IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. SUP 26 OF 2013

BETWEEN

JAMES MWASHORI MWAKIO……..……..……..….APPLICANT

VERSUS

KENYA COMMERCIAL BANK LTD……..……1ST RESPONDENT

MR. ADEN MOHAMMED……..……..…….2ND RESPONDENT

(An Application seeking enforcement of the Court of Appeal Judgment (Kneller, Hancox, JJ.A & Nyarangi, Ag. J.A) dated 3rd April, 1984

in

C.A. NOS 28 OF 1982 & 69 OF 1983 [CONSOLIDATED])

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RULING OF THE COURT

James Mwashori Mwakio (applicant) is a peculiar, unique and tenaciously resilient litigant. We say so because he has walked the corridors of justice so many times over the last three or so decades pursuing what in his view is his proprietary right over property **LR. No. 8707/7.** The said property was sold by the respondent in exercise of its power of sale after the applicant failed to repay a loan he had been advanced.

The matter has been heard and determined before the High Court and severally before this Court. The applicant has nonetheless obstinately refused to accept that the matter should come to a conclusion. This is in spite of this Court advising him incessantly that litigation must come to a close and every journey must come to an end at one point or another. For instance, this Court (Gicheru, Tunoi & Shah, JJ.A) in its ruling in respect of Civil Application No. 59 of 1988 expressed itself as follows:-

> ***"the applicant is, of course, a layman. He is not a lawyer. He harbours deep sense of grievance on the loss of his property which doubtless is a prime property. But he must know that this Court has no jurisdiction to re-write an already delivered judgment in any other manner. Once this Court has delivered its Judgment it brings to finality that particular litigation between the parties, save for the limited application of the slip rule.***

> ***Even if the appellant knows this fundamental principle he does not wish to accept it. We are afraid he has to accept the principle. He must be told and we do so now, that the has come to the end of the road and if he does not desist from filing further applications or suits in connection with the present litigation to his case would be referred to the Attorney General under the provisions of Section 2 of the Vexatious Proceedings Act, Cap 41 Laws of Kenya, seeking orders that he be declared a vexatious litigant."***

That did not deter the applicant and he keeps coming back with the same nature of applications. In Civil Application No. Nai. 123 of 2004, this Court (Tunoi, O'Kubasu & Githinji, JJ.A) ten years ago addressed the applicant in the following terms.

> ***"It appears from the record that the applicant has been granted a waiver on court fees and as a result of this he has misused the noble assistance by inundating the courts with numerous, frivolous and vexatious applications which consume, and indeed waste, a great deal of judicial time and thus denying genuine litigants opportunity to have their cases heard. The right to a waiver on fees granted to the applicant as regards the same subject matter must be withdrawn and we so order …"***

Still unyielding, he moved this Court again two years later and his application was once again dismissed with the court explaining to him succinctly that he had exhausted all the channels open to him.

Not one to give up easily, he has kept coming back one application after another with the same message from the court falling on deaf ears. In a more recent application, this Court in a ruling dated 1st March 2013 did not mince its words when it rendered itself in the following terms:-

> ***"For the umpteenth time, we must tell the applicant that this Court is functus officio, all the issues between the parties having been conclusively decided in the High Court and Court of Appeal in Civil Appeal No. 147 of 1986. The issue as to interpretation of judgment has been conclusively dealt with….***
>
> ***Before we fold our hands, we must join the chorus in condemning the applicant for his continuous abuse of the court process by filing numerous but frivolous applications. We do not know whether he is doing so out of spite for this Court. For whatever reason he is doing so, he must be told that this is the end game. The applicant should come to terms with his fate and carry on with his life without engaging this Court in unnecessary battles whose outcome he probably already knows."***

Needless to say, the applicant still filed another application which according to the Court was not an application as envisaged by the Rules of this Court. The court (Nambuye, Ouko & Murgor, JJ.A) directed him to file a compliant application and advised the registry to reject any application that did not comply with **Rules 42** and **43** of this **Courts Rules.**

Thereafter, he filed this application which although said to be filed under **Rules 42** and **43** of this **Court's Rules**, purports to seek the leave of this Court to appeal to the Supreme Court against the ruling of this Court dated 1st March 2013. The present application is certainly not in compliance with the rules as directed by the court but we opted to hear it in the interests of justice and to give substantive justice paramountcy as opposed to strict adherence to technicalities.

The applicant's prayer is framed as follows:-

> ***"This Court be pleased to grant the applicant leave to appeal to the Supreme Court its ruling dated 1st March 2013."***

The document purported to be his supporting affidavit which is at page 4 of the record of appeal is neither dated nor signed by the deponent. The same just stipulates that the applicant is ***"exhausted to keep***

seeking enforcement of Court of Appeal judgment of 3rd April 1984 without results and I plead for conclusion according to the Judges of this Honourable Court."

It is explicit from his prayer that the only conclusion or orders of this Court the applicant will accept are the ones which will *'enforce the judgment of 3rd April 1984'*. Short of that, he will continue pestering the court with frivolous and somewhat annoying applications until the end of time! It appears that the applicant has the temerity and energy to file countless applications, to salvage what is impossible to achieve.

From the history of this matter as outlined above, we can safely conclude that to the applicant's mind, the Supreme Court is just another tier in the judicial system where he can perpetuate his litigation. He does not simply understand the constitutional requirements entailed in a reference to the Supreme Court. We shall painstakingly endeavor to explain to him in layman's language to try and make him understand. Our concern however is that the applicant may not be interested and/ or eager to take time to read the many decisions rendered by this Court which essentially re-emphasise that his attempt to reclaim his priced property is a fait accompli.

The Supreme Court has very restricted jurisdiction when dealing with matters emanating from this Court as provided for by **Article 163 (4) of the Constitution of Kenya 2010**. This Article gives a party a right to approach the Supreme Court as of right in any case involving the interpretation or application of the Constitution. The other instance is where this Court certifies that a matter of general public importance is involved.

In this case, the applicant does not seek interpretation of any provisions of the constitution. His story all these years is that the judgment of this Court dated 3rd April 1984 should be enforced. This Court has told him *ad nauseum* that there is nothing to enforce in the said judgment and that he has misconstrued its contents. We shall repeat for the benefit of the applicant what this Court told him in its ruling dated 8th February 2008:-

> ***"it is clear that the applicant has asserted on several previous occasions what he now asserts before us that the decision made by this Court on 3rd April 1984 in Civil Appeal No. 69 of 1983 this Court gave judgment in his favour against Kenya Commercial Bank Ltd. It is also clear that this Court has on several occasions consistently found his construction of tenor of the judgment on 3rd April 1984 to be wholly erroneous. We gave considerable latitude to the applicant to ventilate what he passionately felt was a misconstruction of the court order or otherwise a favourable judgment 'stolen' from him. But in the end, we must agree with the learned counsel for the respondent that this Court has become functus officio regarding the construction of the judgment of this Court dated 3rd April 1984 in Civil Appeal No. 69 of 1983…"***

Four days after that ruling, the applicant filed yet another similar application which was dismissed on the same grounds as the first one.

We have told him time and again since then that this Court has dealt with this matter with finality and has now become *functus officio.* In our view, the applicant now wants to move to the Supreme Court to agitate the same issue of the construction of the judgment in question. With respect, that is not a matter for the Supreme Court. It was a matter for this Court, and this Court has dealt with it to exhaustion and no other construction can be given to the said judgment.

For a matter to be referred to the Supreme Court, the issues involved must transcend the parochial interests of the parties. In this case, the judgment in question is strictly in respect of the parties to the suit. Indeed, the respondent has no problem with the same. It is therefore, an issue revolving only around the applicant and has no bearing on anybody else. It does not therefore, qualify to be classified as a matter of general pubic importance as envisaged by **Article 164(3) (b)** of the **Constitution of Kenya 2010**, nor does it raise any jurisprudential moment to warrant certification to the Supreme Court.

The transaction giving rise to all this litigation was a contractual relationship between the parties and does not raise any issues that transcend beyond the parochial interests of the applicant.

As the Supreme Court pronounced in the case of **Hermanus Phillipus Steyn vs Giovanni Gnocchi – Ruscone Sup. Application No. 4 of 2012,**

> ***"Mere apprehension of miscarriage of justice in a matter most apt for resolution in the lower superior court is not a proper basis for granting certification for an appeal to the Supreme Court."***

This pronouncement is on point and should put paid to the applicant's application. There is no issue for him to go and agitate before the Supreme Court. If the applicant feels that his situation raises a constitutional issue which would call for the intervention of the Supreme Court, then he should go there directly without passing through this Court. We believe we have said enough and entreat and implore Mr. Mwakio to listen to us this time and respect our orders. This is the end of his journey as far as this Court is concerned. Let him not come back here with an application that we review or set aside this order or any other similar application.

The time has come for this Court to decisively put its foot down and put an end to the chorus that litigation must come to an end. This Court has the responsibility under **Section 3A** and **3B** of the **Appellate Jurisdiction Act** to facilitate the just, expeditious, proportionate and affordable resolution of appeals.

Under **Section 3B** of the said Act, an advocate in an appeal has a duty to assist the court in furthering the overriding objective and to comply with directions and orders of the court. Invariably, this provision extends to parties who appear before us in person. They are not exempted from this duty. Mr. Mwakio is not exempted from this duty and it is high time that he desists from filing frivolous applications in flagrant disobedience of this Court's directions. There is nothing left for us to say in this matter that has not been said by other Honourable Judges of this Court who have dealt with the same for the last few decades.

We make a finding that the application before us is totally devoid of merit. The same is hereby dismissed with costs to the respondent. We further direct that the registry shall not accept any other application filed by the applicant herein in respect of this matter.

Dated and delivered at Nairobi this 4th day of April, 2014.

W. KARANJA

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JUDGE OF APPEAL

M. A. WARSAME

…….

JUDGE OF APPEAL

G. B. M. KARIUKI

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR