IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 241 OF 2011

BETWEEN

KEVIN MBOGO ……..... 1ST APPELLANT

EDWIN OKELLO …….....…... 2ND APPELLANT

VERSUS

UNIVERSITY OF EASTERN AFRICA BARATON …. RESPONDENT

(An Appeal from a ruling of the High Court of Kenya at Eldoret (Azangalala, J.) dated 24th day of August, 2011 **in MISC. CIVIL APPLICATION NO. 7 OF 2010)**

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JUDGMENT OF THE COURT

1. This is an appeal from the ruling of the High Court (Azangalala, J.) (as he then was) delivered on 24th August, 2011 dismissing, with costs, the appellants' application seeking review of an earlier order made on 16th June 2010 by which the court dismissed the appellants' motion for Judicial Review.

Background

2. On 15th February 2010 the High Court at Eldoret granted leave to the appellants to apply for an order of certiorari to quash the decision of the respondent purporting to suspend or bar the appellants from registering as students at University of East Africa, Baraton and denying them access to the university campus.

3. On 5th March 2010, the appellants filed the substantive motion seeking an order of certiorari. Their complaint was that the decision by the respondent to suspend them from registering as students at the university and denying them access to the campus, breached rules of natural justice as well as the rules and regulations of the university and was ultra vires, null and void. The application was avowedly "*based upon the grounds set out in the statutory statement and verifying affidavit of Kevin Mbogo lodged with the application for leave and on such other grounds as may be adduced at the hearing hereof.*"

4. In opposition to that motion, the respondent filed an affidavit in reply sworn by one Job Kimeto,

dean of students at the university who, after narrating the respondent's version of the background to the matter deposed that the decision challenged by the appellants was reached after due process. In that affidavit, he also asserted that the appellants' application was incompetent "*as it was not supported by a verifying affidavit as per law required*."

5. After hearing the motion, the High Court (Mwilu, J.) (as she then was) delivered judgment on 16th June, 2010 in which she held that the respondent was in "*clear breach of the rules of natural justice*" because, among other things, the notice to the appellants inviting them to appear before a disciplinary committee was not sufficient for them to prepare themselves and the allegations against them were not specified. That notwithstanding, the Judge struck out a "*verifying affidavit sworn by Kevin Mbogo accompanying the motion* [that was] *neither dated nor commissioned by a commissioner for oaths*" and dismissed the motion on grounds of that "*fatal defect*" and concluded the judgment thus:

> **"The *verifying affidavit stated to be made on oath and not being made before a commissioner for oaths is in my humble opinion worthless and cannot be relied upon as supporting the averments made in it. To my mind that is a fatal defect to the entire motion and I so find. I strike out that verifying affidavit and that leaves nothing to support the motion. Order LIII of the Civil Procedure Rules requires the presence of the verifying affidavit and without it has no feet to stand on. This result jeopardizes the ex parte applicant's case which would otherwise have succeeded on the grounds of due notice not having been given and the charges/allegations/complaints not having been made known to the ex parte applicants before hand. The defect noted above is in my view not one curable by the oxygen rule and it renders the whole motion incurably defective, irregular and improper. I dismiss the entire motion with costs to be paid by the Advocate in the circumstances leading to the defect."***

6. The appellants' took the view that there was "*an error of law and patent error of fact apparent on the face of the decision*." They accordingly filed a motion before the High Court on 5th July 2010 seeking orders that the decision of the court given on 16th June 2010 dismissing their motion for judicial review "*be reviewed and set aside.*" According to the appellants, their motion for judicial review dated 25th February 2010 clearly stated on its face that it was "*based upon the grounds set out in the statutory statement and verifying affidavit of Kevin Mbogo lodged with the application for leave*"; that the Judge erred in relying upon an extraneous and superfluous verifying affidavit of Kevin Mbogo to dismiss the substantive motion; that even having struck out that affidavit, the motion for judicial review remained properly anchored on the *verifying affidavit of Kevin Mbogo lodged with the application for leave*; and that in the circumstances the decision to dismiss the motion was made in error.

7. In a replying affidavit to that application for review, Elijah Momanyi Mogona advocate deposed on behalf of the respondent that there were no grounds meriting the review and setting aside of the decision of the court given on 16th June 2010; that the appellants' remedy lay in appealing against that decision; and that an error of law could not be the basis for seeking review.

8. The appellants' motion of 5th July, 2010 seeking orders that the decision of the court given on 16th June 2010 dismissing their motion for judicial review be reviewed and set aside was heard by Azangalala, J. and dismissed in an impugned ruling delivered on 24th August 2011 giving rise to the present appeal.

<u>The appeal and submissions by counsel</u>

9. Learned counsel for the appellants, Mr. G. B. Miyare, referred us to the memorandum of appeal and submitted that the learned Judge erred: in finding that he had no jurisdiction to review the earlier decision of 16th June 2010 dismissing the motion for Judicial Review; and in failing to find that the dismissal of the Judicial Review motion was in error as the same was duly supported

by the affidavit filed in support of the application for leave.

10. Counsel maintained that the affidavit that was struck out by Mwilu, J. who then dismissed the motion for Judicial Review was superfluous and extraneous and should have been disregarded as the same had been filed in error; that there was clearly an error of law and fact on the basis of which the application for review was dismissed; that even without the affidavit that was struck out, the application accorded with the rules; and that that the Judge undoubtedly had jurisdiction to review the decision of Mwilu J.

11. In support of his submissions, counsel referred us to the decision of the High Court in **Republic vs. Anti-Counterfeit Agency & 2 others Ex Parte Surgippharm Limited [2014] eKLR**; **Jitesh Shah & Highland Textiles Limited vs. Nairobi District Land Registrar [2013] eKLR**; the decisions of this Court in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR** and **Nyamogo and Nyamogo Advocates vs. Kogo [2001] EA170**.

12. Opposing the appeal, Mr. E. Momanyi, learned counsel for the respondent, submitted that the learned Judge correctly dismissed the motion for review; that the matter of the competence of the affidavit in support of the motion for Judicial Review was raised before Mwilu, J; and that the learned Judge had applied herself to the matter and had made a decision.

13. According to Mr. Momanyi, the avenue that was open to the appellant was to appeal that decision and not to apply for its review; that the application for review was in any event instituted under wrong provisions of the law and without regard to Section 8 of the Law Reform Act; and that the application for review was properly rejected, as there was no error apparent on the face of the record. In support counsel referred us to the decisions of this Court in **National Bank of Kenya Limited vs. Ndungu Njau Civil Appeal No. 211 of 1996** and **Republic vs. Communications Commission of Kenya [2001] 1 EA 195**

Determination

14. We have considered the appeal and submissions by learned counsel. The sole question before us is whether the learned Judge of the High Court erred in declining to review the earlier order of the court given on 16th June 2010. In declining the invitation to do so, the learned Judge after reviewing the judgment that he had been asked to review had this to say:

> ***"The Learned Judge was therefore clear in her mind that the application for leave had been predicated on a valid statutory statement and a properly commissioned verifying affidavit. So the Learned Judge's decision to eventually strike out the motion and notice was a meditated judicial decision. If that decision was incompetent or legally unsound it would only be corrected by the Court of Appeal and not in the manner adopted. I am afraid the inherent power of the court cannot be invoked to vary, my Learned Sister's decision as I would be sitting on appeal against her said decision. I do not have such jurisdiction. I even doubt whether my Learned Sister herself would have such jurisdiction."***

15. In saying so, we understand the Judge to have been saying that review was not available in the circumstances of the case as the court was for all purposes being asked to sit on appeal over its earlier decision. The matter of the competence of the affidavit was raised in the affidavit filed by the respondent to which we have already referred. The Judge in dealing with the motion for judicial review addressed herself to that issue. If she reached a wrong conclusion of law that would be a good ground to challenge the decision on appeal but not on review.

16. The approach taken by the Judge in declining to sit on appeal, on a matter that may have been suitable for appeal, is consistent with the views expressed by this Court in **National Bank of Kenya Limited vs. Ndungu Njau** (supra) where this Court stated that:

> *"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.*

17. For those reasons, we do not therefore have a basis for interfering with the decision reached by the High Court. The appeal fails and is dismissed with costs.

Dated and delivered at Eldoret This 17th day of December, 2015.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

…….

JUDGE OF APPEAL

A. K. MURGOR

…….

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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DEPUTY REGISTRAR