REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, G. B. M. KARIUKI & GATEMBU, JJ.A.

CIVIL APPLICATION NO. NAI 23 OF 2009

BETWEEN

TOBIAS ONGANY AUMA……..……..……..….1ST APPLICANT

AARON MUISYO MWAILU……..2ND APPLICANT

JOHN OTIENO OWILI…….……..3RD APPLICANT

WALTER OJWANG AWICH…….4TH APPLICANT

FIDELIS NTHUNTHI……..……5TH APPLICANT

HENRY MUNENE KARUBIU……6TH APPLICANT

VERSUS

KENYA AIRWAYS CORPORATION…….……..RESPONDENT

(An application for nullification of Judgment of the Court of Appeal in an Appeal from Judgment and Decree of the High Court of Kenya at Nairobi (Mbogholi, J.) dated 23rd February, 2001

in

HCCC NO. 4434 OF 1992)

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RULING OF THE COURT

The notice of motion dated 30th January 2009 is pronounced to be premised on Rule 1(3) of the Court of Appeal Rules, Section 3 of the Judicature Act and Section 123(II) of the retired Constitution.

The applicants seek three orders as hereunder:-

(1) That the decision of this Honourable Court given on 23rd day of November 2007 in Nairobi Civil Appeal No. 350 of 2002 in favour of the appellant without jurisdiction be declared null and void exdebito justitiae and the appeal be struck out.

(2) That the costs of this application and the costs of the appeal be awarded to the applicants herein.

(3) That the Honourable Court be pleased to make any other orders within its inherent Jurisdiction.

It is predicated on one ground on its face namely that this Court did not have jurisdiction to hear and determine the appeal from the Judgment of the High Court as the notice of appeal was filed by the firm of Hamilton Harrison & Mathews before filing a notice of change of advocates. The application is supported by the affidavit of John Wills Otieno Owili sworn on 30th January 2009.

The gist of his depositions is that when the matter was before the High Court for hearing, the firm of Hamilton, Harrison and Mathews which represented the respondent in this appeal did not file a notice of change of advocates, which was in breach of the then **Order III Rule 6** and **7** of the **Civil Procedure Rules (repealed).**

Although the applicant acknowledged during the hearing of the application that the applicant's advocates did file a notice of change of advocates, his contention is that the same was fatally and incurably defective. According to Mr. Ngoge, the learned counsel for the applicant, the firm of Hamilton Harrison and Mathews had no locus standi to lodge the appeal.

That notwithstanding, Mr. Ngoge submitted that the judgment of this Court delivered on 23rd November 2007 is erroneous as the Court proceeded on the basis that the entire judgment of the High Court was being challenged while in fact the appeal was against only part of the judgment and that the Court erred in holding that municipal law supercedes international law. Accordingly, Mr. Ngoge urged us to set aside the judgment of this Court delivered on 23rd November 2007.

In his response to the applicants' averments, Mr. Kimani Kiragu, learned counsel for the respondent, swore the replying affidavit dated 5th March 2009 in which he deposed that his firm did, prior to filing the notice of appeal, file a notice of change of advocates. He concedes that the notice of change of advocates had an error in its body to the extent of the stipulation in that notice that his firm had been "appointed to act as advocates for the defendant in this suit in place of the Attorney General". He went on to say that the issue of representation was never raised and in any event there is no requirement that an appeal must be filed by the same advocates who acted for a party in the High Court; that the present application is coming very late in the day and no explanation was offered as to why it was not presented until February 2009 when the judgment was delivered in November 2007, and that the Court has no jurisdiction in any case to review or sit on appeal over its own decisions.

We have considered the application before us, the contents of the rival affidavits and counsel's submissions. We have also considered the respondent's list of authorities.

In our view, the application before us is an attempt to appeal against the final judgment of this Court which is not provided for in our laws. A judgment of this Court can only be interfered with by the same court in very limited circumstances, and only when the intention of such an act is to give effect to the intention of the Court at the time the judgment was given. In **Somani's vs Shirinkhanu (No. 2) [1971] E.A. 79 Law, Ag VP** stated that:-

"this Court has always refused invitations to review its own decisions except so as to give effect to its intention at the time the judgment was written. To depart from this rule would in my opinion be to adopt a most dangerous course."

A review of a judgment can also be done under the slip rule when the court wants to correct an apparent error or omission on the part of the court. That is not so in this case. The complaints by the applicant that the appeal was incompetent or that this Court erred in its decision are clearly not matters within the purview of giving effect to the judgment.

We think we have said enough. Our conclusion is that this application totally lacks merit. The same is therefore, dismissed with costs to the respondent.

Dated and delivered at Nairobi this 28th day of March, 2014.

W. KARANJA

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JUDGE OF APPEAL

G. B. M. KARIUKI

…….

JUDGE OF APPEAL

S. GATEMBU KAIRU

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

/rm