



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 307 OF 2014

BETWEEN

PAUL MISORI ORAGOAPPELLANT

AND

CITY COUNCIL OF NAIROBIRESPONDENT

(Being an appeal from the Judgment of the Industrial Court of Kenya at Nairobi

(Nduma Nderi, J.) dated 25th July 2014

in

IND.C.C. No. 1012 of 2010)

JUDGMENT OF THE COURT

On 28th June, 1996, the appellant was employed by the respondent as a city council enforcement officer (“askari”). He served as such until 4th July, 2005 when he was transferred from the City Inspectorate Department to the Nairobi City Inspectorate Training College. According to the appellant, this transfer did not bode well as his duties were without any justification varied from those of an askari to menial tasks such as grounds keeping, watering flowers and cleaning duties. To him, this denoted a demotion. Little did he know, that his frustrations had just began. His appeal against the transfer and the new designation bore no fruit. According to him, his immediate superior, the training commandant instead set out to humiliate him by among others, denying him sick offs, refusing to deploy him and assigning him menial duties inconsistent with his job description as aforesaid. Everything came to a head on 19th August, 2005 when the appellant lost his son and requested for 21 days’ leave. While the immediate supervisor declined to grant the request, his approach to the Deputy Director yielded a more favourable outcome as the leave application was approved pursuant to which he proceeded home to mourn and organize the funeral arrangements for his son.

A rude shock however awaited him return, for shortly thereafter, he received a letter intimating that during the period he considered himself to have been on authorized leave, his supervisor, had deemed him to have absconded duty and thus liable to summary dismissal. Consequently, he was placed on suspension without pay, and required to show cause why his employment should not be terminated. He tendered his

explanation and by a letter dated 2nd October, 2008, the respondent reinstated him to his job. It was a term of the reinstatement that the period of suspension without pay would be treated as unpaid leave. Despite this, the letter also indicating that he should avail himself to his supervisor at the city inspectorate department for allocation of duties, the appellant stated that when he reported as instructed, no duties were allocated and neither were his accrued dues paid, prompting him to file a suit in the Industrial Court (now the Employment and Labour Relations Court). In his view, the conduct of the respondent was a foretaken sign of an employer who was bent on constructively dismissing him. He therefore sought orders worded as follows:-

“(a) The claimant be reinstated to his employment with the respondent forthwith and without loss of benefit.

(b) The claimant be paid his full salary and allowances during the period of interdiction and dismissal.

(c) In the alternative and without prejudice to the above the claimant be paid in full all his terminal benefits as per the C.B.A.

(d) The respondent be ordered to compensate the claimant for unlawful dismissal.

(e) This honourable court does issue such orders as it may deem just and fit to grant.

(f) The respondent do pay cost of those proceedings.

(g) Interest on the above at court rates.”

True to the appellant’s suspicions, by a letter dated 14th September, 2010, his employment was terminated and the respondent proceeded to defend the suit vide the memorandum of reply dated 21st October, 2010 and further memorandum of reply dated 31st March, 2011, in which the respondent basically justified the dismissal as having been summarily executed on account of the appellant’s absconding duty, abuse and misuse of his powers and office.

The matter proceeded to hearing, with the appellant calling two witnesses while the respondent called none. By a judgment delivered on 8th November, 2013, **Nduma Nderi J.**, found that indeed a case for unfair dismissal had been made out by the appellant. With regard to compensation, the court made the following awards:-

“a) Kshs.217,620/= being maximum compensation for unlawful termination;

b) Kshs.500,000/= being exemplary damages for pain and suffering at the hands of the employer;

c) Kshs.54,405/= being three (3) months notice in terms of the Collective Bargaining Agreement;

d) Total award Kshs.772,025/=; and,

e) Costs of the suit to be paid by the Respondent to the Claimant.”

Dissatisfied with the award, the appellant filed an application dated 11th

December, 2013, seeking a review of the judgment. He sought reinstatement on account of the full council meeting held on 2nd October, 2008 and be paid all the arrears of the salary because he was young, aged only 39 years and had over 20 years to work and that his employment had not been terminated by the time he lodged the claim in court. Alternatively he prayed that the terminal dues awarded on the basis

of his salary of Kshs.18,135/- and house allowance of Kshs.6,750/- be reviewed and be based on the current Collective Bargaining Agreement (CBA) where his current salary was Ksh.29,670/- and house allowance of Kshs.15,000/-. By a ruling delivered on 25th July, 2014, the application was rejected on the grounds that; there were no substantial grounds for review, the judgment and decree sought to be reviewed was not attached to the application, and finally that the application was an abuse of the court process.

In a curious move, through a single notice of appeal and indeed the appeal before this Court, the appellant has impugned both the judgment and the ruling aforesaid. In his grounds of appeal, the appellant impugns the two decisions contending that the learned Judge erred; in awarding a sum of Kshs.217, 620/- as compensation based on wrong salary scale, for there was a new collective bargaining agreement in place and coupled with the period that the appellant worked for the respondent, the award was thus inordinately low; in awarding the sum of Kshs.500,000/- which was inordinately low considering the new collective bargaining agreement and the pain and suffering that the appellant underwent at the respondent's hands; in computing the award, he failed to recognize that the appellant would have risen through the ranks if he was still in employment; failed to exercise his discretion judiciously with regard to the award of damages, especially considering that not only had the respondent failed to prove that the appellant absconded duty but had also humiliated and dismissed him for attending his son's burial; failed to appreciate the principles applicable in the award of damages; failed to order reinstatement and instead entered judgment based on the wrong provisions of the law to wit, **Section 12 (3)** of the **Employment Act** which does not stipulate that reinstatement can only be ordered within three years of dismissal; failed to consider the tabulation of dues placed before court by the claimant; dismissing the claimant's application which sought review of the judgment.

Following a case management conference held on 31st August, 2016, parties consented to the hearing of the appeal by way of written submissions with limited oral highlights. Parties subsequently filed and exchanged the respective written submissions.

Highlighting his submissions, **Mr. Misori**, learned counsel for the appellant, whilst seeking to have his supplementary record of appeal admitted on record, promptly sought to have the respondent's belated submissions expunged from the proceedings. With regard to the appeal, he submitted that the learned Judge in his judgment ignored the previous directions issued by **Chemuttut J.**, with regard to the computation of the award. In addition, the appellant also submitted that the learned Judge misapprehended the law in so far as reinstatement was concerned and ended up erroneously applying **section 12 (3)** of the **Employment Act** when he capped the compensation at 12 months' salary. Lastly, that had the court appreciated the revised CBA tabled by the appellant, it would have arrived at a different computation of the award altogether.

Mr. Kwanga, learned counsel for the respondent, did not wish to highlight his written submissions.

Being a first appeal, this Court is enjoined to reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect (see **Selle & Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123**). Further, a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did (see **Ephantus Mwangi & Another v. Duncan Mwangi Wambugu [1982-88]1 Kar 278**).

At the onset, and prior to adverting to the appeal, two issues though not raised in the arguments need to be addressed as they impact on the jurisdiction of this Court to entertain this appeal. One is with regard to the time within which the appeal was lodged, and secondly, the contents of the notice of appeal.

On the first issue, the notice of appeal was lodged in the court registry on **7th August 2014** yet on the face of it, one of the decisions it seeks to impugn was delivered on **8th November, 2013**. Under **rule 75(2)** of the **Court of Appeal Rules**, an appeal to this Court must be lodged within 14 days of the decision appealed against. It would thus appear that in so far as the appeal against the judgment and decree is

concerned, it was filed way out of time. The remedy for such an omission lies in **Rule 4** of this Court's rules which allows an appellant to seek extension of time within which to file notice of appeal as well as the appeal out of time. In the circumstances of this case, the appellant failed to do so. Indeed, there is no evidence that such leave was ever sought or granted nor is there a certificate of delay on the record. Consequently, the notice of appeal and the resultant appeal against judgment and decree is incurably incompetent. Besides the provisions of the law aforesaid, the Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat v. IEBC & 6 Others [2014] eKLR**; expressed itself thus on the issue:

“it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.”

The failure by the appellant to lodge the appeal on judgment and decree in time or to seek leave prior to filing the said appeal renders the same incurably defective and liable to be struck out.

Notably however, the appeal against the ruling on review was lodged on time, given that the decision thereof was delivered on 25th July, 2014 and the notice of appeal lodged on 6th August, 2014. We revert to this aspect later in this judgment.

The second issue is that on the face of it, the appellant's notice of appeal seeks to impugn two decisions at the same time. The notice is expressed as follows:-

“...Take notice that Paul Misori Orago the claimant herein being dissatisfied with part of the judgment of the Hon. Justice Mathews N. Nduma delivered on the 8th November, 2013 and Ruling of a review of the said judgment delivered on 25th July, 2014, intends to appeal to the Court of Appeal against part of the judgment that disallows the prayer for reinstatement, full payment of his terminal benefits and full payment for salary and allowances during the period of interdiction and dismissal.....”

As stated, the ruling on review was borne of the judgment the appellant is also appealing against. Can a party who has sought a review of the judgment again appeal against the same judgment?

As has previously been held by this Court, appeals and reviews are separate and distinct vehicles. An appeal serves a different purpose from a review. In the case of **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR**, this Court upheld the decision of **Benett J.** in **Abasi Belinda v Fredrick Kangwamu and Another [1963] E.A. 557** in which it rendered itself thus: -

“.....a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground of appeal....”

But can a party who has unsuccessfully pursued review of judgment be allowed to lodge an appeal against same judgment? We think not and it is indeed undesirable. Instead, should he be unhappy with the outcome of the review, the recourse available to him is an appeal against the ruling on review (see **Ryce Motors Limited v Jonathan Kiprono Ruto & Another [2016] eKLR**; which cemented the proposition that an appeal may lie against a ruling on review. As a result, and in view of the judgment herein having been reviewed, the appellant's right of appeal against the judgment was extinguished or spent.

The only question that has to be answered is what becomes of the appeal against ruling on the application for review? As indicated earlier, unlike its counterpart, the same was lodged on time. This Court has in the past been faced with situation similar to this; where a notice of appeal impugned two decisions in the same proceedings, with the attendant issue being whether the same was an incurably defective. In the past, where the fate of an appeal was premised on a defective notice of appeal, the inevitable consequence was the striking out of the entire appeal, moreso if the defect went into jurisdiction (see **Republic v Managing Director Kenya Posts & Telecommunications Corporation [1999] eKLR** which cited with approval, the decision in **Attorney General v Kamlesh Mansukhlal Damji Pattni & Others, Civil**

Application No. Nai 59 of 1999 (Ur.22/99) (Unreported). However, thanks to the current Constitution and the Appellate Jurisdiction Act, the court is presently tasked with giving priority to doing substantive justice as opposed to hanging on technicalities to defeat the course of justice. See **Article 159** of the Constitution and **Sections 3A and 3B** of the **Appellate Jurisdiction Act**. In the premise and in a case such as this, the court will breathe life into the proceedings by allowing the appeal to proceed. In **Trans-Nzoia Investment Company Limited v Joseph Wanambis & 4 others [2010] eKLR**, when faced with a notice of appeal which purported to mount an appeal against two distinct decisions in the same proceedings, this court was of the view that impugning two decisions in one notice of appeal was not a fatal defect. It stated as follows:-

“...It would be wholly artificial to separate the two orders in the manner Mr. Kiarie asked us to do and then strike out the record of appeal on that basis. Even if there was any irregularity in filing a single notice of appeal such an irregularity is now curable under and in accordance with the provisions of sections 3A and 3B of the Appellate Jurisdiction Act which have introduced the concept of over-riding objective of litigation in our courts and it would clearly be contrary to the letter and spirit of the two sections to strike out the record of appeal so that the respondents to the motion can start all-over again. That would only increase the time taken by the litigation and costs thereof.....”

On the basis of the foregoing, we are perfectly entitled to consider the impugned ruling on the application for review on its merits. The appellant’s argument on this front is simple; that the Judge erred in failing to review his judgment and order his reinstatement by misconstruing and misapplying the provisions of **Section 12** of the Employment Act, and not ordering payment of his dues as per the terms of the current CBA agreement. But to the Judge, the application for review was unmerited for failing to satisfy any of the grounds known in law to warrant such a review.

Rule 32 of the Industrial Court (Procedure) Rules, 2010 provides that: -

“(1) A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling

- (a) if there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or**
- (b) on account of some mistake or error apparent on the face of the record; or**
- (c) on account of the award, judgment or ruling being in breach of any written law; or**
- (d) if the award, the judgment or ruling requires clarification; or**
- (e) for any other sufficient reasons.”**

The appellant never satisfied any of the above conditions, just as the learned Judge found. His argument was simply that the Judge should have reinstated and awarded him back pay in line with the tabulations under the new CBA; which had been filed at trial pursuant to directions made by Chemuttut, J. Further that the Judge had misconstrued some provision of the Employment Act with regard to reinstatement. In essence, he was asking the Judge to simply re-evaluate his own findings and indeed sit on his own appeal which is not permissible. But again, even if the Judge had erred in law that is, as we have already demonstrated not a ground for review but for the appeal. To drive this point home further, this Court stated in the case of **Pancras T. Swai v Kenya Breweries Ltd [2014] EKLR**:-

“..... It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a

Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are *factus officio* and have no appellate jurisdiction.....”

Of course jurisdiction or power to review an order or decree is largely discretionary, which discretion has to be exercised within the law and specific parameters set out in the *locus classicus* case of **Mbogo v. Shah [1968] EA 93**. Discretion cannot be exercised whimsically or capriciously.

Save for the statement that the Judge simply erred in not allowing his application for review, nothing has been shown to this Court to indicate that the exercise of the discretion by the trial court was injudicious. From the record before us, it is clear that the Judge considered thoroughly the matter before him before arriving at his decision to dismiss the application. Accordingly, we hold the view that the Judge did not err in finding that the appellant did not deserve the orders for review having failed to bring it within the provisions of **Rule 32** of the Industrial Court (Procedure) Rules and indeed the well known considerations for review. The appeal lacks merit and is accordingly dismissed with no order as to costs.

Dated and delivered at Nairobi this 24th day of March, 2017.

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a

True copy of the original

DEPUTY REGISTRAR