** and ***RAFIKI ENTERPRISES LTD vs. KINGSWAY MOTORS & AUTOMART LTD [1996] eKLR.***

The second category of cases allows a measure of review powers but more of the character of application of the slip rule under the Court of Appeal Rules. And the third category consists in the line of cases like ***MANCHESTER OUTFITTERS*** (supra) and ***BENJOH AMALGAMATED*** (supra) which bases the review power on the 'justice' principle even though there is no constitutional or statutory provision that allows the Court to sit on appeal or review its own decisions. It has, however, found solace in the spirit of the constitution and recognized a residual jurisdiction to reopen and rehear a concluded matter "in exceptional situations where the need to obviate injustice outweighs the principle of finality…"

Counsel expressed the view that in arriving at the present position of allowing review and reopening of concluded appeals, the Court has employed rationale that is "*unpersuasive, wanting and unsatisfactory"* and goes on to characterize it as a classic "*judicial power grab*" and "*legislation by the Court*."

Counsel for Iqbal after making those bold statements beat a hasty retreat and indicated that they would mount "*a proper and well-prepared assault on the Court's decisions that clothed itself with the jurisdictional powers to review its past decision on the nebulous and fluid concept of justice."* They then stated that they hope for such opportunity in the not-too-distant future.

We think those statements essentially concede the obvious fact that this is not the case, and this is not the occasion' for us to pronounce on the correctness or otherwise, the rights and wrongs of the latest jurisprudence of the Court as far as review and re-opening of its judgments is concerned. We do not intend to say more on the point, and will not be returning to it.

Turning then to the settled position that the Court can review its decision on exceptional grounds, counsel submitted that the grounds advanced by Nyanja do not meet the threshold and are frivolous and baseless. They asserted that the *ratio decidendi* of our decision was sound and based on the pleadings, evidence and established facts. To them, our having expressed ourselves that ***"our holding on the decisive point of whether Nyanja paid the purchase price in full"*** put the matter to rest, but they nonetheless went through each of the dozen grounds advanced for review, but dismissed them as being based on peripheral issues. We do not see the utility of having to restate every argument the said advocates made in answer to each of those grounds but it is enough to say that they in some instances accused Nyanja of being economical with the truth, outright lying, or making baseless and misguided allegations that were unsupported by evidence. They asked us to dismiss the application as devoid of merit and an abuse of the court process.

Even though we have set out the background, context and rival submissions of the parties at some length and have considered all the decisions cited, we do not intend to overly trouble ourselves with detailed analysis of the law on review of judgments before this Court. As we have indicated, this is a power of recent emanation and one that is not based on the Constitution or our constitutive and operationalizing statute. Nor is it found in the **Court of Appeal Rules, 2010**. Doubtless, it is a vexed and troubling power although some plausible justification has been its stated underpinning: the need to do justice or obviate injustice. Whether or not there be unanimity of opinion on the propriety of the power, there is no denying that the Court has consistently declared it in fresh jurisprudence, and we take it that it exits.

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 has declared with finality. The burden to convince the Court to do must lie with the applicant, in this case Nyanja.

We say without hesitation that our judgment under attack was arrived at with the exercise of our collective mind following a thorough and exhaustive analysis of the entire record in accordance with our mandate under **Rule 29(1)** of the **Rules of Court,** and consistent with a long line of authorities on the duty of a first appellate court. We therefore state without equivocation that on every single issue raised by Nyanja, our decision thereon, much as it may pique and grieve him, was well-considered, well-reasoned and well-justified. We stand by our decision and are not about to sit in judgment over it, attempting to second-guess or grade ourselves in accordance with his proposed marking scheme. We do not accept that our understanding and declaration of the law can only be right and acceptable if it pleases any particular advocate or litigant.

What greatly concerns us is the manner in which the application has been framed and presented. It is obvious that the language and manner of the application and the affidavits in support is full of innuendo and speculation and borders on the epithetical at times. The application casts aspersions on our integrity even on matters that are quite laughable. How, for instance, does Nyanja and his counsel complain that we heard the appeal when we should first have heard the application for security for costs? Surely the record is clear that it is the appeal that was listed for hearing. The application for security for costs was meant to give a measure of monetary cover or security pending the hearing of the appeal but the appeal was in factbeing heard on that day! Moreover, the record shows that the application in question was filed long after Case Management and the direction that the appeal was ready for hearing. Yet we heard it, anyway.

This Court exists for the hearing of appeals and we are not about to pander to the wishes of litigants who would rather we did not. Nyanja and his advocate seem to take issue with our insisting that the appeal be heard on the day it was listed for hearing. We think it is a matter of public knowledge that this Court takes a dim view of any attempts to scuttle hearings of appeals. We labour under a backlog of appeals, and we take time to study the appeal files before the hearing. We are not about to change that policy and we definitely have neither apology to offer nor need to repent the doing of that which we are in duty bound to do. And there was nothing 'suspicious' about our proceeding to hear the appeal and the application on the day, in the manner we did.

One of the more bizarre complaints is that Makhandia and Kiage, JJ.A, having been transferred to Kisumu *"were strangely sitting in Nairobi for this appeal and they seemed quite intent to force the parties to argue the same."* First, when an appeal has been fixed for hearing, counsel has filed submissions and counsel are in court on the hearing date and are ready to proceed, how are parties forced to argue their appeal? Nyanja was the respondent in the appeal and we did not hear his advocate Mr. Kinga'ra, apply for an adjournment. We think that a little familiarization with the way this Court works, and how Judges are empanelled, would have advised caution on the part of Nyanja and his advocate before casting aspersions on the two judges for sitting and hearing cases as directed by the President of the Court in exercise of his legitimate powers. We did not hear any objection against the two judges sitting on the day.

We think it to be scandalous and beneath counsel Mr. Kinga'ra for him to have claimed that Kantai, JA "**was especially hostile to [him] and would not allow [him] to argue his appeal but kept interrupting [him] incessantly".** A little attempt at honesty would have shown the claims to be ludicrous and advised against such false and disparaging remarks. The notes take by all three judges and the judgment itself indicate that Mr. King'ara argued his appeal to the full extent of his abilities. Neither Kantai JA nor the other Judges did what counsel alleges, and it is a sad day that such outright falsehoods can be spewed under oath by an officer of the court or by his own averment nearly 3 decades at the bar. For him to claim that we were rude or hostile to him can only be a figment of a fecund imagination. Ultimately, the allegations are a classic and sad case of an advocate trying to tear down the court house after losing a case.

The claims of bias made should at the very least have required some backing up with evidence. Try as we might, we have not seen in the application or in the affidavits in support thereof even *an iota* of evidence indicative of bias on the part of the Court. What we see instead is a strained stretching of facts into tortuous contortions in an attempt to make a case for review. Such attempts unbacked by evidence and riding only on strident cries of bias and unfairness, without more, would never move a self-respecting bench of this Court into a review of its final judgment. It requires more, much more, to meet the threshold for review, and the application before us misses it by a mile.

In sum, we find that the application before us to be totally lacking in merit and it is dismissed with costs.

Dated and delivered at Nairobi this 4th day of December, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR