



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OUKO, M'INOTI & J. MOHAMMED, JJ.A.

CIVIL APPLICATION NO. NAI 206 OF 2013

BETWEEN

JIMNAH MWANGI GICHANGA ..... APPLICANT/RESPONDENT

AND

HON. ATTORNEY GENERAL ..... RESPONDENT

(An application for review of the judgment of the Court of Appeal at Nairobi (Onyango Otieno & Okwengu, JJ.A.) dated 22<sup>nd</sup> June, 2012

in

CIVIL APPEAL NO. 8 OF 2011)

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RULING OF THE COURT

1. Before us is a Notice of Motion application for review dated 13<sup>th</sup> August, 2013 by **JIMNAH MWANGI GICHANGA** ("the applicant") for the following

orders:

***"1. That this honourable court review its judgment issued on 22<sup>nd</sup> June, 2012 dismissing the applicant's appeal.***

***2. That the costs of this application be provided for."***

2. The grounds upon which the application is premised are set out on the

face of the motion as well as in the supporting affidavit deponed by the applicant on 13<sup>th</sup> August, 2013 as follows:

***"(a) That the Hon. Judges of Appeal failed to properly evaluate the evidence and the judgment of the Hon. Justice Sitati, and in particular failed to appreciate that there were three letters dated 3<sup>rd</sup> June, 1986, 3<sup>rd</sup> January, 1990 and 30<sup>th</sup> May, 2006, which clearly acknowledge his attainment of a Bachelor of Arts Degree;***

- b. *That the Hon. Judges failed to appreciate that the appellant had applied for promotion/deployment which would have entitled him to the grade in question;*
- c. *That this Court failed to evaluate the judgment of Hon. Justice Sitati in respect of finding that the Appellant's case was time barred when indeed it was not, as the same was filed on 30<sup>th</sup> September, 1999 and amended pursuant to a court order on 10<sup>th</sup> June, 2008 which order was issued on 6<sup>th</sup>*

*June, 2008.*”

3. The genesis of this application is a suit which was filed in the High Court by the applicant against the respondent on behalf of the Permanent Secretary Ministry of Education/Teachers' Service Commission (TSC). In the plaint dated 10<sup>th</sup> September, 1999, and amended on 6<sup>th</sup> June, 2008, the applicant who was a teacher by profession claimed that the TSC had failed and/or refused to place him in job group 'R' in accordance with the newly introduced graduate scheme, with the result that upon his retirement, his pension was underpaid. The applicant, therefore, sought a declaration that between 1<sup>st</sup> July, 1996 and 30<sup>th</sup> September, 1997, he was entitled to a salary, house allowance and other benefits calculated on grade 'R' of Chief Principal Teacher within the graduate scheme.

In opposition, the respondent filed a defence dated 17<sup>th</sup> March, 2000 (amended pursuant to a court order of 6<sup>th</sup> June, 2008) in which it was contended that the applicant's claim was statute barred; that the applicant was at all material times in job group 'K'; that the scheme of service did not entitle him to automatic promotion from job group 'K' to job group 'R'; that all promotions are made through advertisements and interviews; that the appellant was never promoted by virtue of any interview to job group 'R'; and that the calculation of the applicant's pension was based on his job group at the time of his retirement, which was job group 'K'.

4. The High Court dismissed the applicant's suit. Aggrieved by that decision, the applicant filed an appeal to this Court [CA NO. 8 OF 2011(*Okwengu, JA with Onyango Otieno, JA concurring*)], which was also dismissed on 22<sup>nd</sup> June, 2012. It is on the basis of the above that the applicant has moved this Court for orders to review its own decision in this application.
5. When the application came up for hearing, the applicant appeared in person while learned counsel, Mrs Okulara represented the respondent. The applicant submitted that the High Court and this Court erred in failing to consider and evaluate material facts pertaining to his case. He further contended that this Court erred in law by relying on **section 3 (2) of the**

**Public Authorities Limitation Act (Cap 39)** to find his case time-barred.

6. Opposing the application, Mrs Okulara contended that the issues argued by the applicant were fully determined by the judgment dated 22<sup>nd</sup> June, 2012.

She contended that the applicant has not placed any new material before the Court in support of his application for review. She, therefore, urged the Court to dismiss the application with costs.

7. We have considered the application, the grounds in support thereof, the

submissions by the applicant and the counsel for the respondent. The main issue for determination in this application relates to the jurisdiction of this Court. Does this Court have the jurisdiction to review its own decisions?

**Article 164 (1) of the Constitution of Kenya, 2010 (“the Constitution”)** establishes the Court of Appeal and **Article 164 (3)** stipulates that:

**“(3) The Court of Appeal has jurisdiction to hear appeals from-**

- a. *the High Court; and*
- b. *any other Court or tribunal as prescribed by an Act of Parliament.”*

The preamble to the *Appellate Jurisdiction Act* reads as follows:

**“An Act of Parliament to confer on the Court of Appeal jurisdiction to hear appeals from the High**

**Court and for purposes incidental thereto.”**

Section 3 (1) of the Act stipulates:

**“The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law.”**

On the issue of this Court’s jurisdiction, Musinga, JA in the recent case of *NGURUMAN LIMITED V SHOMPOLE GROUP RANCH & ANOTHER, CIVIL APPLICATION NO. NAI 90 OF 2013* stated:

**“The Court’s jurisdiction is therefore properly circumscribed and cannot be enlarged. The Supreme Court of Kenya in SAMUEL KAMAU MACHARIA & ANOTHER V KCB LTD & 2 OTHERS, Application No. 2 of 2011 delivered itself thus:**

**“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter; for without jurisdiction, the Court cannot entertain any proceedings. ....”**

On the issue of review, Musinga, JA stated in the same case:

**“Neither the Appellate Jurisdiction Act nor the Court of Appeal Rules contain any provision for review of this Court’s final judgments, though it has been held in several decisions that the court has residual jurisdiction to reopen appeals, albeit in very limited circumstances.”**

8. The parameters for review by this Court of its judgments were recently set out in the case of *BENJOH AMALGAMATED LTD. & ANOR V KENYA COMMERCIAL BANK, CIVIL APPLICATION NO. SUP 16 OF 2012*, where the

Court rendered itself thus:

**“[57] 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).**

0. **It is our finding that this Court not being the final court has residual jurisdiction to review its decisions to which there is no appeal 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. This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice.** (Emphasis added)
9. Against this background, the question for our determination is whether in the circumstances of this application, this Court should exercise its residual jurisdiction to review its final decision as

prayed by the applicant.

10. In making its determination, this Court in the judgment sought to be reviewed, considered the grounds raised by the applicant to ensure that there was no miscarriage of justice that was occasioned in this matter. It was the finding of the Court that all the issues raised were properly determined by the High Court. This Court re-evaluated the evidence that was adduced in the High Court.

11. We reiterate that while this Court has residual jurisdiction to review its decisions, this jurisdiction has to be exercised cautiously and with circumspection. This Court will only exercise such powers in exceptional circumstances such as where it will serve to promote public interest and enhance public confidence in the rule of law. The applicant has not satisfied this Court that his application for review falls within this purview. The applicant has also not adduced any new and important matter or evidence in support of his application for review. We, therefore, find that there exist no exceptional circumstances to warrant this Court's review of its judgment dated 22<sup>nd</sup> June, 2012.

12. In the circumstances, this application is devoid of merit and is dismissed

with no order as to costs.

**Dated and delivered at Nairobi this 23<sup>rd</sup> day of January, 2015.**

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR