



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MAKHANDIA & MURGOR, J.J.A)

CIVIL APPLICATION NO. 308 OF 2018

BETWEEN

ALI MOHAMED MWANZIA.....APPLICANT

AND

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

(Being an application under rule 42 and 47 of the Court of Appeal Rules for review of the orders of the three judge bench made on 13th July 2018 in the application for leave to file the record and notice of appeal out of time for stay of execution dated 29th May 2017 in HCCC No. 1705 of 1997

RULING OF THE COURT

The applicant, Ali Mohamed Mwanzi has filed several applications tirelessly seeking to obtain orders to extend time to file an appeal. In this application filed on 26th October 2018, he seeks for a review or an order that this Court vary its orders made on 13th July 2018. The orders arose from a reference to the full Court from a decision of the learned single judge (Karanja, JA) which declined to extend time to file an appeal.

The background to the application is that in a ruling (Koome, J, (as she then was)) delivered on 12th March 2010, declined to allow the applicant's application seeking orders to set aside an ex parte judgment that had been entered in HCCC No. 1705 of 1997. The applicant was dissatisfied with the decision of the High Court and filed a Notice of appeal dated 25th March 2010, that is *Civil Appeal No. 80 of 2015*, but did not file the record of appeal within the prescribed time. He then filed an application dated 16th August 2010 seeking leave to file the record of appeal out of time, which application was granted on 7th December 2010, but on condition that he files the record within 30 days of the date of delivery of the ruling. The applicant did not file the record within the time frame ordered by the Court but sought instead to file it on 7th April 2015, without seeking the leave of the Court. As a consequence, ***the respondent, National Bank of Kenya*** moved the Court to strike out the record of appeal, which was allowed on 9th May 2017.

Undeterred, the applicant returned to this Court with another application once again seeking to extend time to file his appeal against the impugned ruling of 12th March 2010. On 19th May 2017 the Court struck out both the Notice and record of appeal for failure to comply with the rules of this Court. On 29th May, 2017 the applicant returned for a third time to this Court, this time before the single judge (Karanja, JA) seeking to have time extended to file the appeal. On 29th September 2017, the learned judge declined to grant the order sought.

The applicant was aggrieved and filed a reference to the full court which was dismissed on 13th July 2018. Like the learned single judge, the Court was unable to find any reason upon which to extend time to file the appeal. It is that decision from which the applicant brings this application for review.

The applicant's motion is brought on the grounds that by a ruling dated 19th May 2017, a three judge bench allowed him to file a fresh Notice of appeal and exempted him from paying court fees on account of the financial challenges that he was facing having filed the appeal as a pauper; that he delayed in filing *Civil Appeal No. 80 of 2015* for the reason that it took a long time for the court to allow the application as a pauper; that owing to that delay the application was struck out. It was further contended that on 16th May 2017, the respondent obtained warrants for his arrest to have him committed to civil jail, and that if the orders sought are not granted, the appeal which has immense merit and high chances of success will be rendered nugatory and by which time, he would have suffered irreparable loss and damage if he was committed to civil jail before the appeal was heard.

When the application came up before us, the applicant who appeared in person explained that the delay in filing the appeal was occasioned by the delay in hearing his application to be declared a pauper; that the application had taken 4 years to be heard and determined, and as a

result, he was unable to file the appeal within the timeframe ordered by the Court.

Mr. Ondiwa, learned counsel for the respondent holding brief for Mr. Odhiambo, strenuously opposed the motion, and submitted that the Court is *functus officio* and the application, *res judicata*. Reiterating the background of the application, counsel argued that the review application was an abuse of the court process, and urged us to dismiss it.

We have considered the application and the submissions of the parties. This is an application for review of the decision of the full court on an application for extension of time under **rule 4** of this Court's rules that was dismissed by a single judge. Before we can delve into the issues raised in support of the application, we must first determine whether we have jurisdiction to reopen, and review a decision by a full bench of this Court.

In the case of ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR*** this Court stated;

"Jurisdiction is everything. Without it a Court has no power to take one more step, where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending the evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

Article 164 (3) of the Constitution defines the jurisdiction of this Court thus;

"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."

Section 3 of the ***Appellate Jurisdiction Act*** which confers jurisdiction on this Court specifies that;

"i. The Court shall have jurisdiction to hear and determine appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament in cases in which an appeal lies in the Court of Appeal under law;(emphasis added).

ii. 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.

iii. 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."

As concerns re-opening or reviewing decisions, **rule 35 (1)** of the ***Court of Appeal rules*** provides 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 the application of any interested person so as to give effect to what the intention of the Court was when judgment was given."

While **rule 57 (1)** specifies thus;

"An order made on an application heard by a single judge may be varied or rescinded by that judge or in the absence of that judge by any other judge or by the Court on the application of any person affected thereby, if –

a. the order was one extending the time for doing any act, otherwise than to a specific date; or

b. the order was one permitting the doing of some act, without specifying the date by which the act was to be done, and the person on whose application the order was made has failed to show reasonable diligence in the matter."

From the above provisions it can easily be discerned that the jurisdiction of this Court is limited to hearing and determining appeal, and that reviews of this Court's decisions whether as orders or appeals can only be undertaken in certain specific circumstances. These are under **rule 35**, commonly referred to as the '*Slip Rule*' where clerical or arithmetical errors have been noted or under **rule 51** for the purposes of extending time to do a particular act or for dealing with a situation where a particular act is to be done and no time frame has been specified or for doing the particular act, and no action has been taken within a reasonable time. See ***Standard Chartered Financial Services Limited & 2 others vs Manchester Outfitters (Suiting Division) Limited (Now known as King Woolen Mills Limited & 2 others [2016] eKLR***

In this case the applicant entreaties us to review our decision because, at the time of urging the application for extension of time before the single judge he omitted to explain that part of the delay in filing his appeal was that he was awaiting the hearing and determination of his pauper application that was pending before the Court.

When the above parameters for review are considered in relation to the applicant's assertions, it becomes clear that the reasons advanced do not fall with the parameters specified. They would in effect amount to additional material that the applicant failed or neglected to place before the learned single judge which would, at the time, have informed the judge's decision.

In the circumstances, the reason for review having failed to fall within the confines of either *rule 35* or *rule 51* of this Court's rules, we find that we have no jurisdiction to determine this application. It is without merit and is hereby dismissed.

The applicant having been exempt from paying court fees in Civil Application Nai. 126 of 2011 on 20th February 2015, we make no orders as to costs.

It is so ordered

Dated and delivered at Nairobi this 22nd day of November, 2019.

W. OUKO (P)

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR