



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPEAL NO. 229 OF 2001**

**BETWEEN**

**SUM MODEL INDUSTRIES LTD .....RESPONDENT/APPLICANT**

**AND**

**1. INDUSTRIAL & COMMERCIAL**

**DEVELOPMENT CORPORATION.....APPELLANT/RESPONDENT**

**2. THE HON. ATTORNEY GENERAL .....INTERESTED PARTY**

**(An application to recall rescind set aside cancel or review the judgment and orders made herein on 8<sup>th</sup> June 2007 in an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Msagha J) on 16<sup>th</sup> February 2000**

**in**

**H.C.C.C. NO. 3389 OF 1994)**

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**RULING OF THE COURT**

On 10<sup>th</sup> July 2007, the respondent in this appeal, Sum Model Industries Ltd, filed a notice of motion, in which, he, in effect, seeks a review of the judgment this Court delivered on 8<sup>th</sup> June, 2007, in which damages of Kshs.8,515,060/= awarded to him by the superior court in its Civil Case No. 3389 of 1994, was reduced to Kshs.2,235,138.90.

The applicant's case in the superior court was that the respondent lent it money to establish a bakery. He bought machinery for that purpose but defaulted in loan repayment. The respondent, without any prior notice to it forcefully gained entry into the bakery, seized the machinery and later sold the machinery by public auction. As at the date of sale Kshs. 3,499,831/10 was due and owing to the respondent. The sale realized Kshs.3.59 million which the applicant considered as an under sale. The applicant's claim was for the value of certain properties which were either damaged in the course of the

seizure or were unaccounted for. It also claimed a sum of Kshs. 3,921, 644/30 which according to it was the difference between the market price of the goods sold and the price they realized at the auction. Both claims formed part of the sum the applicant claimed in its plaint as special damages.

There are two respondents named in the motion, namely Industrial and Commercial Development Corporation, the appellant, and the Hon. Attorney General. The latter was not a party in the appeal and it is curious why he has been joined in the motion.

Several grounds have been set out, but they all revolve around ground(a) of the motion which states as under:

“(a) That the Hon. Judges of Appeal arbitrarily without and or in excess of jurisdiction to recall review and or without Appellate jurisdiction over a valid ruling and order on admitted facts by their judgment delivered herein on 8<sup>th</sup> June 2007 purported to recall set aside rescind review and interfere with the ruling and order in Civil Application No. NAI. 153 of 2000 (UR 66/2000) Industrial and Commercial Development Corporation versus Sum Model Industrial Limited which decision removed from contest on the Appellant’s then intended appeal issues 10(b) and 10(e) on the plaint unreservedly admitted by the Appellant’s counsel to be **“due and payable to the Respondent/Applicant in any event.”**

By its plaint dated 15<sup>th</sup> September, 1994, the applicant prayed in paragraph (f) of the prayers, for:

“(f) **Special damages as proved at the hearing hereof**”.

The 1<sup>st</sup> respondent as defendant neither entered appearance nor filed defence within the stipulated period in the rules governing proceedings in the High Court. Interlocutory judgment was entered in default thereof “against the said defendant as prayed in the plaint. The award of costs shall await judgment when the suit will be set down for formal proof”. Thereafter the 1<sup>st</sup> respondent filed a written statement of defence, which pursuant to an application by the applicant was struck out. Mitey J. who heard that application and ordered the defence to be struck out, stated, in his ruling, among other things that:

“The plaintiff’s claim will be tested when the matter comes up for formal proof when the defendant has the right to cross-examination (sic) the plaintiff’s agreement.”

Mbogholi Msagha J. heard the applicant’s suit and pronounced judgment on the basis of only the evidence of the applicant. It was against that judgment that the appeal was filed. The appellant is the 1<sup>st</sup> respondent in the application before us and in its memorandum of appeal it challenged amongst other aspects, the basis upon which special damages were awarded, as in its view no proof had been given to support the award.

In the application before us the applicant contends and it was its counsel’s submission that neither the superior court nor this Court had the jurisdiction to assess special damages, nor did this Court have the jurisdiction to review downwards the award of special damages, the respondent’s defence having been struck out, and the said respondent having not adduced any evidence.

Before this appeal was filed the respondent had moved this Court under **rule 5(2)(b)** of The Court of Appeal Rules, for an order of stay of execution. At the hearing of that application the respondent’s counsel intimated that he was not disputing the applicant’s claim of Kshs.1,650,500/= in respect of the value of repossessed goods. The figure had been pleaded under paragraph 10(b) of the plaint. In view of this Mr.Ngoge submitted that this Court lacked jurisdiction to interfere with the figure in its judgment delivered on 8<sup>th</sup> June 2007.

Additionally, Mr. Ngoge submitted that the appeal was not competent in the first place. He could not raise the issue at the hearing of the appeal, he said, because he was then not representing the applicant. The basis of Mr. Ngoge’s submission was that, during the trial the respondent was represented

by Mr. Vincent Wohoro, advocate. The firm of Waruhiu, Kowade and Ng'ang'a came into the matter after judgment. It was Mr. Ngoge's submission that the firm needed the leave of the superior court before they would properly come on record for the respondent. It was further his submission that the said firm could not properly file a notice of appeal on behalf of the respondent without such leave.

Mr. Thiga for the respondent in answer to the submission regarding the competence of the appeal stated that his firm had filed in the superior court a notice of change of advocate before it filed a notice of appeal. Mr. Thiga also submitted that in view of previous decisions of this Court concerning lack of jurisdiction to recall its decisions for purposes of review, he did not think the Court has jurisdiction to grant the orders the applicant now seeks. He cited four of those decisions, namely: Lakhamshi Brothers Ltd v. R. Raja & Sons (1966) EA 313; Somani v. Shrinkham (No 2) (1971) EA 79; Musiara Limited v. William Ole Ntimama, C.A. Civil Application No. 271 of 2003; Chris Mahinda t/a Nyeri Trade Centre vs. Kenya Power & Lighting Company Limited, C.A. Civil Application No. 174 of 2005. Mr. Thiga did not think that the order made by this Court under **rule 5 (2)(b)**, above, would have any effect in the final judgment.

The superior court concluded the hearing of the applicant's case on 31<sup>st</sup> January 2000 and reserved its judgment to be delivered on 16<sup>th</sup> February, 2000. The judgment was delivered on due date. On 6<sup>th</sup> June 2000 the respondent's present firm of advocates filed a notice of change of advocate, and thereafter a notice of appeal. No issue was raised thereafter regarding either the competency of that firm to pursue the appeal on behalf of the respondent or the competency of the appeal for any other reason. Mr. Ngoge submitted before us that these, among other issues raised herein, should have but were not raised at the hearing of the appeal. When he was asked why they were not raised he sheltered behind the excuse that he was not then counsel appearing for the applicant. We are not unmindful of previous decisions of this Court to the effect that an issue of jurisdiction may be raised at any stage of the proceedings. It is however, doubtful whether such an issue can be successfully raised after the final determination of a matter before this Court. This is the final court in the land, and as we have said on several occasions before proceedings on any given matter must terminate at a certain point. The Court pronounced its judgment on the appeal on 8<sup>th</sup> June 2007 as it was mandated to do by **rule 31** of The Court of Appeal Rules.

In the recent past this Court has received a number of applications seeking orders of review of its own final decisions. The authorities cited above, by Mr. Thiga, are some of the decisions of this Court and its predecessor, the Court of Appeal for East Africa, arising from such applications. In all those decisions the general view expressed is that decisions of this Court are not liable to recall for purposes of review. But in Musiara Ltd, and Chris Mahinda, the court differently constituted held, obiter, that in exceptional circumstances the Court in exercise of its residual inherent jurisdiction might revisit its earlier decisions. However, in the case of Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others Civil Application No. NAI.307 of 2003 (154/2003 UR) a bench of 5 Judges of the Court left no doubt that the issue is one of public policy and notwithstanding that this Court's decision may be wrong, in the interest of certainty, security and finality the matter has to end somewhere. Omolo J.A put it this way:

“The issue of how to handle an impugned decision is the subject matter of the dispute before us and I believe I have sufficiently shown that the first principle in contention, namely that there ought to and must be an end to litigation, is an ancient principle and derives its authenticity from a public policy basis. Yes, a party may be able to show that a decision is wrong either in law or upon some other reason. But for the interest of peace, in the interest of certainty and security, such a party might and is often told:

“Even if all that you say is correct, yet the decision has been made and you must learn to live with it.”

Bosire J.A in the same matter rendered himself on the issue, thus:

“This application appears to challenge the doctrine of finality. This is a doctrine which enables the courts to say litigation must end at a certain point regardless of what the parties think of the decision

which has been handed down. It is a doctrine or principle based on public interest.”

It is now settled that the Court has no jurisdiction to revisit its earlier decisions. That position was re-echoed in Peter Nganga Muiruri v. Credit Bank Ltd and 2 Others, Civil Appeal No. 203 of 2006 (unreported). The court there rendered itself thus:

“We would respectfully point out to the appellant and his legal advisors that this matter had been concluded a long time back and attempts to revive it can only have one outcome - failure.”

Mr. Ngoge appeared to say that there is a difference between an ordinary decision and a decision made without jurisdiction. He probably had in mind the decision of this Court in the Matter of The Owners of the Motor Vessel “Lilian S” vs. Caltex Oil Kenya Ltd. [1989] KLR in which the late Nyarangi J.A remarked “***Jurisdiction is everything. Without it, a court has no power to make one more step.***”

On the assumption that this Court did not have jurisdiction to vary the award of damages made to the applicant by the superior court we say this. Jurisdiction is one of the issues which were available to the applicant to raise in the appeal. Issues of jurisdiction may be raised at any stage of the proceedings. However, it can only be raised during the pendency of a suit, not otherwise. In other words it was open to the applicant before this Court pronounced judgment in the respondent’s appeal to raise the red flag, and tell this Court:

“Sorry, you cannot pronounce judgment on this matter. You lack the jurisdiction to do so. So do not make any more step in the matter.”

The applicant having not raised the issue before judgment was pronounced all we have jurisdiction to do is to tell him:

“Sorry, as a matter of public policy proceedings must terminate at a particular point. Our jurisdiction was spent on 8<sup>th</sup> June, 2007, when judgment was pronounced on this matter. It is immaterial that an issue of jurisdiction could have been successfully raised. We have no power to help you. Learn to live with the judgment.”

We have said enough to show that this application is for dismissal. Accordingly we order that the notice of motion dated 26<sup>th</sup> June 2007 be and is hereby dismissed with costs to the respondent, the appellant in the appeal.

**Dated and delivered at Nairobi this 26<sup>th</sup> day of March 2010**

**R.S.C. OMOLO**

.....

**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

.....

**JUDGE OF APPEAL**

**E.M. GITHINJI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**