



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI. NAI NO. 283 OF 2006 (UR. 158/2006

JAMES MWISHORI MWAKIO APPLICANT

AND

KENYA COMMERCIAL BANK LTD. RESPONDENT

(Application to reverse the judgment of the High Court of Kenya at Nairobi (Pall J.A.) dated 26th July, 1995

in

H.C.C.C. NO. 2815 OF 1980)

RULING OF THE COURT

By the Notice of Motion dated 31st October, 2006 the applicant seeks various orders regarding two properties L.R. No. 8707/7 and io4/Chawia/Dedaya/Ngerenyi. The application is supported by a 280 paragraph affidavit wherein the applicant has given a comprehensive history of the litigation over a period of 25 years and expressed his grievances against various orders made by Courts from time to time.

The foundation of the application is his assertion that according to an order made by this Court on 3rd April, 1984 in *Civil Appeal No. 69 of 1983*, he was the successful party in the suit filed in the High Court, namely, *H.C.C.C. NO. 2815 OF 1980*.

The applicant deposes in paragraph 1 of the supporting affidavit, thus:

“1. That according to Court of Appeal order for 3/4/84 in appeal 68/83 by Justices Kneller, Hancox and Nyarangi, J.J.A. I am the winner of civil case No. 2815/80”.

Unfortunately, the applicant did not annex the authentic or any record of the judgment or order made on 3rd April, 1984. He firmly asserts in his written submissions, that:

“..... the legal position about the five issues I have stated which we (sic) framed together (sic) was final (sic) on 3/4/84 and the legal position was that KCB Ltd lost case for ever and ever and had to pay me without debate. Each time I came I sought enforcement not debate and even now I seek enforcement”.

In the course of the hearing of the applicant, we made an order that the registry should place before the Court the records of previous litigation between the parties and the registry did so. After perusing the

records, we discovered that this is not the first application relating to the construction of the order made on 3rd April, 1984 in *Civil Appeal No. 69 of 1983*. Indeed, in *Civil Appeal No. 147 of 1986 James Mwashori Mwakio vs. Kenya Commercial Bank* the appellant had raised several grounds of appeal concerning the order of 3rd April, 1984 two of which were:

“1. *The learned Judge misconceived the terms of the Court of Appeal on what remains to be examined following the judgment of the Court of Appeal of 3rd April, 1984 on this dispute.*

.....

.....

18. *The trial Judge erred to re affirm his judgment in conflict with the judgment of the Court of Appeal of 3rd April, 1984”.*

This Court in *Civil Appeal No. 147 of 1986* (Plat, Apaloo & Masime, JJ.A.) examined the set of grounds of appeal relating to the decision dated 3rd April, 1984 in *Civil Appeal No. 69 of 1983* and said:

“When this matter was first pending for hearing before the High Court, the appellant sought injunction and a number of orders. These were either not granted or orders were made to which he took exception. So he brought a number of interlocutory appeals and motions before this Court. A number of rulings and orders were made on this which have no bearing on the question debated at the actual hearing before Porter J. The only one that has some relevance, is an order made by this Court on the 3rd April, 1984. That order apparently remitted the substantive suit to the High Court for hearing and determination on its merits.

But the appellant seems to have though that the order to re-hear the suit made by this Court either pronounced on the substantive suit on its merits or made findings on the dispute which was binding on the court below.

One of the appellant’s most reiterated grounds of appeal is that the court below was in error in declining to be bound by this court’s decision”.

The Court continued:

“The same complaint was reiterated in his oral argument before us. In our opinion, the contention on these grounds wholly misconceives the effect of the “judgment” or order of this Court dated 3rd April, 1984.

This Court did no more than to direct the High Court to perform its normal duty of hearing and pronouncing on the matter in dispute between the parties in exercise of its original jurisdiction. This Court had no original jurisdiction and did not take or purport to take upon itself the task of deciding the issue joined between the parties or such as were disclosed on the evidence. That has now been done. We do not need to say any more than that these ill conceived grounds fail together with the oral contentions founded on them”. (The underling is ours).

Earlier in *Civil Application No. Nai. 14 of 1985, James Mwashori Mwakio vs. Kenya Commercial Bank*, the applicant brought a Notice of Motion to discuss deadlock on implementation of the judgment of the Court of Appeal of 3rd April, 1984 in *Civil Appeal No. 68/83*. This Court (Hancox, Nyarangi, JJ.A. & Platt, Ag. J.A.) in dismissing the application stated on 5th July, 1985:

“No deadlock has been shown as regards our judgment of the 3rd April, 1984. Even if there were, this is not the proper way to resolve it. Those judgments were in our view perfectly plain”.

In *Civil Application No. Nai. 59 of 1998 James Mwashori Mwakio vs. Kenya Commercial Bank Ltd*, the applicant brought an application specifically on the enforcement of the judgment of 3rd April, 1984. This Court (Gicheru, Tunoi, Shah, JJ.A.) dismissed the application on 4th June, 1998 saying in part:

“It becomes necessary to find out what the judgment of this Court of 3rd April, 1984 decided. Mr. Mwakio seems to be under the impression that the judgment finally decided his rights in his favour and that the High Court had no jurisdiction to go beyond the scope of that judgment. But that judgment did not finally decide anything. It simply remitted the proceedings to the High Court to proceed to trial in the usual way. The suit was then heard by Porter, J. in the High Court and that court dismissed the suit on 14th April 1988”.

Regarding the finality of the litigation, the court stated:

“The appellant is of course a layman. He is not a lawyer. He harbours a deep sense of grievances on the loss of his property which is doubtless 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 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 that he has to accept the principle. He must be told and we do so now, that he has come to the end of the road”.

Apparently, the applicant took no heed of that advice, hence the application now before us which is a rehash of the self-same issue.

We need not quote any other previous decisions of this Court on the point. It is clear from the above analysis 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 of 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 learned counsel for the respondent Ms. Wambani, 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*.

For those reasons, we dismiss the application with no order as to costs.

Dated and delivered at Nairobi this 8th day of February, 2008.

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR