IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: SICHALE, J. MOHAMMED & KANTAI, JJ.A.)

CIVIL APPEAL NO. 69 OF 2017

BETWEEN

JOSEPH C. MUSYOKI.....APPELLANT

AND

THE HON. ATTORNEY GENERAL.....RESPONDENT

(Appeal against the Ruling and Order of the High Court of Kenya at Nairobi (Njuguna, J.) dated 2nd February, 2017

in

HC. CA No. 273 of 2006)

****

JUDGMENT OF THE COURT

This appeal has a long rather interesting history and the litigation has lasted in the court system a good 15 years since the plaint was filed on 29th April, 2004.

The appellant, **Joseph C. Musyoki,** was a teacher employed in the public service. He was retrenched from his employment leading him to file a suit at the Chief Magistrate's Court in Nairobi. **The Attorney General** "(respondent)" was the defendant. The suit ended up at the High Court of Kenya through an appeal filed by the appellant.

Our jurisdiction in a second appeal like this one is limited by **section 72** of the **Civil Procedure Act** in an appeal which begun at the subordinate court, then went to the High Court and ends up here at the Court of Appeal. It is permitted for such a second appeal to be filed to this Court on the following grounds: that the decision is contrary to law or to some usage having the force of law; the decision has failed to determine some material issue of law or usage having the force of law; a substantial error or defect in the procedure provided by the Civil Procedure Act or by any other law for the time being in force, which may possibly have produced an error or defect in the decision of the case upon the merits.

It is not necessary to go into a detailed anlaysis of the history of the case as a brief summary of it will suffice.

As we have stated the appellant filed suit at the subordinate court. After a hearing the trial magistrate found that the case had not been proved to the required standard and it was dismissed. The appellant filed an appeal at the High Court of Kenya at Nairobi. The same was heard by Sitati, J., who found in favour of the appellant and allowed the appeal in a judgment delivered on 25th October, 2010. Having found in favour of the appellant the learned Judge found that the retrenchment that had been visited on him was unlawful, null and void. The judge ordered that the appellant be paid salary and house allowance which had not been paid from October, 2000 to December, 2007 (both months inclusive) and the Judge went on to calculate the sums due and payable to the appellant in a net sum of Kshs.1,312,960. An appropriate decree was drawn and the matter should have ended there. It did not.

The appellant filed an application for review stating that the decree that had been drawn should be reviewed to reflect the true sum due to him from the respondent arising from the favourable judgment that had been made in his favour by Sitati, J.

Ang'awa J. heard the Motion and agreed. The decree was ordered to be reviewed to reflect the true salary together with allowances in accordance with a Government Circular issued on 1st October, 2006. In the end the judge ordered that the actual calculation be worked out and confirmed with the parties by the Deputy Registrar of the High Court. The orders made by the Deputy Registrar were then to be endorsed

by the judge.

It is on record at page 170 that an order was issued on 19th of October, 2015 by the Deputy Registrar of the Civil Division of the High Court where it was ordered:

> ***"THAT the sums found due per calculations between the parties is Kshs.1,836,687.92 (One million eight thirty six thousands (sic) six hundered eighty seven ninety two centts)".***

The ruling by Angawa J. was made on 2nd October, 2012.

There is on record an order issued on 17th July, 2013 made by Waweru, J. which order was made after the parties had appeared in court. It is to the effect:

> **"IT IS HEREBY ORDERED BY CONSENT:**
>
> ***1.THAT it is hereby agreed that following the calculations made by the Deputy Registrar on 17th December, 2012, the amount now owed by the Respondent to the Appellant is Kshs.1,994,170.32 (which is inclusive of interest up today (sic)).***
>
> ***2.THAT this amount to be paid to the Appellant through his Advocates on record within the next forty five (45) days from today.***
>
> ***3.THAT in default the Appellant may execute for the same''***

Again that matter should have ended there, the appellant having succeeded in the appeal and his review application having been allowed.

What has provoked this appeal is a ruling by Njuguna, J. delivered on 2nd February, 2017 on another application for review made by the appellant before the said Judge. In that application the court was asked to review or vary the decision of the Deputy Registrar given on 17th December, 2012 computing the interest payable to the appellant from 26th October, 2010 being the date of judgment instead of 29th April, 2004 being the date of filing of the suit in the subordinate court. The judge was also asked to set aside the part of the Deputy Registrar's order computing interest payable to the appellant from 26th October, 2010 being the date of judgment and substitute thereof an order computing interest from 29th April, 2004 being the date of filing of the said suit.

In grounds in support of the motion the appellant gave a history of the case saying that he had been retrenched. He restated the various litigation that had ensued stating that he had had to change advocates four times which had led to the matter being delayed and their had been interruptions in execution of the appellant's instructions to his lawyers. The appellant also stated in the grounds and in a supporting affidavit that there was an error by the Deputy Registrar which had led to him (the appellant) being deprived of substantial amounts of money in excess of Shs.9,000,000.

That application was opposed by the respondent through a replying affidavit.

The Judge reviewed the case and identified as the issue for her determination whether there was an error apparent on the face of the record to warrant a review of the decision of the Deputy Registrar dated 17th December, 2012. The Judge found that there was no error on the face of the record and further found that the order was made by consent of the parties and was binding on them.

There are three grounds taken in the memorandum of appeal filed by the appellant's lawyers **Messrs Ataka Kimori & Okoth Advocates**. It is taken as a ground of appeal that the Judge erred in law and fact in failing to find that there was an error apparent on the face of the record; the judge is also faulted for failing to find that there was no consent between the parties to compute interest from the date of judgment and not from the date of filing suit. Finally, that the Judge erred in law and fact in failing to find that the Deputy Registrar recorded erroneous computation of the sum due to the appellant. We are therefore asked to allow the appeal and set aside the ruling and orders of the Judge.

When the appeal came up for hearing before us on 29th July, 2019 learned counsel **Miss Valentine Ataka** appeared for the appellant while **Mr. Munene** learned counsel appeared for the respondent. Both parties had filed written submissions and lists of authorities which we have perused and considered.

In an oral highlight Miss Ataka submitted that the ruling had the effect of giving judgment to the appellant without a consideration of what the appellant would have been entitled to up to retirement. Also that the ruling was silent on the issue of interest as it did not state the relevant period the judgment covered. According to counsel, Ang'awa, J. in allowing the application for review ordered the parties to appear before the Deputy Registrar to compute the amount due to the appellant. Parties appeared before the Deputy Registrar but according to counsel for the appellant parties did not enter into a consent. Counsel faulted the learned judge for finding that there was a consent. According to counsel a consent should be evidenced by a letter signed by both parties presented to court for adoption. For all that we should allow the appeal.

In an oral highlight Mr. Munene for the respondent submitted that the application before the Judge was the second application for review after a similar earlier application had been allowed. According to him a consent was recorded on 3rd July, 2013 before Waweru, J. and that the figures recorded on that day were calculated and arrived at by the parties. Counsel referred us to the case of **National Bank of Kenya v Ndungu Njau [1997] eKLR** for the proposition that a consent has contractual effect on parties who make it and can only be set aside if there is proof of fraud. According to counsel, an application for review could only succeed if there was an error on the face of the record which error should be self evident not requiring an elaborate argument for the error to be established. Counsel reminded us that the appellant had been represented all along by counsel and submitted that an advocate has a right to compromise a suit on behalf of his client. He asked us to

dismiss the appeal.

We have considered the whole record and the submissions made.

The issue in this appeal is not difficult to resolve.

As we have already shown, on 17th July, 2013 an order was issued after Waweru, J. had on 3rd July, 2013 recorded a consent by the parties where the Judge following calculations by the parties under the supervision of the Deputy Registrar entered a consent judgment in favour of the appellant. This was after the Deputy Registrar had on 17th December, 2012 issued an order on 19th October, 2015 following the said exercise of working out the sum payable to the appellant as agreed by the parties.

Those court orders are on record. Njuguna, J. in the application for review was being asked to review the orders of the Deputy Registrar.

Under **Order 45** of the **Civil Procedure Rules** a person who is aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred, or by a decree or order from which no appeal is allowed and who from discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason desires to obtain a review of the decree or order may apply for a review of judgment to the court which passed the decree or made the order and all this must be done without unreasonable delay.

The application for review before Njuguna, J. was dated 26th October, 2015 and it asked to review the Deputy Registrar's order made on 17th December, 2012. We have looked at the order and have perused the said motion and we cannot see any error apparent on the face of the record or any error at all. The application was in any event made with unreasonable delay.

Two factors which made the application unsuccessful in any event as held by the Judge were that there was no unreasonable delay in bringing the application and, secondly, the orders made by Waweru, J were made by consent. The Judge cited various case law including **Kenya Commercial Bank Limited v Specialised Engineering Company Limited [1982] KLR 485** and **Brooke Bond Liebig Limited v Mallya [1975] EA 266** to fortify her finding that a consent judgment could only be set aside for fraud or collusion or for any reason which would enable the court to set aside an agreement. That was a correct finding which cannot be faulted in law.

The appellant was ably represented by counsel before the Deputy Registrars and before the judges and the consent was freely entered after the lawyers had looked at the matters in issue and made determinations of the same. There is no iota of evidence that there was any fraud committed by anybody. The Deputy Registrars and the judge recorded the matters that the lawyers after discussions and considerations agreed. There was no error on the face of the record at all.

The orders made were by consent of the parties and **Section 67(2)** of the **Civil Procedure Act** does not allow an appeal where a decree is passed with the consent of the parties.

Having considered all the grounds of appeal and the submissions made we have not found any merit in any of the grounds of appeal. The appeal also does not fit within the limits of the jurisdiction donated by **Section 72 Civil Procedure Act** for what we may consider in a second appeal like this one. The appeal is dismissed with costs to the respondent.

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

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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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.

DEPUTY REGISTRAR