IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & M'INOTI JJ.A)

CIVIL APPLICATION NO. 264 OF 2016 (UR 213/2016)

BETWEEN

PETER KIMANI KAIRU T/A KIMANI KAIRU & COMPANY ADVOCATES....APPLICANT

AND

ANNA MARIE CASSIEDE.....1ST RESPONDENT

BRUNO CASSIEDE.....2ND RESPONDENT

(Application for rescission of an order and/or the reinstatement of an appeal or the extension of time to file a notice of appeal and institute an appeal from the ruling and order of Kimaru, J. dated 4th June 2008

In

H.C.C.C. NO. 39 of 2007)

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RULING OF THE COURT

Before us is a rather unusual application in which the applicant, ***Peter Kimani Kairu***, an advocate of the High Court, seeks several orders in the alternative. Firstly he urges us to rescind this Court's order dated 15th December 2015, which marked his appeal, ***Civil Appeal No. 175 of 2008***, as withdrawn with costs to the respondents, and reinstate the same for hearing and determination. Secondly, he prays in the alternative for an order extending time to file a notice and record of appeal out of time, so that he can start all over again and appeal against the order of the High Court that was impugned in the withdrawn appeal. Lastly he seeks stay of execution of the said order of the High Court pending the hearing and determination of the reinstated or the new appeal. The respondents, ***Anna Marie Cassiede*** and ***Bruno Cassiede***, who at the material time were the applicant's clients, contend in answer that there is no jurisdiction to grant the orders sought by the applicant; that his appeal was withdrawn by a consent order which cannot be set aside absent fraud or mistake, and that in any event the applicant's conduct disentitles him to the reliefs that he seeks.

The background to the application is fairly straightforward. The respondents, desirous of purchasing the property known as ***LR No. 3734/348*** on ***Othaya Road, Nairobi (the suit property)*** instructed the applicant to act for them in the transaction. The applicant was also the advocate for the vendors, ***Christopher Stephen Hornby*** and ***Nancy Wanjiru Hornby***. The agreed purchase was ***Kshs 25,000,000***, of which the

respondents paid to the applicant ***Kshs 2,500,000*** and ***Euros 286,000***. Subsequently the transaction fell through; the respondents declined to execute the agreement for sale; and demanded from the applicant refund of their funds. It appears that by then, the applicant had already released the purchase price to the vendors, which the respondents contended was contrary to their instructions.

When the payment from the appellant was not forthcoming, the respondents filed ***Nairobi High Court Civil Suit No. 39 of 2007*** praying for judgment against the applicant for Kshs 2,500,000/=, interest at court rates from 27th January 2006, Euros 286,000, interest at court rates from 15th March 2006 and costs of the suit. By a defence dated 12th March 2007 the applicant pleaded that there was a binding contract between the respondents and the vendors on account of offer and acceptance; that the vendors had performed their part of the contract by sending to the respondents an agreement for sale and a transfer, which the respondents declined to execute; and that in the premises they were not entitled to refund of the purchase price.

On 17th July 2007, the respondents took out a motion on notice for summary judgment against the applicant. By a ruling dated 4th June 2008, ***Kimaru, J.*** allowed the application and entered judgment for the respondents as prayed in the plaint but with interest at court rates from the date of the filing of the suit. The applicant was aggrieved by the ruling and lodged a notice of appeal on 13th June 2008. Thereafter he applied for stay of execution of the order of the High Court and on 9th October 2008, this Court granted him conditional stay of execution upon paying to the respondents ***Kshs. 27,500,000*** within 14 days. It is common ground that the applicant duly complied with the condition and subsequently filed ***Civil Appeal No. 175 of 2008.***

When the appeal came up for hearing, the parties indicated to the Court that they wished to settle the matter amicably. Accordingly the Court adjourned the hearing of the appeal and gave them 30 days to reach a settlement, failing which the appeal would be listed for hearing. The intended settlement did not materialize and the appeal was once again listed for hearing. Ultimately on 15th December 2015, the appeal was withdrawn pursuant to an order of this Court, in the following terms:

> ***"Upon the application of Mr. Kiche, learned counsel holding brief for Mr. Ohaga, (for the) appellant, to withdraw this appeal, and Mr. Ojiambo, learned counsel for the respondent, not objecting but praying for his costs, this appeal No. 175 of 2008, is hereby withdrawn under rule 96(5) of this Court's Rules with costs to the respondent."***

Subsequently the respondents demanded from the applicant payment of over Kshs 20,000,000 being interest on the principal sum, which the applicant had already paid to the respondents, and costs. That is what prompted the applicant to make the application now before us, invoking Article 159 of the Constitution, Section 3, 3A and 3B of the Appellate Jurisdiction Act and rules 4, 5(2) (b) and 57 (2) of the Court of Appeal Rules.

Through his learned counsel, ***Mr. Muite***, Senior Counsel, and ***Mr. Marete,*** learned counsel, the applicant avers that this Court had already found that his appeal was arguable and not frivolous; that he withdrew the appeal on the advise of his advocate on the understanding that the parties had agreed to settle the dispute amicably because he had already paid the principal sum to the respondents; that towards the amicable settlement he paid to the respondents, in good faith additional Kshs 2,000,000; that subsequently the respondents became adamant and insisted on payment of over Kshs 20,000,000 made up of interest and costs; and that the said demand was usurious, extortionate and oppressive taking into account that the applicant acted in good faith and did not derive any personal benefit from the transaction between the vendors and the respondents.

It was further submitted that the applicant was primarily invoking the inherent jurisdiction of the Court and the overriding objective to do justice in the circumstances of the case. Relying on the ruling of this Court in ***Kasturi Ltd v Nyeri Wholesalers Ltd (2014) eKLR***, the applicant urged that litigation ought to come to an end when all the parties have been heard on merit and substantive justice administered and that the overriding objective is not intended to give justice to one party at the expense of another. The applicant further added that rule 57(2) of the rules of this Court allows him to apply for the Court to

rescind the order withdrawing the appeal. In support of that proposition, he relied on the ruling of ***Nambuye, J.A.*** in ***Nguruman Ltd. v. Shompole Group Ranch & Another (2014) eKLR.*** It was also submitted that any inconvenience occasioned to the respondents by rescinding of the order would be adequately compensated by award of costs.

Regarding the prayers for extension of time and injunctive relief, the applicant submitted that it was in the alternative to the prayer for rescission and restatement of the appeal for hearing, and that should we decline to rescind the order withdrawing the appeal or to reinstate the appeal for hearing, then we should extend time for him to file a new notice of appeal. It was contended that the power of the Court to extend time is discretionary and unfettered and that always the court aims to do justice to the parties. The applicant also submitted that he had placed before us sufficient material to enable us exercise discretion to extend time in his favour.

Lastly the appellant urged us to issue injunctive relief otherwise his intended appeal would be rendered nugatory. He relied on the earlier ruling of this Court where he was granted stay of execution of the order of the High Court on the grounds that his intended appeal was arguable and would be rendered nugatory if stay of execution was not granted.

The respondents vigorously opposed the appeal, through their learned counsel, ***Mr. Ojiambo*** contending that rules 5(2) (b) and 57(2) are not applicable in this application; that the application does not meet the criteria for exercise of the Court's inherent jurisdiction; that the appellant had willingly abandoned his right of appeal; and that by his conduct he did not deserve exercise of the Court's discretion in his favour.

On applicability of rule 5(2) (b), the respondents submitted, on the authority of ***Dickson Muricho Muriuki v. Tomothy Kagondu Muriuki & Others (2013) eKLR*** and ***Nguruman Ltd. v Shompole Group Ranch & Another*** (supra) that in the absence of a notice of appeal or an appeal, an application under that rule cannot be sustained. As regards rule 57(2), it was the view of the respondents that it is relevant only to orders issued by a single judge extending time, but without specifying the date within which an act should be done. The rulings of this Court in ***Standard Chartered Financial Services Ltd v. Manchester Outfitters (Suiting Division) & 2 Others (2016) eKLR*** and ***Githara Chuchu & 473 Others v. Gatitu Coffee Growers Co-op Society Ltd & Another, CA No. 346 of 2009***, were relied upon to submit that the application of rule 57(2) is limited to the situations set out in rule 57(1), which are not relevant to the present application.

Next the respondents submitted that upon the withdrawal of the appeal, the Court became *functus officio* and it cannot be asked to rescind its orders except in exceptional circumstances where failure of justice has been occasioned. They cited ***Sereite Luyombya v. Uganda (1965) EA 698*** and submitted that whilst the Court has inherent jurisdiction to restore an abandoned appeal, it can do so only if the abandonment was the result of mistake or fraud involving failure of justice, if the appeal is not restored. In this case, it was submitted that the applicant had not established any mistake or fraud in the withdrawal of the appeal, and on the authority of ***Kenya Commercial Bank Ltd v. Specialized Engineering Co Ltd [1982] KLR 485*** and ***M&E Consulting Engineers Ltd v. Lake Basin Development Authority Another [205) eKLR*** that he was bound by the actions of his advocates.

Lastly the appellants urged us to dismiss the application on the basis that the applicant had not established sufficient cause to justify rescinding of the order or restoring the appeal; he lacked vigilance in prosecuting the appeal and was not deserving of an equitable remedy; and having waved, abandoned or disclaimed his appeal, he had lost it for good and that it would be an abuse of the process of the court to allow him to file a new appeal or to revive the abandoned one.

We have anxiously considered the application, the replying affidavits, the illuminating written and oral submissions by learned counsel, and the authorities that they relied upon. We readily agree with the respondents that in the circumstances of this appeal, the applicant has no basis for invoking rule 5(2) (b) of the rules of this Court as far as his application for stay of execution is concerned. As matters stand now, his appeal having been withdrawn, there is no appeal or notice of appeal on which an application for stay of execution can be founded. It is trite that to invoke rule 5(2)(b) there must be an appeal filed in this

Court, or an intended appeal in the form of a notice of appeal. (See ***Safaricom Ltd. v. Ocean View Beach Hotel Ltd. & 3 Others, CA No. 325 of 2009;*** and ***Benjoh Amalgamated Ltd. & Another v. Kenya Commercial Bank Ltd, CA No. SUP. 16 of 2012).***

We similarly agree with the respondents that rule 57(2) of the rules of this Court has no application in the circumstances of this application. That rule provides as follows:

> ***"57. (1) An order made on an application heard by a single judge may be varied or rescinded by that judge or in the absence of that judge by any other judge or by the Court on the application of any person affected thereby, if—***
>
> > ***(a) the order was one extending the time for doing any act, otherwise than to a specific date; or***
> >
> > ***(b) the order was one permitting the doing of some act, without specifying the date by which the act was to be done, and the person on whose application the order was made has failed to show reasonable diligence in the matter.***
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> ***(2) An order made on an application to the Court may similarly be varied or rescinded by the Court."***

This Court has had occasion to interpret the above provision (which previously was rule 56) but we are afraid the decisions of the Court have been anything but consistent. In ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others, CA. No. 307 of 2003***, ***Omolo, JA***, citing ***Musiara Ltd. v Ntimama, CA No. 271 of 2003*** and ***Chris Mahinda t/a Nyeri Trade Centre v. Kenya Power & Lighting Co Ltd., CA. No. 174 of 2005***, stated in a ruling dated 7th December 2007, that rule 56(2) was limited to rescission of orders made by a single judge or by the whole court with regard to extension of time for doing any act otherwise than to a specific date or if the order was one permitting the doing of some act, without specifying the date by which the act was to be done. The same conclusion was reached in ***Githara Chuchu & 473 Others v. Gatitu Coffee Growers Co-op Society Ltd. & Another*** (supra), where the applicants, who were aggrieved by an order of this Court requiring them to obtain grants of administration applied to the Court to rescind or vary the order. By a ruling dated 1st March 2013, this Court held that:

> ***"The former rule 56 is today rule 57 of the 2010 Rules. By dint of that rule (57), this Court will rescind its orders if the order relates to extension of time otherwise than to specific date or where the order directed the doing of some act without specifying the date by which the act is to be done. The matter before us does not related to any of the above circumstances."***

A different view was taken in ***Nguruman Ltd v. Shompole Group Ranch Another*** (supra), where an applicant who was aggrieved by an order of stay of proceedings issued by this Court under rule 5(2)(b) in the absence of an appeal or notice of appeal applied for review and rescinding of the order for stay of proceedings. The application was heard by a bench of five judges and in rulings dated 3rd October 2014, ***Nambuye, JA*** took the view that rule 57(2) is of general application to all orders made by the Court and is independent of rule 57(1) which is the one that is limited in the manner aforesaid. ***Musinga, JA*** took the same view, concluding that rule 57(2) grants the Court jurisdiction to vary or rescind an order made in an application.

In ***Standard Chartered Financial Services Ltd & 2 Others v Manchester Outfitters (Suiting Division) & 2 Others***, (supra) a bench of five judges of this Court held unanimously on 8th April 2016 that rule 57 was limited in scope and applies only where the order being varied or rescinded is, first an order made pursuant to an application and second the order is either for extending time or an order permitting the doing of some act without specifying the date by which the act is to be done and the defaulting party has failed to show reasonable diligence in the matter. The Court conclude that the word "similarly" in rule 57(2) limited the application of the rule to situations similar to those provided in rule 57(1).

The distinguishing feature of ***Nguruman Ltd v. Shompole Group Ranch & Another*** (supra) and

Standard Chartered Financial Services Ltd 2 Others v Manchester Outfitters (Suiting Division) & 2 Others, (supra), both of which were decided by five-judge benches was that the review sought in the former was pursuant to an order made under rule 5(2)(b) of the Court of Appeal Rules whilst the review in the latter as in the case before us, sought to reopen and rehear a concluded appeal. The ***Standard Chartered Financial Services Ltd & 2 Others v. Manchester Outfitters (Suiting Division) & 2 Others***, (supra) case is therefore more relevant and we would accept the view that the application of the entire rule 57 is limited to situations where the order in question relates to extension of time otherwise than to specific date or where the order directed the doing of some act without specifying the date by which the act is to be done. In addition to the reasons given in ***Standard Chartered Financial Services Ltd & 2 Others v Manchester Outfitters (Suiting Division) & 2 Others***, (supra), in our view it is not possible to interpret two sub-rules of the same rule to mean two totally different things. The reason why the two sub rules are drafted under the same rule is because they are closely related to each other and address different aspect of the same issue. If they were intended to address totally different issues, we would expect to find them in two separate rules, not as sub-rules of the same rule. Accordingly, what is addressed in rule 57(2) cannot be interpreted totally independently of rule 57(1).

Regarding the prayer for extension of time which the applicant makes in the alternative, it is necessary to point out that by dint of *rule 53* of the rules of this Court, an application for extension of time is to be heard by a single judge. ***Rule 55*** allows a party that is dissatisfied by the decision of the single judge to make a reference to the full court. As much as possible, the provisions of those rules must be observed, so as to avoid denying an aggrieved party, in aggregate, the opinions of four judges, which the rules allow him. Accordingly we do not see any compelling reason why the rules should not be followed, should it be necessary for the applicant to seek extension of time under rule 4.

That leaves the issue of the inherent jurisdiction of this Court and the overriding objective. Section 3 (2) of the Appellate Jurisdiction Act provides as follows:

> ***"For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court."***

The overriding objective, which was introduced in 2009 vide a new section 3A to the Appellate Jurisdiction Act states that the purpose of the Act and the rules made thereunder is to facilitate the just expeditious, proportionate and affordable resolution of appeals and obliges the Court to interpret the Act and the rules so as to give effect to the overriding objective and the parties to assist the Court in that regard. The inherent jurisdiction of the Court is addressed in the following terms in ***rule 1(2)*** of the Court of Appeal Rules:

> ***"(2) Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."***

There is no dispute that this Court, by its nature as a court of law, has inherent jurisdiction to make orders as may be necessary for the ends of justice. In an illuminating article, ***I. H. Jacob*** observes that the inherent jurisdiction of a court is not derived:

> ***"from statute or rule of law but from the very nature of the court as a superior court of law, and for this reason, such jurisdiction has been called "inherent". This description has been criticized as being "metaphysical" but I think nevertheless that it is apt to describe the quality of the jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the***

authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner."

(See ***I. H. Jacob "The Inherent Jurisdiction of the Court", Vol. 23 Current Legal Problems (1970) page 23***. See also ***Ryan Investments Ltd & Another v. The United States of America [1970] EA 675*** and ***Equity Bank Ltd. v. West Link MBO Ltd,*** supra).

Across the border in Tanzania, the Court of Appeal in ***Tanzania Equipment Ltd v. Devram P. Valambia, CA No. 18 of 1993*** held that it had inherent jurisdiction to review its decisions where there is a manifest error on the face of the record which resulted in miscarriage of justice, or where the decision was obtained by fraud or where a party was wrongly deprived of the opportunity to be heard. Similarly in Uganda in ***Seiste Luyombya v. Uganda [1965] EA 698***, the same approach is evident, even though that decision was in respect of a criminal case. An appellant who had given written notice of abandonment of his appeal leading to its dismissal subsequently applied to reinstate the same. The rules did not provide for reinstatement of such appeals and the High Court dismissed the application on the ground that the appeal was already dismissed and the court was *functus officio*. On appeal, the Court of Appeal allowed reinstatement of the appeal, holding that an appellate court has jurisdiction to restore an abandoned appeal if it can be shown that the notice of abandonment was given by mistake or fraud such as to involve a possible failure of justice in the event of the appeal not being restored.

Here in Kenya this Court has abandoned the earlier rigid stance that its decisions are final and may not be re-opened. In ***Benjoh Amalgamated Ltd & Another v. Kenya Commercial Bank Ltd. (supra),*** after comprehensive review of case law both international and local, the Court stated thus:

"The 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)."

In ***Standard Chartered Financial Services Ltd & Another v. Manchester Outfitters,*** (supra), the Court took the save view and stated that:

"...this Court is clothed with residual jurisdiction to reopen and rehear a concluded matter where the interest of justice demands, but that such jurisdiction will only be exercised in exceptional situations where the need to obviate injustice outweighs the principle of finality in litigation."

That, of course does not mean that the inherent or residual jurisdiction is to be invoked willy-nilly in all and sundry cases. Its limits are clearly apparent in the decisions in ***Benjoh Amalgamated Ltd & Another v. Kenya Commercial Bank Ltd. (supra)*** and ***Standard Chartered Financial Services Ltd & Another v. Manchester Outfitters,*** (supra). In addition there are well known situations where the inherent jurisdiction of the court will not be invoked, such as where an issue is already addressed and regulated by an Act or rules (See ***Wanjau v. Muraya [1983] KLR 276***). Nor can inherent powers of the Court be used to confer on it a jurisdiction that it does not otherwise have. (See ***Oosthuizen v. Road Accident Fund (258/10) [2011] ZASCA 118).***

In this application the respondents contend that the applicant has not made a case to enable the Court to invoke its inherent jurisdiction and give him a remedy. They urge that the appellant withdrew the appeal voluntarily and that he has lost it for good. They also say that this Court is *functus officio* and that the appellant was not vigilant to prosecute the appeal when it existed and therefore he is not deserving of any assistance from this Court. On the other hand the appellant states that he withdrew the appeal in good

faith on the advice of his advocate and on the honest belief that the parties had committed to settling the outstanding issues, only for the respondents to turn round and slap him with a demand of more than Kshs. 20,000,000. He states that he had already paid the full decretal amount of Kshs 27,500,000 to the respondents as ordered by this Court and that he did not benefit in any way from the transaction in which he was acting for both the vendors and the respondents. In addition and as a sign of his *bona fides*, he had paid the respondents an additional Kshs 2,000,000 towards amicable settlement of the matter. He lastly states that this Court had found that his appeal was arguable and not frivolous.

Under normal circumstances we would expect a party to first secure a compromise or settlement before withdrawing his appeal. The appellant, who is an advocate of the High Court says that he was mistaken in the belief that the parties had committed to an amicable settlement. To the extent that his appeal was not heard and determined on merit, we shall give him the benefit of the doubt for as the former ***Kwasi Apaloo, JA*** (as he then was) aptly stated in ***Philip Keipto Chemwolo & Another v. Augustine Kubende [1986] eKLR:***

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits."***

In the event, we allow the Motion dated 1st December 2016 in terms of prayer 2; rescind the order dated 15th December 2015 marking the appeal as withdrawn; and reinstate the same for hearing and determination on merit. There will also be stay of execution of the decree of the High Court dated 4th June 2008 pending the hearing and determination of the appeal. The respondents will have the costs of this application in any event. Due to the time that has lapsed, we direct that the appeal be listed for hearing and determination on priority basis. It is so ordered.

Dated and delivered at Nairobi this 28th day of July, 2017

P. N. WAKI

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JUDGE OF APPEAL

R. NAMBUYE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR