IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 70 OF 2015

BETWEEN

JOHN MACHARIA GICHIGI.....APPELLANT

AND

COMMISSIONER OF POLICE.....RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Dulu, J) dated 3rd November, 2009

in

H.C. Misc. Application No. 296 of 2008)

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JUDGMENT OF THE COURT

This is an appeal arising from an order issued by the High Court (Dulu, J.) on the 3rd day of November, 2009 dismissing the appellant's application dated the 19th day of March, 2009, seeking to set aside his orders of 16th day of March, 2009 dismissing the appellant's substantive Judicial Review Notice of Motion, dated the 25th day of June, 2008, for want of prosecution.

The background to the appeal is that, the appellant was a member of the Police Force, having joined the said Force in the year 1981. On the 17th day of September, 2007, orderly room proceedings were commenced against him for allegedly taking an exhibit to wit, a mobile phone. On the 26th day of November, 2007, **The Commissioner of Police** (the respondent) sentenced him to dismissal from the Force, effective 29th August, 2007.

The appellant was aggrieved and filed High Court Misc. Application No. 296 of 2008, in the Judicial Review Division Milimani, Nairobi, vide an exparte chamber summons dated the 23rd day of May, 2008, seeking leave of court to apply for an order of certiorari against that decision.

Leave was granted by **Dulu, J**. on the 20th day of June, 2008; pursuant to which substantive Notice of Motion dated the 25th day of June,

The substantive Notice of Motion was resisted by grounds of opposition dated the 2nd day of October, 2008 and a relying affidavit of **George Omwoyo** deposed to on the 12th day of March, 2009. It came up for *inter partes* hearing on the 16th day of March, 2009, when it was dismissed for want of prosecution upon non attendance by the appellant or his advocate despite the hearing date having been taken by consent. The appellant promptly filed an application for reinstatement dated the 19th day of March, 2009. It was resisted by the respondent's grounds of opposition dated the 1st day of April, 2009 and canvassed by way of oral submissions, resulting in the impugned dismissal orders of 3rd November, 2009.

In doing so, **Dulu, J.** had this to say:-

> ***"Having considered the application, in my view, the sections of the Civil Procedure Act and Rules cited do not apply to Judicial Review Proceedings. As was held by the Court of Appeal in the case of the Commissioner of Lands Versus Kunste Hotel Ltd Civil Appeal No. 234 of 1995- Judicial Review proceedings are neither Civil nor Criminal. However, in my view, the Judicial Review court has inherent jurisdiction to entertain applications and grant appropriate orders, in the interests of Justice. I will consider the application, not under the Civil Procedure Act and Rules, but under the inherent Jurisdiction of this Court.***
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> ***The applicant wants me to set aside my orders dismissing the Notice of Motion for non attendance. It was an order that determined the Notice of Motion without hearing the same. In my view, the decision of the Court was an order as provided for under section 8 of the Law Reforms Act. Section 8(3) of the Law Reforms Act (cap 26) provides:-***
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> > ***"8(30 No return shall be made to any such order, and no pleadings in prohibition shall be allowed but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section."***
>
> ***In my view from the above provisions of the law, this Court has no jurisdiction to set aside the final order on the Notice of Motion which I made. The only available remedy is for the Applicant to appeal from my decision. On that reason, this application cannot succeed. Consequently, I dismiss the application. However, parties will bear their respective costs of this application."***

The appellant was aggrieved and filed this appeal raising seven (7) grounds of appeal. He complains that the learned Judge erred in law:-

> ***(1) by finding that he had no jurisdiction to set aside, vary, and or review his order of 16th March, 2009 notwithstanding, the manifest merits of setting aside, varying and/or reviewing the same.***
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> ***(2) by finding that his order of 16th March, 2009 dismissing the Notice of Motion dated the 25th June, 2008 was a final order as contemplated under section 8(3) of the Law Reforms Act. Cap 26 laws of Kenya and was therefore not liable to be reviewed.***
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> ***(3) by misdirecting himself by invoking the provision of section 8(3) of the Law Reform Act Cap. 26 Laws of Kenya to hold that he had no jurisdiction to review his erstwhile orders notwithstanding, that the above provision only applied in respect of prerogative orders which was not the case.***
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> ***(4) by failing to find that the obtaining premises as set out in the Notice of Motion dated 19th March 2009 warranted a review of the order of 16th March, 2009 and by so doing failed to obviate a miscarriage of justice.***
>
> ***(5) failing to appreciate and invoke the inherent powers that inhere in him as a judicial officer and thus failing to correct an excusable mistake and avoid miscarriage of justice.***

(6) by dismissing the Notice of Motion dated 19th March, 2009 without considering and appreciating the overwhelming merits thereof.

(7) ***by holding that the only remedy available to the appellant in his wish to set aside the order of 16th March, 2008 was that of appeal notwithstanding that in addition an application for review lies.***

The appeal was canvassed by way of written submissions orally highlighted by the respective learned counsel, and buttressed by case law. Learned counsel, **Mr. Kahiga Waitindi,** on behalf of the appellant urged that section **8(5)** of the Law Reform Act Cap 26 Laws of Kenya only confers a right of appeal to a person aggrieved by a final order of *mandamus, prohibition* or *certiorari*.

To buttress that submission, counsel cited the High Court case of **Republic versus Kihoro Land Disputes Tribunal & another exparte Sospeter Kambogo Mwangi [2011] eKLR** which held that the law is quite explicit that under section **8(3)** of the Law Reform Act, when the court has made an order in respect of *mandamus, prohibition* and *certiorari,* the order shall be final and only subject to the right of appeal under section **8(5)** of the Act; and the High Court case of **Methang'athia & 4 others versus District Land Adjudication and Settlement Officer Meru North Nyambane District and 3 others [2000] KLR 500** for the holding that the High Court has no jurisdiction to stay, arrest, recall, review, set aside or quash a prerogative order which has already been made or granted in finality, as such an order is final and subject only to the right of appeal conferred by section 8(5) of the Law Reform Act.

Mr. Waitindi urged that the order subject of this appeal was not such a final order.

He referred to the High Court case of **Republic versus Permanent Secretary Ministry of Housing and Another exparte Fountain Enterprises [2007] eKLR** in which **Nyamu, J.** (as he then was) held that a default order made under the Law Reform Act is subject to challenge. It only becomes final where no challenge has been made against it by the party in default. He also cited **Paul Kipkemoi versus the Capital Market Authority High Court Misc. Application 1523 of 2003** for the holding that a default order can be set aside upon good cause being shown by the defaulting party; and **Republic versus Disciplinary Committee exparte Karimi C. Njau [2013] eKLR** in which the High Court recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merit as courts exist for the purpose of deciding the rights of the parties and not imposing discipline.

In opposing the appeal, learned counsel **Miss. Odhiambo** holding brief for **Mr. Onyiso** for the first respondent reiterated the written submissions that the reliefs such as recall, review and setting aside are only available under the Civil Procedure Act procedures; that the jurisdiction the appellant had invoked to redress his grievances was premised on the Law Reform Act provisions; that it is now trite that this is a special jurisdiction which is neither civil nor criminal; that section **8(3)** and (5) of the Act provide that orders made in exercise of jurisdiction under the Act are only appealable and not subject to any other form of intervention by a court of law.

He cited various High Court decisions including **Dickson Mincho Muriuki versus Central Provincial Land Disputes Appeal Committee Misc. Civil App. No. 112 of 2008**; **Ndete versus Chairman Land Disputes Tribunal and another [2002] KLR 392; Welamondi versus the Electoral Commission of Kenya [2001] 1KLR 481**; and **Republic versus National Transport and Safety Authority and 10 others exparte James Maina Mugo,** all making the court that Judicial review is a special jurisdiction which is neither civil nor criminal.

Miss Odhiambo next urged that the prayers sought on appeal by the appellant are null and void for want of procedure.

She relied on **Owners of Motor Vessel Lillians 'A' versus Caltex Oil (Kenya) Ltd [1989] KLR 1,** for the principle that where there is want of jurisdiction a court of law has to down its tools; **The Speaker of the National Assembly versus Karume [1992] KLR 22**; that where there is a clear procedure laid down

for accessing relief it should be strictly followed and lastly **Nguruman Ltd versus Shampole Group Ranch and another [2014] eKLR**, that the inherent power of the Court can only be invoked where there is no appropriate section, order or rule for accessing the relief sought.

The appeal under review arises from the learned Judge's exercise of discretion.

The parameters for interference with the exercise of such judicial discretion on appeal are well settled. **Sir Clement De Lestang V.P**. put it succinctly in **Mbogo versus Shah [1968] EA 93** at page 94 thus:-

> ***"It is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

The President, **Sir Charles Newbold** agreeing, added his own understanding at page 96, thus:-

> ***" 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 has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."***

See also Madan JA (as he then was) in **United India Insurance Co. Ltd Versus East African Underwriters (Kenya) Ltd [1985] EA 898** who stated that;

> ***"The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting as at first instance, would or might have given different weight to that given by the Judge to the varies factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of consideration of which he should have taken account of; or fifthly, that his decision albeit a discretionary one is plainly wrong."***

We have given due consideration to the record in the light of our mandate, the rival submissions and principles of law relied upon by either side. In our view, two issues arise for our determination namely:

> **(1) Whether the trial court had jurisdiction to set aside its orders made on the 16th day of March, 2009.**
>
> **(2) Whether the reliefs sought on appeal by the appellant are available.**

With regard to issue number 1, we agree with the learned Judges' finding that the exercise of Judicial Review jurisdiction is a special Jurisdiction which is neither civil nor criminal. See the **Commissioner of Lands versus Kinste Hotel Ltd** (supra).

We also agree with the submissions of both sides that orders issued with finality in the exercise of the said jurisdiction namely *mandamus, prohibition* and *certiorari* are not amenable to recall, review and setting aside. See also **Biren Amritlal Shah & another versus Republic & 3 others [2013] eKLR.**

The converse of the above position is what was stated by Nyamu, J. (as he was then) in **Republic versus Permanent Secretary Ministry of Housing & another Exparte Fountain Enterprises** (supra) namely that a default order granted in the exercise of the Judicial review Jurisdiction is not a final order in terms of section **8(3)** as read with section **8(5)** of the Act and is therefore amenable to interference by the issuing court. It only becomes final where there has been no challenge to it either by the defaulting party

or any other party to the proceedings from which it arises. In **Aga Khan Education Service Kenya Versus Republic & 3 others civil Appeal No. 257 of 203**, however, the court cautioned that the exercise of the power of recall, review and setting aside of orders not issued in finality under the Judicial review Jurisdiction is a very restricted jurisdiction and will only be exercised very sparingly and in very clear-cut cases.

In the light of the above principles it is our holding that the learned Judge fell into error when he misapprehended the default order issued by him on the 16th day of March, 2009 to be a final order in terms of section **8(3)** as read with section **8(5)** of the Act. He therefore wrongly exercised the discretion to recall, review and set aside the said order and this caused not only hardship but an injustice to the appellant, which calls for our interference with the said exercise of discretion.

Turning to issue number 2, in the light of our reasoning and finding with regard to issue number 1 above, we allow the appeal, set aside the orders made by the learned Judge on the 3rd day of November, 2009, and substitute therefor an order allowing the appellant's application dated the 19th day of the March, 2009.

We remit the matter back to the High Court for the hearing and disposal of the appellant's substantive Notice of Motion for Judicial Review dated the 25th day of June 2008 on priority basis.

(2) The appellant will have costs of the appeal and the proceedings before the Court below.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER, 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

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

DEPUTY REGISTRAR