IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KIAGE & SICHALE, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 74 OF 2015

BETWEEN

DANIEL LAGO OKOMO.....APPELLANT

AND

SAFARI PARK HOTEL LTD.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

(Application to review the judgment of the Court of Appeal at Nairobi (Visram, Karanja & Koome, JJ.A) dated 8th December, 2017

in

Civil Appeal No. 74 of 2015)

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RULING OF THE COURT

The Notice of motion dated 11th April 2018 by **Daniel Lago Okomo,** the applicant in person, is not a study in clarity. In fact, quite the opposite. Expressing itself as brought under **Order 45** of the **Civil Procedure Rules** and **section 3A** of the **Civil Procedure Act**, which we state straight away are inapplicable to proceedings before this Court, it seeks, and we set it out verbatim in full to show it for what it is, as follows;

> ***"1. (a) That the application filed herein be certified urgent and be placed before the honourable court for further direction.***
>
> ***(b) That as per certificate of urgency item 1(b) and notice of motion 1(c) or both the judges supplied me with guidelines of the threshold for the eventual judgment as per article 47(2) of the Constitution.***
>
> ***2. That the honourable court be pleased to review his judgment reading made on 8th December 2017 by setting aside the same and entering judgment for the application as prayed for in the amended plaint. Or supplementary insertion as the same were blocked by registry in 2015 date of submission. [a] That the same honourable court accept and nullify the hearing by the said judges as from 28th November, 2012 upto and including the ruling by Lady Justice Ougo of November 7th 2013 as they acted contrary to section 7 of the Civil Procedure Act [2010]., Kenya.***
>
> ***3. That the same applicant was allowed to sue as a pauper, as the case was concluded without points missing in the interest of impunity; as all details were all within the court jurisdiction 29 days before judgment reading yet again in court clerks blocked the same documents in the bundles in attempt to file all of them in March 31st 2015." (sic).***

It is said to be grounded on matters appearing in its face as;

> ***"(a) That there are mistakes and errors apparent on the face of the record whose consideration afresh and properly would dramatically change the judgment. However, Justice Ougo hearing of this case was res judicata. That the same judgment records omitted appellant oral testimonies of September 26th 2017, meaning the***

judgment itself was partial and full verbatim proceedings must be re-written.

(b) That there are also sufficient reasons, and grounds to believe that the honourable court did not access the party's submission in this matter thereby leading the court to make different conclusion as it happened. Justice Ougo ruling missed anything on remedy even if her hearing was legitimate, but for which it was not.

(c) That; other than the foregoing there is every possibility and that due to a number of documents filed in the case, a confusion arose which misled the honourable court into entering wrong decision either by not seeing the documents or confusing the same or some court clerks in the registry or its head in particular did not forward my requested record as per September 25th 2017 demand by 1st respondent which I did on recorded on November, 10th 2017 rubber stamped date as attached in this same document on page ……, I will not have an advocate unless an explanation or reference in law is cited, or any other logic explaining how I do not know or understand the process in this suit.

(d) That the applicant has noted the confusion and has explained the same fully in his affidavit." (sic).

In support of the motion is an affidavit sworn by the applicant presumably on 10th April 2018 even though it also bears a typed date of 2nd January 2018. It is a curious affidavit with many rather extravagant claims. For instance at paragraph 1 he swears as follows;

"(b) That the judges should fulfill my request as per the item 1(b) under certificate of urgency in this review appeal or article 47(2) of the Constitution. Items 1-6 of this affidavit remains bold, others were dilly dally tactics business by Justice Ougo, however, the same judges must also summon Hilton Hotel Ltd and Pinkerton Security Ltd for them to bring my con victims if they are to ascertain whether my request for summary judgment was realistic or imaginary, failure to which they have no reason to consider Justice Ougo ruling, which was actually illegal from the start, as per section 7 of the Civil Procedure Act [2010], Kenya.

(c) That the judgment as read on 8th December, 2017 is halfway and misses, or fails to capture the oral testimonials [Daniel Lago Okomo] made on 25th September 2017 in court room before judges Anashir Visram, Ms. Martha Koome and Ms. Wanjiru Karanja, and this makes me conclude a representative of judiciary cartels invaded my case system, meaning it must be re-written, even separate from this ruling review application." (sic).

He goes on to state at paragraphs 3;

"3. That on examination of the facts vis-a-vis the evidence and oral testimonies adduced in court on 25th September, 2017 there exist serious contradictions noting that a different judge read the case and possibly read it in confusion, with communication stating. We will instead of "we read or we noted." Meaning a different Judge outside the three person judges; Hon. Justice Alnashir Visram, Lady Justice Wanjiru Karanja and Lady Justice Martha Koome wrote the actual judgment. This to me contradicts the sanctity of a three person judgment (jury) in an appeal court." (sic).

The applicant then goes on to make many scurrilous and intemperate remarks under oath against Ougo, J. in several paragraphs including 11;

"11. That the ruling by Lady Justice Ougo remains faulty to me up to now. If her advisory was impartial then why didn't she also advise the 1st defendant over the remedies I had sought for the case? To me Justice Ougo must be removed from office for violating her role and job description(s). From the records, Justice Ougo asked me questions and I satisfactorily answered her to her own affirmation. Why and how again did she realize I need advisory, yet she failed to summon witnesses to explain their claims against me? Justice Ougo ruling be dismissed, or she is naturally recommended for probity on fraud by EACC, and eventually removal from office." (sic).

The affidavit also includes what the applicant titles as "*A plea and notice to all judges in Kenya in this case reference"* declaring that he would not hire an advocate "*unless there is a citation under Judicial Procedure Act" (sic)* that requires him to do so.

That rambling affidavit concludes, quite bizarrely, as follows.

"22. That Safari Park Hotel Ltd, had earlier stated they had earlier arrested me from the same venue in August 2002 on trespass charges. This is true. I notified them to the need to pay the backdated price if they do not prove any trespassability rules of their hotel. They failed to answer my question of Makadara Courts. Rewards and penalty works in prosecution. Why do you exercise sympathy at Appeal Court by posing this irrelevant example?

Could the court kindly advise me on the units of measuring of good and bad faiths yes every judge has his or her interpretation; however, this does not allow Justice Ougo to falsify my figures yet she maintains she leads a healthy life without reading glasses.

Would it hurt Appeal Court if I recommend Justice Ougo fasification of my figures to EACC if your side still fee she was right?

Judiciary ombudsperson/man in their verification stated Justice Ougo made a ruling without quoting the right figures [I.E page 31, lines 7-9 in the appeal bundles].

23. That the five [5] members of the Judicial Service Commission [JSC] who had been targeted by an advocate of the High for removal from the Board must remove these two judges; failure to do so means the lawyer was right and next time the Speaker,

National Assembly must not spare any party from removal or debate over the same." (sic).

It seems to us, and we say so without any disrespect to the applicant, that the application and the supporting affidavit are really no more than a tirade against judges whose decisions the applicant does not like. It is of course his right not to seek legal representation and as a Court we usually bear in mind the handicap and disadvantage that a ***pro se*** litigant may face especially in issues of law. That notwithstanding, and we will say no more on this, a litigant of whatever description or circumstance must still prove his case and must bring his plea within the accepted parameters of procedural and substantive law in order to succeed. We also do not think that merely because a litigant is in a person he has a license to insult and vilify judges and opponents at will as the affidavit before us displays.

The applicant relied on that affidavit when he appeared before us for the hearing of the application. In his address to us he focused on criticizing Ougo, J., repeatedly, notwithstanding that we were not hearing the appeal from the learned Judge's decision which had been fully heard and determined by our colleagues Visram, Karanja and Koome JJ.A, whose judgment this application ostensibly seeks to review. He went on to assert that his character was defamed by Safari Park Hotel, the 1st respondent, who called him a conman. He concluded by stating his aim and purpose by this application is a desire for rehearing of his appeal thus;

"I seek the hearing of Ougo, J. and the whole process be nullified because it did not follow due process."

The application is opposed with the two respondents filing submissions which were highlighted by learned counsel **Mr. Okeyo** for the 1st respondent, and **Mr. Onyiso,** the learned Senior Principal State Counsel for the 2nd respondent. Mr. Okeyo's position was that no material had been placed before us to justify review and that acting in person did not absolve a litigant of that duty to place requisite material before the court. He added that successive courts have advised the applicant to obtain the services of counsel but he has adamantly refused to do so. He concluded by stating that the decision of this Court on the appeal was final and there ought to be an end to litigation.

On his part, Mr. Onyiso contended, citing this Court's decision in ***BENJOH AMALGAMATED LIMITED & ANOR vs. KENYA COMMERCIAL BANK [2014] eKLR,*** that this application is for dismissal as it did not demonstrate fraud, bias or injustice, which are the only bases upon which this Court can review its judgments.

To those submissions the applicant maintained his own self sufficiency, stating that although he be a layman in law, he is yet "*possessed of the logic*" that enables him to represent himself. His parting shot was an accusation that "*the respondents have been truant and have been dilly-dallying",* in answer to a complaint that he did not effect service of his application on the respondents.

We have with the greatest solicitude attempted to make head or tail of the application before us. In so far as it declares itself a plea for this Court to review the judgment of Visram, Karanja and Koome JJ.A, we have examined it in light of the principles applicable.

We must state that review applications before this Court are not ordinary, every-day proceedings. The Court of Appeal Rules, 2010, do not make provision for them. In fact, for the longest time it was the position of this Court, as was of the former Court, that its decisions are clothed with finality and not open to be re-opened, for which, indeed, there was no jurisdiction. See ***LAKHAMSHI BROTHERS LTD vs. RAJA & SONS [1966] EA 313***; ***RAFIKI ENTERPRISES LTD vs. KINGSWAY AUTO MART LTD*** Civil Application No. 375 of 1996.

As pointed out in **BENJOH AMALGAMATED** (supra), the Court in ***MUSIARA LTD vs. WILLIAM OLE NTIMAMA*** **Civil Application No. 271 of 2003**, a 2004 decision, expressed itself as possessed of jurisdiction to review its decision, a position followed a year later in ***CHRIS MAHINDA vs. KENYA POWER & LIGHTING CO. LTD*** **Civil Application NO. 174 of 2005,** but the non- reviewability of its decisions was firmly re-established by a five-judge bench in ***JASBIR SIGH RAI & 3 OTHERS vs. TARLOCHAN SINGH RAI & 4 OTHERS (*****Civil Application No. 308 of 2008).**

Following the promulgation of the 2010 Constitution and with it the superimposition of the Supreme Court as the apex and final court in the land, this Court has had a change of heart and adopted the stance that it does have inherent residual jurisdiction to entertain and grant applications for review of its decisions or judgments in certain exceptional cases, and even then with great caution and circumspection. This was expressed in ***BENJOH AMALGAMATED*** (supra) thus;

"57. Jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court).

…

61. It is our finding that this Court not being final court has residual jurisdiction to review its decisions to which there is no appeal to correct errors of law that have occasioned real injustice or failure or miscarriage of justice thus eroding public confidence in the administration of justice. This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice."

The exceptionality of the circumstances under which this Court will review its judgments and even so with great caution and circumspection, are matters of such critical importance, raising the bar so high, that seldom will review applications be successful. Thus dismissal is the more likely fate as evidenced by ***SAMWUEL MBUGUA IKUMBU vs. BARCLAYS BANK OF KENYA LIMITED [2015] eKLR***; ***HASSAN MUSAMBAYI MBARUKU vs. NASHON ASEKA [2016] eKLR*** and ***THOMAS OWEN ONDIEKI & ANOR vs. NATIONAL BANK OF KENYA LTD & ANOR [2017] eKLR***, all post-***BENJOH AMALGAMATED*** (supra) decisions of this Court sitting at Nairobi, Kisumu and Eldoret, respectively.

Having made every effort to discover what there is in the application before us to justify our review of the judgment of this

Court, we come to the inevitable conclusion that there is nothing. We do not review judgments just because a losing litigant is unhappy and despondent. We have no jurisdiction to do so. And we must state quite categorically that the proliferation of application for review of this Court's judgments in recent times is a trend that must be checked.

This application fails and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 12th day of October, 2018.

P. N. WAKI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR