



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI**

CORAM: OMOLO, O'KUBASU & DEVERELL, J.J.A.

CIVIL APPLICATION NAI 174 OF 2005 (106/2005 UR)

BETWEEN

CHRIS MAHINDA T/A NYERI TRADE CENTRE APPLICANT

AND

KENYA POWER & LIGHTING CO. LTD RESPONDENT

**(Appeal from the ruling and orders of the High Court of Kenya
at Nyeri (Mr. Justice J. M. Khamoni) dated 25th July, 2004**

in

H.C.C.C. NO. 37 OF 2004)

RULING OF THE COURT

This is an application by Mr. Chris Mahinda representing himself brought under **section 3(2)** of the Appellate Jurisdiction Act, **Rules 42 and 56 (2)** of the Court of Appeal Rules (the Rules).

The applicant seeks the following orders:-

- 1. That the Honourable Court be pleased to assert its inherent jurisdiction to rescind its own orders.***
- 2. That the Honourable Court be pleased to substitute its order dated 10th June, 2005 with an order dismissing the respondent's application dated 9th August, 2004 and allow the appeal with costs to the applicant.***
- 3. That the taxation in C. A. No.148/2004 be stayed pending determination of this application.***

The application is brought on the grounds that:-

- (a)The ruling of the court grossly violated the law on Advocates Act and the Law Society of Kenya Act and is a gross travesty of justice.***
- (b)The ruling of the court deprived the applicant of the protection of law and allowed injustice to***

be occasioned on him in respect of rule 22 (2) of the court of appeal rules.

(c) The court occasioned injustice to the applicant by contravening court of appeal rule 27 (3). The preliminary objection raised was ignored against the rule.

(d) It is a fundamental tenet of the adversarial system that cases are won or lost on the basis of the respective strengths in a proper consideration of the facts and law pertaining to the matter submitted by the contending parties rather than whether the court is inclined or persuaded to believe or disbelieve either party.

(e) The power, authority and jurisdiction of the court under rule 56 (2) of the court of appeal rules include the power to rescind its decision.

(f) That the Respondents herein have illegally obtained a taxation date, which ought to be stayed by this Honourable Court.

(g) The applicant prays for the order that the cost of and incidental to this application be paid by the respondent.

It became clear from the applicant's oral submissions that the applicant was dissatisfied with the decision of this Court delivered on 10th June 2005 by which the applicant's Notice of Appeal and Record of Appeal were struck out consequent upon the Court's finding that the person signing those documents on behalf of the applicant herein was not qualified to act as an advocate at the time he signed them. After setting out the detailed reasoning for the decision, the concluding paragraphs of that ruling were as follows:-

“We come to our decision based solely on the undisputed fact that no practising certificate for 2004 had been issued to the advocate prior to the signing by him of both the Notice of Appeal and the Memorandum of Appeal. When those two acts were done by him the advocate was not qualified to act as an advocate with the effect that the two documents were incompetent.

A practising certificate is issued for a whole year and the certificate issued in this case was for the year 2004 and it was suggested that, although it was issued on 22nd September 2004, it had retrospective effect back to the beginning of 2004.

We do not accept this submission. If no practising certificate had been issued when the act was done the advocate was not qualified to do that act at the time he did it.

We accordingly allow the application and hereby order that the Notice of Appeal and the Memorandum of Appeal be struck out with costs to the applicant. The effect of this order is that the record of appeal itself must be struck out.”

The applicant, as already stated, appeared in person before us. His submission was that the Court had reached a wrong conclusion as a result of an inadvertent misinterpretation of the Advocates Act.

He submitted that this Court had jurisdiction to hear the application as it fell within the ambit of rule 35(1) and (2) of the Court of Appeal Rules (“the Rules”). Those provisions are as follows:-

(1) A clerical or arithmetical mistake in any judgment of the court or any error arising therein from an accidental slip or omission may at any time, whether before or after the judgment has been embodied in an order, be corrected by the court, either of its own motion or on the application of any interested person so as to give effect to what was the intention of the court when the judgment was given.

(2) An order of the Court may at any time be corrected by the Court, either of its own motion or on the application of any interested person, if it does not correspond with the judgment it purports to

embody or, where the judgment has been corrected under sub-rule (1), with the judgment as so corrected.

We have no hesitation in rejecting the applicant's reliance on rule 35. The applicant is contending that the interpretation of the law by the court was wrong. This cannot fall within the phrase "*clerical of arithmetical mistake.*"

The applicant also argued that the order for costs fell within the ambit of the words in rule 56(1)(b) "*the order was one permitting the doing of some act, without specifying the date by which the act was to be done.*" We do not consider that that rule enables the Court, which has awarded costs to the successful applicant, to rescind its order for costs because the successful applicant has been slow to tax its bill of costs where there is no time limit for the filing such a bill.

However that does not mean that there are no circumstances in which the Court of Appeal can review, vary or rescind its decisions.

CA Civil Application 271 of 2003 (Nairobi) Musiara Ltd v. William Ntimama (Tunoi, O'Kubasu, JJA and Onyango Otieno Ag JA (as he then was)) was a case in which Musiara Ltd sought orders for a declaration by this Court that the Ruling or Order of this Court previously made by a different Bench should be recalled or cancelled or alternatively rescinded. The Court hearing this application reiterated that:-

"this court has always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of this court on the basis of arguments thought of long after the judgment or decision was delivered or made."

The Court further stated:-

"At the moment this court is the final court of the land. Where an issue has been determined by a decision of the court, that decision should definitively determine the issue as between those who were party to the litigation. The reason for this general approach is that public policy demands that the outcome of litigation should be final and that litigation should not unnecessarily be prolonged. This is the reason why limits have been placed on the rights of citizens to open or to reopen disputes."

The Court then cited with approval the following passage from ***Taylor & another v. Lawrence & another [2002] 2 All. ER 353.***

"The court of appeal held that it had a residual jurisdiction to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances. The court had implicit powers to do that which was necessary to achieve the dual objectives of an appellate court, namely to correct wrong decisions so as to ensure justice between the litigants involved, and to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents. A court had to have such powers in order to enforce its rules of practice, suppress any abuses of its process and defeat any attempted thwarting of its processes. The residual jurisdiction to reopen appeals was linked to a discretion, which enabled the court of appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised. There was a tension between a court having such a residual jurisdiction and the need to have finality in litigation, such that it was necessary to have a procedure, which would ensure that proceedings would only be reopened when there was a real requirement for that to happen. The need to maintain confidence in the administration of justice made it imperative that there should be a remedy in a case where bias has been established and that might justify the court of appeal in taking the exceptional course of reopening proceedings which it had already heard and determined. It should, however, be clearly established that a significant injustice had probably occurred and that there was no alternative effective remedy. The effect of reopening the appeal on others and the extent to which

the complaining party was the author of his own misfortune would also be relevant considerations.”

In the present case we consider that there are no exceptional circumstances such as the establishment of bias on the bench or any significant injustice having occurred. This is merely a case where the applicant disagrees with a decision on a matter of interpretation of statute law. It is not therefore a case in which the applicant should be permitted to reopen the argument.

For these reasons we order that the application by motion dated 23rd June 2005 be hereby dismissed with costs.

Dated and delivered at Nairobi this 18th day of November, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

W. S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR