



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: WAKI, NAMBUYE & KIAGE, J.J.A)

CIVIL APPLICATION NO. NYR. 5 OF 2017 (UR 4/2017)

BETWEEN

LEONARD MAMBO KURIA..... APPLICANT

AND

ANN WANJIRU MAMBO.....RESPONDENT

(An Application for stay of execution pending the lodging, hearing and determination of an intended appeal against the ruling/order of the High Court of Kenya at Nakuru (Ndungu, J) dated 29th September, 2016)

In

H.C. Matrimonial Cause No. 10 of 2015)

RULING OF THE COURT

The main issue in the application before us, as it is in the intended appeal, is whether an error was made in referring to the applicant as '**LEONARD WANJIRU KURIA**' instead of '**LEONARD MAMBO KURIA**', and if so, whether the right procedure was followed in rectification of the error.

The motion is basically brought under **Rule 5(2)(b)** of this Court's Rules although **Sections 3, 3A & 3B** of the Appellate Jurisdiction Act are thrown in for consideration. It seeks three substantive orders as follows:-

2. "Pending the lodging, hearing and determination of an intended appeal from the ruling/order of the High Court on the 29th September, 2016, this Honourable Court be pleased to grant a stay of execution of the said ruling/order.

3. Pending the lodging, hearing and determination of an intended appeal from ruling/order of the High Court on 29th September, 2016 this Honourable Court be pleased to order the release of the Applicant on such terms as are reasonable.

4. Pending the lodging, hearing and determination of an intended appeal from ruling/order dated on 29th September, 2016 this Honourable Court be pleased to grant an order of stay any further proceedings of the High Court.” (Emphasis added)

Those orders will issue if the applicant satisfies the Court, firstly that he has an arguable appeal; that is, one that will not necessarily succeed, but one which ought to be argued fully before the Court and is not frivolous. Secondly, and in addition to the first test, that the success of the intended appeal will be rendered nugatory if the orders are not granted. “Nugatory” in its full meaning includes being rendered worthless, futile, and invalid but also means trifling. See ***Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227*** at page 232. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

What attempt has been made by the applicant to satisfy those tests?

The basis for seeking the orders is a ruling delivered by the High Court (**A.K. Ndungu, J**) on 29th September 2016 committing the applicant to civil jail for a period of six months for disobeying a court order made on 10th October 2014. The complaint in respect of that ruling is summarized in seven paragraphs of the motion and elaborated in the supporting affidavit sworn by the applicant, as follows:

- 1. “The High Court in its ruling and order in this matter on 29th September, 2016 found LEONARD WANJIRU MAMBO guilty of contempt of Court and committed him to serve six months in prison.***
- 2. The Respondent extracted an order pursuant to the said ruling on 4th October, 2016 in which LEONARD WANJIRU MAMBO was found guilty of contempt of court and committed to Civil Jail for six months.***
- 3. The Learned Trial Judge introduced a stranger to the proceedings as LEONARD WANJIRU MAMBO is not the Applicant herein neither is he a party to the suit***
- 4. The Applicant was dissatisfied with the ruling and order issued by the superior court and filed a Notice of Appeal on 3rd October 2016 and applied for typed copies of the proceedings on 3rd October, 2016.***
- 5. In execution of the orders issued by the superior court, the Respondent took out warrants of arrest against the Applicant and not LEONARD WANJIRU MAMBO as stated in the ruling delivered on 29th September, 2016 and the order extracted on 4th October, 2016.***
- 6. The Applicant challenged the warrants of arrest on the ground that they did not reflect the names on the ruling and order subject matter hereof.***
- 7. That the ruling bearing the name LEONARD WANJIRU MAMBO has (sic) mysteriously removed from the Court record and has been replaced with one bearing the Applicant’s names.”***

So then, the genesis of the problem was the ruling dated 29th September 2016. The applicant makes no other complaint about that Ruling, even in the intended appeal, except the complaint that a total stranger, **Leonard Wanjiru Mambo** was introduced in the Title and Heading of the ruling purporting to be the applicant herein. A copy of the ruling was exhibited with the application but it is not certified by the deputy registrar of that court. The applicant swears that “both advocates for the parties were issued with originals typed and signed copies of the ruling” when the ruling was delivered. Presumably he was in court to see this. But the advocate on record for him at the time is not the one before us. The erstwhile advocates were **M/S Githui & Company Advocates** and then **M/S Lawrence Mwangi & Mwangi, Advocates** before **M/S Wamaasa, Masese, Nyamwange & Company** took over and filed a notice of change of advocates on 13th October 2016. There is no affidavit from the former advocates to

authenticate the source of the uncertified copy of the ruling.

In submissions before us, learned counsel for the applicant Mr. Wamaasa vehemently argued that the impugned ruling was the one delivered and signed by the trial judge and it was the basis upon which an order was extracted and a warrant of arrest issued. That is why the applicant protested before the High Court and filed a notice of motion on 24th October 2016 seeking to have the warrants of arrest stayed or set aside on the basis that **Leonard Mambo Kuria** was not **Leonard Wanjiru Mambo**. However, when the parties appeared before the trial judge on 24th November 2016, the judge on perusal of the court file confirmed that there was no mis-description of the parties as purported thus prompting the applicant to withdraw the motion and pay thrown away costs of Sh. 7000 to the respondent. According to Mr. Wamaasa, and without elaboration, he withdrew the application to **“save the judge’s face”**.

The motion before us is virtually a rehash of the withdrawn motion before the High Court. It is opposed by the respondent who contends through learned counsel **Mrs E .W. Mukira** that it is a mere attempt by the applicant to escape his just desserts after disobeying a valid court order. Counsel exhibited another Ruling, similarly uncertified, which she swore was issued to her by the court on application and payment for it on 4th October 2016. It was not given to the parties at the time of delivery as averred by the applicant who was not even present when the ruling was delivered. That ruling has no mis-description of the parties and according to counsel, it was the one upon which the formal order was extracted and a warrant of arrest issued. If that was the case, one would then wonder how counsel for the respondent came to extract an order and obtain a warrant of arrest containing the name of ‘**Leonard Wanjiru Mambo**’ and why counsel wrote to the Deputy Registrar of that court on 1st December 2016 seeking rectification of those documents under **Sections 99 and 100** of the **Civil Procedure Act**. Mrs. Mukira simply tells us it was human error on her part.

We have considered the record of the motion and all the documents in support and opposition thereof. In our view, counsel on both sides of the argument were not forthright and were indeed less than candid in this saga. This is regrettable. For the duty of counsel to assist the court is as weighty as counsel’s duty to the client. Counsel can only fairly discharge the duty to the court by maintaining fidelity to the law and avoiding emotional entanglement with the ebb and flow of the client’s case. Nevertheless, we realize it is tempting in a matrimonial matter like this for counsel to get derailed and we leave it at that. It is for those reasons that we took the unusual liberty to call for the original file from the High Court to crosscheck the information supplied by the parties and their counsel.

The onus was on the applicant to satisfy the Court that the impugned ruling was authentic and contained the error he says it did. But there was no attempt to obtain certification of the ruling exhibited with the application. On the contrary, the applicant confirmed that the trial Judge gave audience to the parties to show the error but the Judge disowned the ruling exhibited by the applicant. At all events, even if the ruling contained an error in the heading, the body of it never made any reference to the person stated in the heading and only referred to **“the applicant”** throughout. It was expressly stated to be in respect of the application dated 3rd November 2016 between the applicant and the respondent herein and the orders given were against the applicant in that application who is the same applicant before us.

When the applicant first raised the issue before the High Court on 24th November 2016, it appears the respondent’s counsel sought to resolve the complaint by inviting the court to correct the error *suo motu* under **Section 100** of the **Civil Procedure Act (CPA)**. We may reproduce the proceedings of that day:

“24/11/16

Before Justice A. K. Ndungu J.

C/clerk – Betty

Wamasa for Defendant/Applicant

Mukira for Plaintiff/Respondent

WAMASA: Application is dated 24/10/16. We have interim orders.

MS MUKIRA: The applicant is raising a typo error of the name of the defendant. Under(sic) S100 C.P.C. (sic) allows the court on its own motion or through application to rectify a typo-error.

Mention 10.30 AM. Court to peruse ruling of 29/9/16.

Signed

10.30 A.M

Coram as before

Directions:

I have perused the ruling of court delivered on the 29/9/16. On the face of it there is no misdescription of the names of the Respondent, the said name having been recorded as Leonard Mambo Kuria.

Signed.

WAMASA: The court has the correct ruling as opposed to what was provided to me by my client. I wish to withdraw the application dated 24/10/16 at thrown away costs of sh.7000/-.

Signed. 24/11/16

COURT: The parties to discuss the matter within the next 4 working days and in default of an agreement execution to issue.

Mention 1/12/16

24/11/16”

As regards the impugned ruling therefore, which is the subject matter of the intended appeal, we are not persuaded that the applicant has nothing to do with it or the warrant of arrest that was predicated on it. The trial Judge confirmed, and there is a record of his original signed ruling in the High Court record, that there was no error in the title and heading of the ruling. There is no valid basis for falsifying that confirmation. In our view, there is no serious or arguable appeal on that issue and the first test in the application has not been surmounted.

That would be sufficient to dispose of the application. But assuming without accepting that there was an error as proposed by the applicant, what procedure would have been appropriate to correct it?

We stated earlier that an oral application for rectification was made before the trial judge on 24th November 2016 under **Section 100** of the **CPC**. Later on (1st December, 2016) the respondent's counsel wrote to the Deputy Registrar invoking **Sections 99** and **100** to the same effect. The application of these two sections has been considered before in several decisions. They vest a general power to the courts to correct or amend their records. As such they are an exception to the doctrine of '**functus officio**'-- **the principle that once a decision has been given, it is (subject to any right of appeal) final and conclusive. It cannot be revoked or varied by the decision-maker. As the court stated in the case of Jersey Evening Post Limited vs. Ai Thani [2002] JLR 542 at 550:-**

“A court is functus when it has performed all its duties in a particular case. The doctrine does

not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available”.

Section 100 states as follows:-

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

The purpose of amendment is to **“determine the real question or issue raised by or depending on the proceeding”** and it can be done **“at any time”** which must mean from the time the suit is filed to final disposition.

Section 99 on the other hand, provides:-

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”

It is the relevant one in this matter as it relates to ‘judgments, decrees or orders’. This Court examined the mechanics of its application in the case of **Republic v Attorney General & 15 others, Ex-Parte Kenya Seed Company Limited & 5 others [2010] eKLR**, stating:-

“27. It is a codification of the common law doctrine dubbed ‘the Slip Rule’, the history and application of which has a wealth of authorities both locally and from common law jurisdictions. It is a rule that applies as part of the inherent jurisdiction of the court, which would otherwise become functus officio upon issuing a judgment or order, to grant the power to reopen the case but only for the limited purposes stated in the section.

28. Some of the applications of the rule are fairly obvious and common place and are easily discernible like clerical errors, arithmetical mistakes, calculations of interest, wrong figures or dates. Each case will, of course, depend on its own facts, but the rule will also apply where the correction of the slip is to give effect to the actual intention of the Judge and/or ensure that the judgment/order does not have a consequence which the Judge intended to avoid adjudicating on.

The Australian Civil Procedure has provisions in pari materia with section 99. As was stated in the case of Newmont Yandal Operations Pty Ltd v The J. Aron Corp & The Goldman Sachs Group Inc [2007] 70 NSWLR 411, the inherent jurisdiction extends to correcting a duly entered judgment where the orders do not truly represent what the court intended.

29. Nearer home the predecessor of this Court in Lakhamshi Brothers Ltd v R. Raja & Sons [1966] EA 313 endorsed that application of the rule, that is, to give effect to the intention of the court when it gave its judgment or to give effect to what clearly would have been the intention of the court had the matter not inadvertently been omitted. Spry JA in Raniga Case (supra) also stated as follows: -

A court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention.

30. What is certainly not permissible in the application of section 99, is to ask the court to sit

on appeal on its own decision, or to redo the case or application, or where the amendment requires the exercise of an independent discretion, or if it involves a real difference of opinion, or requires argument and deliberation or generally where the intended corrections go to the substance of the judgment or order”.

In either case, the court may proceed on its own motion or on application by any party. As for the procedure, none is provided for under the two sections and therefore, under Order 51 Rule 1 of the Civil Procedure Rules a ‘Notice of Motion’ is the prescribed procedure.

With that clarification of the procedure in obiter dicta, we revert to our earlier finding that the application before us lacks merit and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nakuru this 23rd day of February, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL