IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KOOME, JJ.A)

CIVIL APPEAL NO. 71 OF 2011

BETWEEN

MASHREQ BANK P.S.C.....APPELLANT

AND

KUGURU FOOD COMPLEX LIMITED.....RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi Milimani Commercial Courts (H.P.G Waweru, J.) dated 18th November, 2005

in

Milimani Commercial Courts Civil Suit No. 1287 of 1999.)

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JUDGMENT OF THE COURT

[1] This is an interlocutory appeal as the main suit which was filed some 19 years ago has not been heard. It challenges the exercise of a Judge's discretion to review an order previously made in regard to the hearing and conclusion of **Milimani Commercial Court Civil Suit No 1287 of 1999** by a different Judge. The order that was reviewed and set aside was made on 25th September, 2001 by **Mbaluto J.,** directing that the suit be heard *de novo*. Kuguru Food Complex Ltd, (hereinafter referred to as "Kuguru Foods") successfully made an application to review that order on 9th June, 2005 after it had been in existence for about 4 years. This is the order that gave rise to the instant appeal.

[2] A brief background of the matter is that on or about 27th September, 1999 Kuguru Foods filed suit against Mashreq Bank P.S.C. (hereinafter referred to as the "Bank") principally seeking special and general damages for negligence and fraud by the Bank, its servants and/or agents. The Bank denied liability and after the pleadings closed, the hearing started on or about 12th July, 2000 before Hewett, J., who unfortunately passed away after hearing three witnesses for Kuguru Foods. Those three witnesses were Dinesh Chandra Bhatesa (PW1), Peter Ngibuini Kuguru (PW2) and Ann Wanjiru Kuguru, (PW3).

[3] After the unfortunate demise of Hewett J., the matter was listed for mention and after some back and forth, the court ordered the proceedings to be typed and furnished to each of the parties. When the parties were furnished with the typed proceedings, the matter came up for hearing on 25th August, 2001 before Mbaluto J. and Mr. Amin learned counsel for the Bank indicated to the court that he was not happy about the contents of the typed proceedings and he preferred the witnesses to be heard *de novo*. Mr. Makori learned counsel for Kuguru Foods left the issue to the court, whereupon Mbaluto J., made an order that the trial should start *de novo*.

[4] It would seem the matter was fixed for hearing on numerous occasions but for one reason or another attributed to Kuguru Foods who sought several adjournments, it did not proceed. Finally the matter was fixed for hearing on the 15th June, 2005 but just on the threshold of the said hearing date, a notice of motion dated 9th June, 2005 was filed by Kuguru Foods in which they sought to review and set aside the order directing that the suit be heard *de novo* and substituting therefore an order that the matter proceed from where Hewett J., left it. The notice of motion was opposed by counsel for the Bank who saw mischief and abuse of the court process in it. It fell for hearing before Waweru J., who upon hearing the parties and weighing the matter, found merit in the motion, he allowed it with the result that the order made on 25th September, 2001 by Mbaluto J., was set aside and substituted with an order that the suit should proceed for hearing from where the late Hewett, J., left it.

[5] This is what has provoked the instant appeal that is predicated on some 6 grounds of appeal to wit;-

> ***i. That the Judge erred in law by failing to appreciate the provisions of Order XLIV of the civil procedure Rules which provide that an application for review must be made without unreasonable delay; the application was made almost after 4 years and no reasons were given for inordinate delay;***
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> ***ii. Failing to appreciate that the character of the witnesses in the trial is fundamental to proving the allegations therein such as fraud and illegality which raised the burden of proof to a quasi- criminal standard which means that the demeanour of the said witnesses under cross- examination was crucial;***
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> ***iii. Failing to hold that the delay of 4 years by Kuguru Foods before filing the notice of motion was in itself inordinate and no good reasons were provided;***
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> ***iv. Failing to exercise discretion judiciously;***
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> ***v. Sitting on his own appeal;***
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> ***vi. Failing to take into consideration relevant facts pleaded evidence, replying affidavit and submissions.***

[6] During the plenary hearing, Mr. Amin learned counsel for the Bank relied on the written submissions and made some oral highlights by elaborating on the aforementioned grounds of appeal. According to counsel, the learned Judge failed to consider that it was necessary to have a *de novo* hearing because the typed record of proceedings that were availed to the parties were poorly prepared and did not capture the gist of the evidence. The fact that the Judge had resorted to printing answers was a clear demonstration that the evidence was not flowing and may not convey the correct impressions made by the trial Judge, a matter that counsel for the appellant informed the court was critical and would impact on the outcome of the case and affected the tenets of a fair hearing.

[7] Bearing in mind the poor state of the proceedings, counsel stated that was the reason behind the kind of consensus by both parties that after the trial Judge passed away, the matter be heard *de novo*. That was the reason that counsel for Kuguru Foods did not say anything and left the matter to the court. Another crucial consideration that eluded the Judge was the fact that the application was made after an inordinate delay of 4 years. This delay went against the principles applicable in a matter seeking review of a court order as set out in this Court's case of **Tanjal Investments Vs. El Nasr Export & Import Co.** [2004] eKLR. The ratio being that a party seeking review must do so without unreasonable delay. Whereas the respondents alleged that PW1 had left the country and could not be traced, this ought to have been weighed against the fact that this was the respondent's suit which was predicated on allegations of fraud thus it was necessary for the trial Judge to get the advantage of observing the witness. The respondent failed to demonstrate their inability to procure their witness. Moreover, the respondent failed to show the application met the strict strictures for review that is mistake, error apparent on the record or discovery of new evidence that could not be obtained with due diligence or any other sufficient reason to warrant the granting of the orders. Lastly counsel pointed out that a fair trial is the hall mark of the constitution as the Judge failed to take into account relevant considerations thus the decision to allow review was injudicious.

[8] This appeal was opposed by Ms Irene Chege, learned counsel holding brief for Mwaure & Mwaure Advocates for Kuguru Foods. She too relied on their written submissions and made some oral highlights supporting the impugned ruling. She submitted that the reasoning given by the Judge was on all fours with the requirement of ***Order 45*** of the Civil Procedure Rules. In her view, the application for review that was made on 9th June, 2005 was made without unreasonable delay; it was brought because the respondents' witness one Mr. Dinesh Chandra Bhattesa who had testified before the late Judge Hewett could not be traced as he was already out of the jurisdiction of the court. The Judge also considered that the appellant would not suffer any prejudice as the veracity of the evidence by the said witness was subjected to cross - examination. The Judge clearly explained the reasons behind his exercise of discretion and pointed out that the delay was properly explained.

[9] In this regard counsel cited the case of **Mbogo & Another Vs. Shah,** Civil Appeal No. 5 of 1967 where the Court of Appeal stated that;-

> ***'…A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as result there has been an injustice."***

Counsel went on to submit that it will be prudent to continue with the matter from where it was left, bearing in mind the suit was filed 19 years ago and even the witness who was to be called may not remember the evidence. In the event there was any issue to do with the demeanour of a witness, the trial Judge could have noted it in the proceedings, and since none was identified, it would be in the interest of justice to proceed from where the proceedings were left. On that account, counsel urged us to dismiss the appeal with costs.

[10] This appeal raises the sole issue of whether Waweru J., erred in exercising his discretion to review an order by Mbaluto J., dated 25th September, 2000 after a period of 4 years; whether the exercise of discretion was judicious; whether the Judge considered all the relevant factors and material before him and finally whether the Judge sat on an appeal of an order made by a Judge of concurrent jurisdiction. We also discern from the material before us that we have to examine whether there were sufficient grounds for review, or whether the discovery that one witness had left the jurisdiction of the court would pass muster as discovery of new evidence that was not available even after the exercise of due diligence on the part of the party seeking review.

[11] As generally stated by counsel for Kuguru Foods, this Court ought not to interfere with the exercise of a Judges' discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a court exercising judicial

discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of ***Mbogo Vs. Shah,*** (supra)

> ***"….A court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice".***

[12] That said, the application for review was principally brought under the provisions of the old ***Order XL1V Rule 1*** of the Civil Procedure Rules which provided that;-

> ***"1. (1) Any person considering himself aggrieved-***
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> ***a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> ***b) By a decree or order from which no appeal is hereby allowed, and who from the 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 without unreasonable delay."***

First, the order of review was challenged because it was brought after 4 years which period, counsel for the Bank submitted was inordinately delayed. The issue of delay was well canvassed before the Judge, he considered it and this was what he stated in his own words;-

> ***"The objection to this aspect of the application is that there has been undue delay in bringing the application; that the plaintiff has not demonstrated that it exercised due diligence to discover the whereabouts of its witness in question or secure his attendance; and that the plaintiff has not provided strict proof of allegations contained in its application. Regarding delay, it is deponed in the supplementary affidavit of Peter Kuguru, the managing director of the plaintiff, that he learnt at the end of April 2005 that the witness in question had long left the country when he went to inform him at his place of business in Nairobi that the suit was fixed for hearing on 15th June, 2005. The present application was filed on 9th June, 2005. I find no unreasonable delay in bringing the application."***

[13] In this case we would perhaps have agreed with the above reasoning of the Judge that the respondent's explanation for delay was reasonable given that Peter Kuguru went to look for the witness just before the hearing date that was set for 15th June, 2005. On the other hand we are not convinced that was a sound reasoning while bearing in mind that the matter had been fixed for hearing on numerous other occasions. In this event one would question why the said Peter Kuguru had not looked for the witness sooner after the order directing the matter to proceed *de novo* was made in September, 2000 while bearing in mind this suit was filed in 1999. The Judge reasoned that looking for a witness before a hearing would have been tantamount to stalking a witness and interfering with his freedom. Perhaps if this was the only ground, we would have left the matter there while noting the unfortunate circumstances that faced the trial was the untimely death of the trial Judge after hearing the evidence of three witnesses.

[14] However, another unexplained occurrence in this matter which is fundamental, in our view, and was not clarified by Kuguru Foods is when directions were given as to how the hearing would proceed, Mr. Amin learned counsel for the Bank pointed out that the record of proceedings were not properly typed and they were not clear. On the other hand counsel for the Kuguru Foods said nothing, which in essence signified that it was not opposed to the matter proceeding *de novo.* Based on that set of circumstances, Mbaluto J. went ahead and ordered the proceedings to start *de novo*. This is where we part company with the reasons given by the learned Judge for review because in our humble view the order for *de novo* hearing was purely made because it was brought to the attention of the Judge that the proceedings were not clear. This aspect seems to have escaped the Judge as he only considered the aspect of delay and the fact that the information of the absence of the witness was not available to the respondent until when the application for review was made.

[15] The order sought to be reviewed was made by Mbaluto J. upon deliberate consideration of the submission by counsel for the Bank *'that the proceedings were incoherent'*. On the other hand, the respondent sought a review on the grounds that one of their witnesses could not be found. These were two divergent positions that were not considered by Waweru J., as he seems to have given weight to issues of delay and the fact that it was not possible for the respondent to know that their witness had left the country and completely ignored the state of the proceedings. The Judge failed to consider a key aspect that is if the proceedings were not in the correct form, and they represented the evidence, this would significantly impact on the outcome of the case raising a valid question of whether the trial would pass muster of a fair trial. Had the Judge taken this into account, perhaps it would have occurred to him that the said proceeding would have presented difficulties for a Judge who was to complete the trial.

[16] This failure is obviously followed by a pertinent question of whether this was a suitable matter for review or an appeal as it involved a correction of an 'error' that is whether the Judge erred in ordering a *de novo* hearing or it was an order that could be reviewed because the information about the witness was not available. The case by Kuguru Foods was that when the order was made, certain information that their witness had left the country could not be obtained while as aforestated, the case for the Bank was that the proceedings were not correctly recorded. To extrapolate these two divergent positions, one needed to deeply interrogate the order made by Mbaluto J., to find out whether the proceedings were correct which is tantamount to the Judge sitting on an appeal. It is trite that a Judge cannot sit on an appeal of an order issued by a court of concurrent jurisdiction. What was before the Judge involved an examination of why the Judge ordered a *de novo* hearing, and an examination of whether the proceedings were indeed incoherent a matter which we think was beyond the purview of review. See the Court of Appeal decision in Civil Appeal No. 90 of 2005, **Stephen Mwaura Njuguna Vs. Douglas Kamau Ngotho** consolidated with **Civil Appeal No. 247 of 2007** where it was held;-

> ***"The learned Judge had no jurisdiction to determine a matter that was decided by a fellow Judge of concurrent jurisdiction. He could not for instance set aside a judgement of Muga Apondi J, a Judge who has the same jurisdiction as himself. Such setting aside could only be by an appellant court but not by a Judge of the High court as the appellant sought."***

[17] It is clear, from the above analysis that even if we were to ignore the other grounds of appeal, grounds Nos 5 and 6 have merit. Accordingly the appeal is allowed with the result that the ruling dated 18th November, 2005 is set aside and substituted with an order that the trial of the suit shall commence *de novo*. Costs of this appeal shall abide the outcome of the suit.

Dated and delivered at Nairobi this 26th day of October, 2018.

P.N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR