



IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPLICATION NO. 29 OF 2014

BETWEEN

BONFACE INONDI OTIENO.....APPLICANT

AND

MEHTA ELECTRICALS LTD.....RESPONDENT

(Application for setting aside the judgment of the Court of Appeal at Mombasa dated 3rd July 2015

in

CA. No. 29 of 2014)

RULING OF THE COURT

By his Motion on Notice dated 15th July 2015, the applicant, ***Bonface Inondi Otieno***, acting in person, seeks the following prayers:

- i. That the Court be pleased to re-open and re-examine its judgment and order made on 3rd July 2015 in Civil Appeal No. 29 of 2014, Bonface Inondi Otieno v. Mehta Electricals Ltd.;***
- ii. That the said judgment and order be declared a nullity and set aside and the appeal be heard afresh; and***
- iii. That costs of this application be provided for.***

The Motion purports to be taken out under “***section 64 and 77 (a)*** of the ***Constitution***”, ***section 3*** of the ***Appellate Jurisdiction Act***, ***section 3*** of the ***Judicature Act*** and ***rule 1(2)*** of the ***Court of Appeal Rules***. It is apt to note that if the appellant meant to invoke Articles 64 and 77 (a) of the Constitution (the latter does not even exist), the same have no relevance to the issues that he has raised in the application. If on the other hand he intended to rely on the provisions of the former Constitution, they equally have no application as they were repealed with effect from 27th August 2010, long before the filing of the appeal

whose judgment the applicant seeks to be reviewed. That means that in reality the motion is anchored on the two statutes and the rules of this Court.

The grounds upon which the applicant seeks review of the judgment are that the Court erred by hearing the respondent's advocates who were not properly on record; by entertaining the respondent's written submissions which were filed out of time; by ignoring a precedent from the then Industrial Court, to wit ***Kenya Airways Ltd v. Donald Osewe Oluoch, Cause No. 1362 of 2013***; and by holding that the issue before it was *res judicata*.

The respondent, ***Mehta Electricals Ltd***, resisted the application on the basis of its grounds of opposition dated 5th November 2015 in which it contended that the application was an abuse of the process of the court; that there were no exceptional circumstances to warrant review of the judgment of this Court; and that no injustice or prejudice was occasioned to the applicant as he was afforded a full hearing before the judgment was rendered.

A short background to the application is apt before we delve into its merits. The respondent, who at the material time was engaged in the laying of overhead and underground electricity distribution networks in South Sudan, employed the applicant as a linesman from 5th July 2006. In the course of his employment, the applicant fell from a tree and sustained personal injuries. Subsequently he filed in the ***Senior Resident Magistrate's Court, Mombasa, Civil Suit No. 559 of 2007*** claiming general and special damages. By a judgment dated 25th May 2010, the court awarded him general damages of ***Kshs. 800,000/=*** for personal injuries, less payments made to him under the ***Workmen's Compensation Act***, and special damages of ***Kshs 5,000/=***.

Three years down the line, the applicant filed a claim against the respondent in the ***Industrial Court*** (as the ***Employment and Labour Relations Court*** was then known) claiming ***Kshs 83,988/=*** as his terminal dues following alleged unlawful termination of his contract of employment on 18th October, 2006. The respondent filed a notice of preliminary objection to the claim contenting, first that the claim was *res judicata*, and secondly that the same was time barred by ***sections 4(1) (a) and 4(2) of the Limitations of Actions Act***, the cause of action having arisen in October 2006.

By a ruling dated 11th April 2014, the Employment and Labour Relations Court (***ELRC***) held that while the claim was not *res judicata*, the same was time barred. Accordingly the claim was struck out with costs, after which the appellant filed ***Civil Appeal No. 29 of 2014*** in this Court. That appeal was similarly dismissed with costs by the judgment dated 3rd July 2015, which the applicant now seeks to be reviewed and set aside.

By the consent of the parties, the appeal was canvassed by written submissions. While the applicant elected to highlight his submissions, the respondent opted to rely exclusively on its written submissions and list of authorities.

The applicant submitted that his case was "unique and peculiar" and that his application for review of the judgment of this Court was deserved. He contended that this Court erred in holding that the ELRC had concluded that his claim was *res judicata*. The order of the ELRC, he argued, did not conclude that his claim was *res judicata* and therefore this Court was in error so as to justify a review of its judgment. In his view, that erroneous holding by this Court amounted to a violation of his right to a fair trial under ***Article 25(c)*** of the Constitution because the correct order, which showed that the ELRC had not found his claim to be *res judicata*, was not before this Court

It was the applicant's further submission that this Court erred by entertaining the preliminary objection and hearing counsel for the respondent while he was not properly on record as required by ***Order 6 rule 2*** of the ***Civil Procedure Rules***.

The body of the application raised other issues, which the applicant did not address in his written submissions. These were that the respondent's written submissions were filed out of time and therefore

this Court erred by admitting and relying on them; and that this Court erred by ignoring the decision of the then Industrial Court, in *Kenya Airways Ltd v. Donald Osewe Oluoch*, Cause No. 1362 of 2013 where it was held that time does not start to run for purposes of limitation of actions where the claimant has been prosecuting another claim against the respondent.

The respondent maintained, in its written submissions, that the application was an abuse of the process of the Court. Relying on *Benjoh Amalgamated Ltd & Another v. Kenya Commercial Bank Ltd*, CA NO. 16 of 2012 and *Jimnah Mwangi Gichanga v. Attorney General*, CA No. 206 of 2013, the respondent submitted that the jurisdiction of this Court to review its decisions is exceptional and must be invoked with great circumspection to correct errors of law that have occasioned real injustice or failure or miscarriage of justice, thus eroding public confidence in the administration of justice. As regards the applicant's application, it was submitted that there was nothing exceptional about it to warrant invoking a residual jurisdiction.

We have carefully considered the application, the supporting affidavit, the grounds of opposition, the submissions by the parties, the authorities cited and the law. Before we consider the application, we must lay to rest the applicant's persistent and misconceived insistence that this Court held that his claim was *res judicata*. We have carefully considered the judgment the subject of this application and we are satisfied that the Court did not make any such finding. The Court determined the appeal on the basis that, as found by the ELRC, the applicant's claim was time barred. It expressed itself thus:

“It is not disputed that the appellant (the applicant) filed his memorandum of claim in September 2013 (the exact date of filing could not be discerned from the court stamp) whilst his contract of employment had been terminated by the respondent on 18th October 2006. The appellant does not deny this, in fact he acknowledges that he filed Misc. Application No 2 of 2013 seeking an order to be granted leave to file his claim against the respondent out of time and which application was dismissed. He also does not deny that he had filed Civil Suit No. 559 of 2007 against the respondent based on the same cause of action. He however blames his former lawyer for not including claim for “loss of earnings”. That may well be so but the preliminary objection taken by the respondent was upheld principally on the basis that the cause of action was time barred.” (Emphasis added).

It is now settled that whilst this Court has residual jurisdiction to review its decisions, that jurisdiction will not be exercised as a matter of course but only in exceptional cases where it will serve to promote public interest and enhance public confidence in the rule of law. In *Benjoh Amalgamated Ltd & Another v. Kenya Commercial Bank Ltd*. (*supra*), after comprehensive review of case law both international and local, this 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 a judgment rendered on 8th April 2016 in *Standard Chartered Financial Services Ltd & Another v. Manchester Outfitters*, CA No. Nai. 224 of 2006 this Court emphasized the principle as follows:

“We reiterate that position and stress 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.”

In effect, the residual power is not exercised as a means of re-opening determined issues as though it was an appeal on merit.

Turning to the merits of this application, what are the exceptional circumstances relied upon by the applicant? The applicant claims that this Court erred by finding that his claim was *res judicata*, by ignoring an ELRC precedent, by hearing counsel who was not properly on record and by considering submissions filed out of time.

With due respect, a reading of his application and submissions leaves no doubt in our minds that this application is no more than an invitation to us to reconsider the merits of the judgment dated 3rd July 2015 and come to a different conclusion. That is tantamount to inviting us to sit on appeal against the said judgment, which we shall not countenance. Without in any way indulging in the illegitimate exercise that the applicant wants us to undertake, it is plain to us that the Court did not find that applicant's claim was *res judicata* as he alleges; it gave reasons why it could not rely on the decision of the ELRC; and by virtue of the powers vested on it by Article 159 of the Constitution, it could decide to hear counsel for the respondent and consider submissions filed out of time.

This application has absolutely no merit and is hereby dismissed in its entirety with costs to the respondent. It is so ordered.

Dated and delivered at Mombasa this 27th day of May, 2016

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