IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPLICATION NO. 191 OF 2011

BETWEEN

MUKURU MUNGE……..……..…….....…..….APPLICANT

AND

FLORENCE SHINGI MWAWANA……..……1ST RESPONDENT

GILLIED MWANYASI MWAWANA……..…….2ND RESPONDENT

JOSEPH MWANGANGA MWAWANA……..……...3RD RESPONDENT

(Application to re-open and vary the judgment of the Court of Appeal at Malindi, (Githinji, Makhandia & Sichale, JJ.A) dated 7th October 2013

in

CA No. 191 of 2011)

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RULING OF THE COURT

The applicant, ***Mukuru Munge*** is before us for the third time on the same matter. The first time, he was before the Court on a second appeal from a judgment of the High Court. That appeal was dismissed by a judgment dated 7th October 2013. Thereafter he came back for a certificate to appeal to the Supreme Court, claiming that his intended appeal raised matters of general public importance within the meaning of ***Article 164(3)(b)*** of the ***Constitution***. That application was similarly dismissed vide a ruling dated 9th October 2014. Now he is before us seeking review of the judgment of 7th October 2013 claiming that the Court made erroneous pronouncements on the law. The real question before us now is whether there are genuine grounds to justify invocation of an exceptional jurisdiction of the Court or whether the application is a poorly disguised invitation to the Court to sit in appeal on its own judgment.

By way of background and context, this dispute revolves around an agreement between the applicant and one ***James Mwawana*** (the seller) who is since deceased, for the sale to the applicant, of a parcel of land known as ***LR 4118/148 (the suit property)*** in Taveta town. Under the agreement, entered into some 19 years ago, the agreed purchase price was Kshs 110,000, of which the applicant paid Kshs 10,000 as deposit. The appellant averred that the balance was payable only after the seller obtained a letter of

allotment of the suit property, although the agreement for sale which was produced as an exhibit and is part of the record does not make any reference to a letter of allotment. In due course the seller passed on, and in 1998 the applicant formed the distinct impression that the respondents, ***Florence Shingi Mwawana***, ***Gillied Mwanyasi Mwawana*** and ***Joseph Mwanganga Mwawana***, respectively the wife and sons of the deceased, had reneged on the sale agreement. Resorting to self-help, he invaded the property and demolished some houses thereon, hoping to spur the respondents into completing the sale. The result was a suit, which does not concern us in this appeal. Needless to add the respondents did not complete the sale.

By a plaint dated 25th July 2008, the applicant instituted before the ***Senior Resident Magistrate's Court, Taveta, Civil Suit No. 16 of 2008*** seeking an injunction to restrain the respondents from interfering with the suit property and specific performance of the agreement upon his payment of rent and costs due to the then County Council of Taveta. The applicant pleaded in the plaint that there was no administrator or administrators of the estate of the deceased and that he had sued the respondents as "next of kin" of the deceased.

By a defence dated 1st August 2008, the respondents pleaded that the applicant's suit was time barred, having been brought later than 6 years from the date when the cause of action accrued. Subsequently they filed a notice of preliminary objection along the same lines. In a ruling dated 2nd October 2008, the trial magistrate upheld the preliminary objection and struck out the suit as incompetent.

The applicant responded by lodging ***Civil Appeal No. 176 of 2008*** in the High Court in Mombasa, contending that the trial court had misapplied the law on limitation of actions. In a considered judgment dated 26th January 2011, ***Azangalala, J.*** (as he then was) found that indeed the applicant's claim was time barred under ***section 4(1) (a)*** of the ***Limitation of Actions Act*** and dismissed the appeal with costs. In the pertinent part of the judgment the learned judge expressed himself thus:

> ***"The averments in the above paragraph clearly indicated when the appellant's cause of action accrued. The deceased died 4 months after the agreement in 1996. In 1998, the deceased's family, as per the appellant's own pleadings, were not willing to continue with the transaction. The appellant's cause of action clearly arose then-that is when the deceased's family showed unwillingness to continue with the transaction in the year 1998…The appellant's suit was founded on contract and should have been commenced within 6 years from the year 1998. So by 32st December 2004, the appellant should have commenced this suit. When he did so on 28/7/2008, the limitation period of six(6) years had already lapsed. That conclusion was inevitable from the appellant's plaint."*** (Emphasis added).

While dismissing the appeal the learned judge also noted that the competence of the applicant's suit was doubtful, as it had been brought against persons who were not the administrators of the estate of the deceased.

Undeterred the applicant lodged a second appeal to this Court, being ***Civil Appeal NO. 191 of 2011***. As in the first appeal, the main contention was that the law on limitation of actions was misapplied by the High Court. After considering submissions by the respective parties, and in particular quoting the extract of the High Court's judgment that we have set out above, this Court found the appeal lacking in merit and dismissed the same.

Upon dismissal of the appeal, the applicant filed an application in this Court for certification that his intended appeal to the Supreme Court raised matters of general public importance. The ground upon which that application was based was that this Court did not consider the applicant's case and arguments and therefore he intended to seek justice in the Supreme Court. After considering the application, the Court noted that the mere fact that a party has lost an appeal in this Court does not automatically translate into a right of appeal to the Supreme Court. It also found that the applicant's application did not raise any fundamental issue or matter of general public importance to warrant certification. Accordingly the application was dismissed with costs.

The applicant's next maneuver was to file the application now before us in which he applies for the Court to reopen, review and vary its judgment dated 7th October 2013 because, he claims, it is erroneous and based on misconstruction of the law on limitation of actions. By consent the application was heard by way of written submissions, with the applicant exercising the option of highlighting the same, while the respondents relied exclusively on their written submissions.

Mr. Gikandi, his learned counsel, submitted that since this Court is no longer the final Court in Kenya, it has jurisdiction to review and set aside its own decisions in order to correct errors of law which have occasioned a miscarriage of justice. For that proposition counsel relied on ***BENJOH AMALGAMATED LTD & ANOTHER V. KENYA COMMERCIAL BANK LTD, CA NO. SUP. 16 OF 2012,*** and submitted further that there was a miscarriage of justice in this case because by striking out the applicant's suit, he was denied an opportunity to have his claim determined on merit.

Mr. Gikandi urged that the Court erred by misinterpreting the law on limitation of actions as regards when the cause of action arose. Under the agreement for sale, it was contended, the applicant was not obliged to complete the sale until he was given the letter of allotment. So long as that letter was not availed, it was argued, the cause of action did not arise. Accordingly, counsel concluded, the Court had erred in holding that the cause of action arose in 1996, which was in fact the date of the agreement. The gist of that argument was expressed as follows in the written submissions:

> ***"In our humble submission the Honourable Court determined the issue of limitation of action herein only by reference to the date… the agreement for sale herein came into being and avoided making the fundamental and crucial determination of WHEN the cause of action in relation to the said agreement accrued."***

Pressing the applicant's case further, learned counsel contended that since the agreement for sale did not make time of the essence, and there was a condition precedent of obtaining the letter of allotment before completion, the respondents were estopped by ***Section 39*** of the Limitations of Actions Act from pleading that the applicant's claim was barred by limitation.

Next we were urged to find that invocation of the Limitation of Actions Act is a reliance on a technicality, which is contrary to the dictates of ***Article 159(2)(d)*** of the ***Constitution*** and is otherwise curable under the overriding objective in ***sections 3A and 3B*** of the ***Appellate Jurisdiction Act***. The decision of the Court of Appeal of Tanzania in ***NDYANABO V. ATTORNEY GENERAL, CA NO. 64 OF 2001*** was cited to emphasize the importance of the right to access the courts in a democratic society.

Lastly it was submitted that decisions of this Court are binding on all other courts below and an erroneous statement of the law like in this case risks perpetuating the same mistake in many other cases. We were accordingly urged to review and set aside the judgment so that in addition to addressing the error, the applicant's suit before the subordinate court may be heard on merit so that justice can be done and be seen to have been done.

Opposing the application, ***Mr. Stephen Oddiaga,*** learned counsel for the respondents contended in his written submissions that the application was not merited and was otherwise an abuse of the process of Court. It was submitted further that this Court had not in any manner misinterpreted the law on limitation of actions because the applicant had himself expressly identified the date when the cause of action arose when he pleaded in his plaint before the subordinate court that he had confirmed in 1998 that the family of the seller was not willing to complete the sale and give him the letter of allotment. Citing from the judgment of the High Court, counsel argued that the first appellate court whose decision was upheld by this Court, had expressly found that the cause of action arose in 1998 when the family of the deceased declined to proceed with the transaction.

Turning to the agreement for sale, it was submitted that the assertion that there was a condition precedent that the completion was subject to the seller obtaining a letter of allotment was an afterthought as there was no such condition in the agreement, which was part of the record.

As regards the power of this Court to review its decisions, it was contended that although such power was conceded, it must be exercised in exceptional circumstances of which the present application was not. Learned counsel added that litigation must come to an end whether one of the parties was satisfied or not and disputed that the Limitation of Actions Act is a mere technicality which can be overlooked or ignored under the overriding objective.

We have duly considered the application, submissions of learned counsel, both oral and written, the authorities cited and the law. In ***BENJOH AMALGAMATED AND ANOTHER V KENYA COMMERCIAL BANK LTD (supra),*** this Court undertook an exhaustive review of previous decisions as well as decisions from several foreign jurisdictions regarding the power of a court of appeal, which even though is not the apex court, nevertheless is the final court for the majority of cases before it, to review and set aside its own decisions. The Court concluded that it has residual jurisdiction, in limited cases, to reopen a decided matter. That power, the Court added must be exercised with circumspection. The Court concluded 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)."***

The residue power of the Court to reopen its decisions is therefore a circumscribed power to be exercised in exceptional cases. That power is not intended to circumvent the principle that, save in those cases where the Constitution allows an appeal to the Supreme Court, decisions of this Court are otherwise final.

Beyond the residual power to reopen a decided case, it must be pointed out that under ***rule 35 (1)*** of the ***Court of Appeal Rules,*** (commonly referred to as the slip rule), the Court has power to correct any clerical or arithmetical mistake in its judgment or any error arising therein from an accidental slip or omission. The Court may undertake that correction of its own motion or on the application of any interested person, and at any time whether before or after the judgment has been embodied in an order.

The slip rule does not allow the Court to sit in judgment on its own previous judgment. (See ***LAKHAMSHI BROTHERS LTD V. R RAJA & SONS (1966) EA 313)***. Its purpose is to effect correction so to give effect to the intention of the Court when it gave its judgment. The predecessor of this Court in ***RANIGA V. JIVRAJ [1965] EA 700*** stated the limit of the slip rule thus, at page 703:

> ***"A court will, of course, only apply the slip rule where it is 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."***

The central question in this application is whether it falls within the restricted categories under which the Court can re-open its judgment. The primary ground upon which the Court is being asked to exercise its residual jurisdiction is that its application of the law of limitation is erroneous. That, with respect, cannot constitute a ground for re-opening the judgment for two reasons. Firstly to proceed as the applicant invites us to do amounts to this Court sitting in appeal from its own decision, which clearly is not the purpose of the Court's special and residual jurisdiction. Secondly and more compelling, what the applicant claims to constitute a misapplication of the law of limitation is a perversion of the judgment of this Court, arrived at from a mischievously selective rather than holistic and contextual reading of the judgment.

It is axiomatic that a cause of action founded on contract accrues when breach takes place and not when

damage is suffered. (See ***CITTY ON CONTRACTS, Sweet & Maxwell, 23rd Ed. Vol. 1 page 732*** and ***MWANGI V. KIIRU [1987] KLR 324)***. And a breach of contract occurs when one or both parties fail to fulfill their obligations under the terms of the contract.

This Court upheld the decision of the High Court and in particular quoted with approval the passage of the judgment of the High Court that found that the cause of action arose in ***1998*** after the respondents made it crystal clear that they were not going to complete the sale. The straw that the applicant hangs upon to make the case that there was misapplication of the law on limitation is a passage from the judgment where the Court stated thus:

> ***"The cause of action having arisen in 1996 and the suit having been filed in 2008, the cause of action was undoubtedly time barred."*** (Emphasis added).

To the applicant, that sentence meant that the cause of action arose from the date of contract because the contract was entered into in 1996. The Court did propound the general proposition that the applicant ascribes to the judgment, namely that a cause of action arises from the date of contract. It actually upheld the High Court's judgment, which found that the cause of action arose in 1998 when the respondents declined to proceed with it. Coming shortly after the Court had quoted the High Court with approval, clearly the reference to 1996 was a slip, a typographical error, which ought to have read 1998. Instead of a strained, laboured and artificial interpretation that ascribes to the sentence in question the conclusion that ***"a cause of action arises from the date of contract***", a sober, holistic and in-context reading of the judgment makes the intention of the Court absolutely clear that what was intended was reference to the year 1998 in lieu of 1996. In our view, the reference to 1996 instead of 1998 is the kind of slip that is curable under rule 35(1) if for no other reason, to obviate mischievous interpretation of the judgment.

Under rule 35(1) the Court is empowered, on its own motion, to correct any error in the judgment arising from an accidental slip or omission. We accordingly invoke the rule and correct reference to ***1996*** on page 4 of the judgment dated 7th October 2013 to read ***1998***. That should put to rest the disingenuous claim that this Court has concluded that in contracts the cause of action accrues on the date of the contract.

The other arguments presented by the applicant do not, in our opinion, advance any further his case for reopening of the judgment. We would in particular like to point out that in our view, the applicant's argument, which equates the law of limitation to mere procedural technicality that can be ignored pursuant to Article 159 of the Constitution, has no basis. The purpose of the law on limitation of actions is to avoid stale claims, based on the sensible and rationale appreciation that over time memories fade and evidence is lost. The law of limitation therefore seeks to compel claimants not to sleep on their rights and to bring their claims to court promptly. Secondly, the law on limitation of actions ensures that claims are instituted within reasonable time after the cause of action has arisen, so as to secure fair trial when all the evidence is available and to ensure that justice is not delayed. In our minds, those are important constitutional values and principles, which are underpinned by legislation on limitation of actions.

If any authority is required, and there is a multitude, the following few will suffice to drive the point home. In ***MEHTA V. SHAH [1965] EA 321, Crabbe, JA*** observed as follows at page 328:

> ***"The overriding purpose of all limitation statutes is based on the maxim interest reiupblicae ut sit finis litium and it has been the policy of the courts to lean against stale claims."***

Later ***Potter, JA.*** echoed the same view in ***GATHONI V. KENYA CO-OPERATIVE CREAMERIES LTD. [1982] KLR 104,*** at page 107 when he stated:

> ***The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest."***

Further a field, ***Diplock, LJ.*** (as he then was) had expressed the rational of Limitation of Actions statutes

in the following terms in ***LETANG V. COOPER*** *[1964] 2 All ER 929:*

> ***"The Act is a limitation Act; it relates only to procedure. It does not divest any person of rights recognized by law; it limits the period within which a person can obtain a remedy from the courts for infringement of them. The mischief against which all limitation Acts re directed is delay in commencing legal proceedings; for delay may lead to injustice, particularly where the ascertainment of the relevant facts depends on oral testimony."***

The Supreme Court of India has also weighed in heavily on the side of limitation periods, not as mere procedural aberrations, but as substantive provisions justified and underpinned by serious policy considerations. The apex Court in India expressed itself rather powerfully in ***POPAT & KOTECHA PROPERTY V. STATE BANK OF INDIA STAFF, SC, Civil Appeal No. 3460 of 2000,*** that we think it deserves to be quoted in *extenso:*

> ***"The period of limitation is founded on public policy, its aim being to secure the quiet of the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. The statute i.e. Limitation Act is founded on the most salutary principle of general and public policy and incorporates a principle of great benefit to the community. It has, with great propriety, been termed a statute of repose, peace and justice. The statute discourages litigation by burying in one common receptacle all the accumulations of past times which are unexplained and have not from lapse of time become inexplicable. It has been said by John Voet, with singular felicity, that controversies are limited to a fixed period of time, lest they should be immortal while men are mortal…***
>
> ***Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So, a life-span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae ut sit finis litium (it is for the general welfare that a period be put to litigation). The idea is that every legal remedy must be kept alive for legislatively fixed period of time…"***

(See also the judgment of this Court in ***MTANA LEWA V. KAHINDI NGALA MWAGANDI, CA NO. 56 OF 2015).***

From the above consistent judicial authorities, we are satisfied that limitation periods are not mere technicality, to be ignored under the overriding objective as urged by the applicant.

We have said enough to show that this application is totally bereft of merit. The same is hereby dismissed in its entirety with costs to the respondents. It is so ordered.

Dated and delivered at Mombasa this 26th day of February, 2016

ASIKE MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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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