IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & J. MOHAMMED, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 124 OF 2004

BETWEEN

HABO AGENCIES LIMITED.....APPLICANT

AND

WILFRED ODHIAMBO MUSINGO.....RESPONDENT

(Being an Application for review/rescission of the orders given by the Court of Appeal

(Koome, G.B.M. Kariuki & Otieno Odek, JJ.A) dated 24th June, 2016 in an application

for restoration of the appeal from the Ruling/Order of the High Court of Kenya

at Nairobi (Khamoni, J.) dated 15th August, 2001

in

HCCC NO. 2047 of 2000)

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RULING OF THE COURT

1. Civil Appeal No. 124 of 2004 **Habo Agencies Limited** vs **Wilfred Odhiambo Musingo** was filed before this Court on 22nd June, 2004 seeking in the main an order that the appellant be granted leave to file and serve its defence on the respondent out of time. It is therefore an old appeal by any standards.

2. The appeal was given a hearing date and both advocates were duly served with the hearing notice. However, on 5th February, 2013 when the appeal came up for hearing, Mr. Tiego learned counsel for the respondent, appeared in Court ready to proceed with the appeal but there was no attendance by counsel then on record for the appellant. Mr. Tiego applied for dismissal of the appeal and having confirmed that the firm of Keverenge & Anyanzwa had been served with the hearing notice and acknowledged receipt of the same, the Court proceeded to invoke provisions of **Rule 102(1)** of the Rules of this Court and dismissed the appeal.

3. Where an appeal is dismissed under the above Rule, the appellant may apply to the Court for restoration of the appeal under the proviso which provides as follows:-

> ***"Provided that where an appeal has been so dismissed, or any cross appeal so heard has been allowed, the appellant may apply to the Court to restore the appeal for hearing or to re-hear the cross appeal, if he can show that he was prevented by any sufficient cause from appearing when the appeal was called for hearing."*** *(Emphasis supplied)*

Rule 102(3) however limits the timelines within which an application for restoration can be made as follows:-

> ***"An application for restoration under the proviso to sub-rule (1) or the proviso to sub-rule (2) shall be made within thirty days of the decision of the court, or in the case of a party who should have been served with a notice of hearing but was not so served, within 30 days of his first hearing of that decision."*** *(Emphasis supplied)*

4. Any application for restoration ought therefore to have been filed by 5th March, 2013 but it was not. Three months later, on 10th June 2014, the firm of Amuga & Co. Advocates filed a Notice of Change of Advocates and filed two applications. The first application was premised on **Rule 4 of the Court's Rules** for extension of time for lodging an application for restoration of the appeal for hearing. The second application was the application for restoration of the appeal itself.

5. The first application fell for hearing before Waki, JA who heard and dismissed it on 16th January, 2015. Undeterred, the appellant moved the Court for reference to full Court under **Rule 55 of the Court's Rules**. The reference was heard and for reasons given in the Ruling dated 3rd July, 2015, the application was allowed and the application for restoration which was already on record was deemed as having been filed within time. That application was heard by M. K. Koome, G.B.M. Kariuki and J. Otieno-Odek, JJ.A. who rendered the Ruling dated 24th June, 2016 which we are now asked to rescind or set aside pursuant to **Rule 57(2) of the Rules of this Court**.

6. In the application filed by the firm of Amuga & Co. Advocates on behalf of the appellant/applicant, the applicant prays for orders restoring the appeal and in the alternative that the notice of motion dated 9th June, 2014 seeking restoration of the appeal be heard afresh by a differently constituted bench of the Court.

7. According to the applicant, the learned Judges dealt with and dismissed the *"reference"* which had already been allowed earlier and which was not the subject of the application for restoration. This is how the appellant puts it in the grounds on the face of the application.

> *"(iv) … However, in their ruling delivered on 24th June, 2016 the Judges dealt with and purported to "dismiss" the reference which had already been dealt with and determined by ruling delivered on 3rd July, 2015 instead of dealing with the application for restoration of the appeal.*
>
> (v) *The ruling dated 24th June, 2016 and the orders made therein, by which the court purported to "dismiss the reference to the full bench of this Court and uphold the ruling by the single judge dated 16th January, 2015" is erroneous.*
>
> *Made without jurisdiction and ought to be re-visited and set aside in the interest of justice."*

8. When the application came up for plenary hearing Mr. Amuga, learned counsel for the applicant gave the history of the matter, and maintained that the learned Judges dealt with the application for restoration as if they were dealing with the reference. He reiterated that this Court has jurisdiction to review/rescind the impugned ruling pursuant to **Rule 57 (1) of the Rules of this Court**.

9. On his part, Mr. Tiego, learned counsel for the respondent urged that this Court has no jurisdiction to rescind the impugned ruling pursuant to **Rule 57(2)** and that jurisdiction is limited to single Judge Matters. He nonetheless conceded that there were *"clerical mistakes"* in the ruling which in his view can be corrected under **Rule 35(1) & (2)** of the this Court Rules, which is also referred to as the slip Rule. He referred the Court to paragraph 7 of the impugned ruling where his submissions on the application for restoration were captured. He submitted that reference by the Court to the application before it as a *"reference"* was in error, or mistake which is curable urging that the intention of the Court was clear, particularly as captured in paragraph 12 of the said motion, he asked the Court to dismiss the application.

10. In reply, Mr. Amuga maintained that the said *"errors"* were not typographical errors and the Court should therefore rescind the entire ruling.

11. We have considered the motion before us, the grounds on its face and the affidavit in support. We have also considered both learned counsel's oral submissions in court and the law. We have keenly read and assimilated the contents of the impugned ruling. The contents are not disputed. The factual aspect of the matter is whether the learned Judges were actually dealing with the application for reference, and dismissed it, or whether from the content of the impugned ruling, reference to the word *"reference"* was a typographical error.

12. The point of law aspect is whether we have jurisdiction to rescind the ruling under **Rule 57(2) of the Rules of this Court**. We start with the jurisdictional issue. Mr. Tiego's argument is that the Rule only relates to single Judge Rulings. We don't think we need to dwell too much on that issue. Whereas **Rule 57(1)** provides for single Judge matters, **Rule 57(2)** provides:-

> ***"(2) An order made on an application to the Court may similarly be varied or rescinded by the Court."***

Nambuye JA, in the case of **Nguruman Limited vs Shompole Group & Another [2014] eKLR** faced with a similar argument overruled the same and concluded:-

> ***"To me had the Rules Committee intended to confine the operation of sub rule 2 to the applications presented under sub rule (1) only, It would have gone further to indicate that the operation of sub rule (2) was limited to any other application presented with regard to matters mentioned in sub rule (1)."***

A similar view was expressed by Musinga, JA in the same case where he expressed:-

> ***"I hold the view that rule 57(2) grants this Court jurisdiction to vary or rescind an order made in an application."***

We are of similar persuasion and reiterate that whereas **Rule 57(1)** specifically empowers the Court to vary or rescind orders made by a single Judge, **Rule 57(2)** empowers the Court to review any other orders not covered under sub-rule (1). This Court has jurisdiction to rescind or vary the impugned ruling.

13. Having resolved the issue on jurisdiction as we have done above, we now must tackle the issue of whether the learned Judges dismissed the application for *"reference"* or the one for *"restoration"* both of which were filed on the same date. To determine this issue, we must look at the substance of the impugned Ruling more closely.

14. To start with, the application for reference had already been heard and determined by the time the motion for restoration came up for hearing. The application had been allowed and accordingly disposed of and that is what paved way for the hearing of the application seeking restoration of the appeal. There was therefore nothing left for the Court to dismiss as at 22nd February, 2016 when the motion for restoration was canvassed and Ruling reserved. There was therefore no doubt whatsoever in the minds of the Judges as to what application they had heard, which application they reserved for Ruling. Why the confusion then?

15. There is concession that the learned Judges referred to the motion they dealt with as a *"reference"*, was this a clerical mistake or slip of the pen which can be corrected? To answer this question, we must look at the substance of the impugned Ruling. We start from the opening of the impugned ruling. It reads as follows:-

> *This is a reference to a three judge bench of this Court against a decision of a single judge of the Court declining an application for restoration of an appeal dismissed for non-attendance. On 5th February 2013, a three judge bench of this Court made the following Order in relation to Civil Appeal No. 124 of 2004.*
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> **"This appeal was listed for hearing before us this morning. However, neither the appellant nor its advocates Asige Keverenge & Anyanzwa were served with the hearing notice for today's hearing on 23rd January 2013 according to the Hearing Notice availed to us. All they stated at the back of it on receipt of the same is "without prejudice". Mr. Tiego, learned counsel for the respondent is present and seeks its dismissal and costs of the appeal. In the circumstances, the appeal is marked as dismissed pursuant to Rule 102(1) of this Court's Rules. The appellant is to pay cost of the appeal."**
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> **"Aggrieved by the Order of 5th February 2013, the applicant filed a Notice of Motion dated 9th June 2014 seeking review and setting aside of the Order made dismissing Civil Appeal No. 124 of 2004 for non-attendance. The application was placed before a single Judge of this Court (Waki, J.A.) who delivered a ruling dated 16th January, 2015 dismissing the motion."**
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> **"Upon dismissal of the motion by the single Judge, the applicant applied for reference to a three judge bench of this Court under Rule 55 of the Rules of this Court. This Ruling is in regard to the mode in reference before a three judge bench of this Court. In this reference, the parties have argued the notice of motion dated 9th June, 2014 being an application to set aside the order of this Court made on 5th February, 2013."**

16. From the above excerpts of the Ruling, it is crystal clear that at that point in time, the drafter of the said ruling was dealing with the reference under **Rule 55 of the Rules of this Court**, which is referred to expressly, including the name of the single Judge who had handled the single Judge application. Paragraph 5 also referred to the reference to full court. At paragraph 6 however, the Ruling takes a different trajectory and refers to restoration of the appeal. The Judges express themselves in that paragraph *"…we were urged to restore the appeal and let the applicant have his day in court."*

From the above, there is no doubt that the learned Judges were dealing with the application for restoration of the appeal.

17. The course of the ruling then changes at paragraph 7 and the Judges went back to the *"Reference Motion"* but the content changes before the end of that paragraph and the Judges seem to be addressing the motion for restoration. Paragraph 8 currently refers to counsel for the applicant's reply on the motion for restoration. Paragraph 9 has a mix up of *"reference"* and "*restoration"* but substantively deals with "*restoration of an appeal*" that has been dismissed for non-attendance. The concluding paragraph, which contains the determination is important and we therefore quote it here verbatim:-

> **"In the instant case, the applicant's submission lays blame on its previous counsel on record; there is nothing on record to show that the applicant was diligent in pursuing its appeal; the applicant has not shown that it was actively taking action to follow its appeal and ensure that it is heard and determined. It is the appellant's submission that the appeal was not heard as a result of mistake on the part of its counsel. As we have states, there is nothing on record to show that the applicant actively or at all pursued its appeal. In the absence of such evidence, we are not persuaded that the single judge erred in his findings and determination in the ruling dated 16th January, 2015. Accordingly, we dismiss the reference to the full bench of this Court and uphold the ruling by the single judge dated 16th January 2015. The notice of Motion dated 9th June 2014 is hereby dismissed with costs.** (Emphasis supplied)

18. The above conclusion leaves no doubt in anybody's mind that the learned Judges had now gone full circle and reverted to where the Ruling started; with the reference to full Court from the decision of the single Judge which had already been concluded. As stated earlier, there was no reference pending for the learned Judges to dismiss. Their order of dismissal though in conflict with the earlier one which allowed the reference had no impact on the motion on reference. However, can this determination be juxtaposed to the motion for restoration? We think not. From the above analysis, it is clear that the impugned ruling cannot be corrected under **Rule 35 (1)** and **(2) of the Rules of Court**. It would be in the interests of justice that the impugned ruling be rescinded.

19. We accordingly arrive at the ineluctable conclusion that the Notice of Motion dated 14th July, 2016 is for allowing. We allow the same with no orders as to costs as the confusion in the Ruling was not caused by the respondent and he ought not to be condemned to costs of the application. We further direct that the Notice of Motion for restoration of the appeal be heard afresh before a reconstituted bench which should exclude Koome and Otieno-Odek, JJ.A. We so order.

Dated and delivered at Nairobi this 8th day of November, 2019. **R. N. NAMBUYE**

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR