REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 8 OF 2021

FERROTECH INDUSTRIES LTD.....APPELLANT

VERSUS

MWADZIWE ALI HARE.....RESPONDENT

(Being an appeal from the ruling of the Chief Magistrate's Court at Kaloleni given on the 03.08.2021 in SRMCC No. 254 of 2018)

BETWEEN

MWADZIWE ALI HARE..... PLAINTIFF

VERSUS

FERROTECH INDUSTRIES LTD..... DEFENDANT

JUDGMENT

1. This dispute arises from a ruling delivered by the trial court on 3rd August 2021 in Kaloleni SRMCC No. 254 of 2018. By that ruling, the trial magistrate declined to review the court's judgment delivered on 17th December 2019. The basis for the application for review was that the trial court assumed jurisdiction over the matter when by law, it did not have it.

2. Aggrieved by the decision, the Appellant filed the current appeal. The appeal is opposed.

3. The Respondent has, in addition to opposing the appeal on its merits, challenged this court's jurisdiction to hear it. The grounds for objecting to the court's jurisdiction are set out in the Notice of Preliminary Objection dated 6th July 2021.

4. On 12th October 2021, the parties took directions that both the preliminary objection and appeal be heard concurrently. Further, it was agreed that the two be canvassed through written submissions. The parties have since filed their respective submissions.

5. Since the preliminary objection relates to the court's jurisdiction to entertain the appeal, it is appropriate that this aspect of the matter be disposed of first. This is necessary because a determination of this question will determine whether the court will go into the merits of the appeal.

6. The basis of the preliminary objection is section 52(2) of the Work Injury Benefits Act as read with article 162(2) of the Constitution of Kenya 2010 and section 12 of the Employment and Labour Relations Court Act. In the Respondent's view, section 52(2) of the Work Injury Benefits Act donates appellate jurisdiction to the court under the Act only in respect of decisions by the Director of Occupational Safety and Health Services (the director). Accordingly, the court cannot assume jurisdiction in respect of appeals from a Magistrate's Court on matters arising from the Act.

7. I do not agree with the position taken by Counsel for the Respondent on this issue. Section 52(2) of the Work Injury Benefits Act deals with appeals from decisions by the director on claims filed before him or her in accordance with the provisions of the Act. On the other hand, the appeal herein challenges the decision by the trial court refusing to review its judgment under section 80 of the Civil Procedure Act as read with Order 45 of the Civil Procedure Rules. With a lot of respect to Counsel, I do not see how this can be said to fall within the purview of section 52(2) of the Work Injury Benefits Act. This is a distinct question arising from the exercise of the trial court's review jurisdiction under section 80 of the Civil Procedure Act. Just because the question on review before the trial court related to jurisdiction of the court to handle the dispute in view of the provisions of the Work Injury Benefits Act does not of itself bring the matter within the purview of section

52(2) of the Work Injury Benefits Act.

8. The court's appellate jurisdiction is, as set out by Counsel for the Appellant, well articulated under section 12 of the Employment and Labour Relations Act. It covers all employment and labour relation disputes and matters incidental and connected thereto. And there is no doubt that what was before the trial court was a dispute arising from an employment relationship.

9. I would have had reservations on the court's jurisdiction if the trial magistrate's decision had been an award made pursuant to the provisions of the Work Injury Benefits Act. But this is not the case in this cause. I therefore decline to allow the preliminary objection as presented.

10. Another preliminary matter issue relates to whether the Applicant, having exercised the right of appeal from the judgment of the trial court, was in law entitled to apply for review of the same decision under Order 45 of the Civil Procedure Rules. It is clear from the record that immediately the trial court delivered its judgment, the Appellant in this cause filed an appeal against the decision via Malindi High Court Civil Appeal No. 6 of 2020. The Appellant says that the said appeal has since been withdrawn. In support of this contention, the Appellant has filed a copy of the Notice of Withdrawal of Appeal dated 5th July 2021. The Appellant has also filed an extract of email communications with the court through which a request for assessment of court fees on the notice was done.

11. However, on examination of the copy of the Notice of Withdrawal of the Appeal included in the Record of Appeal, the court noted that it did not bear the court receiving stamp. This prompted the court to call for the physical court file to confirm whether the Notice of Withdrawal of Appeal had actually placed on the court file and endorsed.

12. A perusal of the court record in Civil Appeal No 6 of 2020 disclosed that there was no Notice of Withdrawal of the Appeal placed on the court file. And neither is there an endorsement of the withdrawal of the said appeal.

13. The net effect of this development is that the Notice of Withdrawal of Appeal cannot possibly be deemed as duly filed. In ***Paul Odhiambo Onyango & another v Kalu Works Limited [2020] eKLR***, the court expressed the view that a document intended for filing in court can only be deemed as filed when it is stamped with the court receipt stamp at the relevant court registry. Expressing the same view, Wendo J in ***Republic v Public Procurement and Administrative Review Board Ex-Parte Zhongman Petroleum & Natural Gas Group Company Limited [2010] eKLR*** said as follows:-

> **''In my view, a document is deemed to be lodged when it is presented, paid for, acknowledged as received by stamping and allocated a number.''**

14. Consequently, the appeal in Civil Appeal No 6 of 2020 is deemed to still alive as at the date of writing this judgment. Suffice it to say that the appeal was still live when the application for review was filed before the trial court. That this is so is evident from the Appellant's own documents filed before the trial court. At paragraph 13 of the affidavit by Winnie Awuor Paul in support of the application for review, she depones as follows:-

> **'' That I aver to have been notified by the Advocates on record that they have now lodged online a notice of withdrawal of the said incompetent Memorandum of Appeal <u>though the physical file is for unknown reasons said to be missing from the registry.''</u>** (Emphasis added by underlining)

15. This disposition is, in my view, a confirmation of the fact that as at the time of filing the application for review, the Appellant was aware that it had not managed to place its Notice of Withdrawal of Appeal No. 6 of 2020 on the court file as the file was said to be missing from the court registry. Thus, the document had not been endorsed by the court at that time.

16. The accepted legal position is that a party to litigation may not pursue an appeal and a review of the same court decision simultaneously. In ***Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR*** the Court of Appeal expressed itself on the matter as follows:-

> **''In concluding this limb of the judgment, it has to be stressed that the legal policy of Order 45 is to prevent a party, against whom judgment has been passed, from availing himself of two remedies at one and the same time; to apply for a review in the court below while his appeal (not notice of appeal) is pending in the Court of Appeal. It is now an accepted view that both the Civil Procedure Rules and the Court of Appeal Rules did not contemplate the simultaneous proceedings of review and appeal before two different courts at the same time. Where a party has filed an appeal but subsequently wishes to apply to the court from which the appeal came to review the decision impugned, that party must, in the first place withdraw the appeal.''**

17. As has been pointed out above, in the instant case, the Appellant attempted to withdraw the appeal but did not successfully do so. The Appellant did not follow up its Notice of Withdrawal of Appeal to ensure it was stamped and placed on the court record for purposes of endorsement by the court.

18. As such the appeal remains alive. As such, the Appellant can only be deemed to have been pursuing the appeal and review concurrently. To the extent that this is so, the application for review before the trial court was inappropriately filed. Consequently, the trial court's decision to dismiss the application on this ground was, in my view, sound. Thus, the current appeal in so far as it seeks to challenge the decision of the trial magistrate on this ground is without merit.

19. The other issue that the trial court considered was whether the issue of jurisdiction as raised in the application for review was a matter that was suitable for review or appeal. In the trial court's view, the question whether the trial court had jurisdiction to entertain the suit,

coming after judgment had been delivered in the cause, ought to have formed a ground of appeal against the judgment rather than an application for review.

20. In taking this position, the trial court proceeded on the generally agreed position that the question whether a trial court misapprehended the law on a particular issue during the trial is a matter suitable for consideration in an appeal against the decision rather than through review. In the trial court's view the question whether a court wrongly assumed jurisdiction over a matter is an issue of law and hence amenable for reconsideration on appeal.

21. The position taken by the trial court on the issue appears to find support precedent. In ***Patrick Miano v Mathira Coffee Farmers Housing Cooperative Society Ltd [2017] eKLR*** Ngaah J dealing with a similar issue as in the current case had the following to say on the matter:-

> **''Even if the appellant's argument that the trial court lacked jurisdiction was to be accepted as plausible and therefore it either misapprehended the law or misdirected itself in that regard when it proceeded to hear and determine the dispute before it, that cannot be a ground for review. As always, a difference of opinion on the interpretation of the law or a legal principle cannot be a ground for review. I have previously stated elsewhere (HCCC No. 12 of 2014(Nyeri) Ecobank Ltd versus David Njoroge Njogu and Ann Wanjiru Njogu) that where a party aggrieved by an order or a decree is of the conviction that the order or the decree was based on a misapprehension of the law, the correct course would be to appeal against that decree or order rather than file a review application which, in my humble view, puts the judge or the magistrate who made it in a somewhat awkward position of explaining or defending the order or the decree.''**

22. In **Julius Ochieng Oloo & another v Lilian Wanjiku Gitonga [2019] eKLR**, the Court of Appeal expressed itself as follows on the same issue:-

> **''That said the question before us is whether lack of jurisdiction by the court against which review was being sought albeit introduced late could have been a ground for review as envisioned under Order 45 of the Civil Procedure Rules; and further, whether the ratio decidendi by the learned Judge is erroneous in law. The grounds for review as envisaged under the said Order are limited to; (a) Discovery of new and important matters or evidence which was not within the knowledge of the applicant or which could not be produced by him at the time when the decree or order was made; (b) a mistake or error on the face of the record; or c) some other sufficient reason. Supplemental to the above is that the application must be brought without unreasonable delay.**
>
> **It follows that lack of jurisdiction by the court making the ruling/order is not an error apparent on the face of the record, but rather an error of judgment that goes to the merit of the decision. Such an error can only be corrected by an appellate court.''**

23. The Appellant sought to rely on the decision in ***Nairobi City Council v Thabiti Enterprises Ltd (1995-1998) 2 EA 231*** to express the view that want of jurisdiction does constitute a ground for review. Although the Court of Appeal in the Nairobi City Council case mentions the question of jurisdiction as providing a possible ground for review, this was in the context of whether a court can properly determine a matter which is not captured in the pleadings before it and whether if it did so this would constitute an error on the face of the record that the court can correct through a review of its decision.

24. Further, it must be noted that the Julius Ochieng Oloo decision by the Court of Appeal is a latter decision by the same court. Applying the cannons of interpretation, I take the view that the views expressed in the Julius Ochieng Oloo decision express the latest position of the Court of Appeal on the matter which this court is bound by.

25. I should also perhaps point out here that the view that matters touching on errors of law should really be the subject of appeal rather than review was in fact expressed in the dissenting judgment of Lakha J in the Nairobi City Council case. It is this view that was to later be expressed by the Court of Appeal in the Julius Ochieng Oloo case.

26. In ***Pancras T. Swai v Kenya Breweries Limited [2014] eKLR*** the Court of Appeal once again expressed itself in the following terms on the issue under consideration:-

> **'' It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are *functus officio* and have no appellate jurisdiction.''**

27. In ***Manjula Dhirajlal Soni v Dukes Investments International Limited & 2 others [2018] eKLR***, the court dealing with a similar scenario stated as follows:-

> **''What this court has been called upon to do by the Bank is to review and set aside the orders that were made by Nyamweya J. on 18th December, 2014 and to hear afresh the Bank's Notice of Motion application dated 25th June, 2014 that was dismissed and the Interested Party's application dated 30th June, 2014 that was allowed on the ground that Nyamwaya J. had no jurisdiction to hear the two (2) applications because she was not an Environment and Land Court judge.**
>
> **I am of the view that when a court proceeds to exercise jurisdiction it does not have, that is not a mistake or error apparent**

on the face of the record but an error of judgment that goes to the merit of the decision. Such error in my view can only be corrected through an appeal process. If a judge is to be called upon to review his decision on the ground of lack of jurisdiction, that would be tantamount to calling upon the judge to sit in an appeal against his own decision. In the case before me, the Bank has contended that the decision of Nyamweya J. was null and void and of no legal effect. A court cannot be called upon to declare its own decision null and void. It is only an appellate court that can do that.''

28. Having regard to the foregoing, I think that the trial court was correct in declining to review its decision by taking the position that the issue of jurisdiction ought to have been taken on appeal rather than by way of review. Accordingly, the appeal in so far as it challenges the trial court's ruling on this ground is without merit.

29. The other matter that was considered by the trial court in declining the application for review is that it had taken inordinately long for the Appellant to file it. From the record, the judgment that was sought to be reviewed was delivered on 17th December 2019. The application for review was presented on 6th July 2021 some one year and seven months down the line.

30. That an application for review under the Civil Procedure Act and Rules should be filed without undue delay is a requirement set out under Order 45 of the Civil Procedure Rules. Therefore, any delay that appears prolonged in my view needs to be properly explained by the applicant.

31. I have perused the affidavits in support of the application for review before the trial court. None of them offers an explanation why it took more than one year and seven months for the Appellant to take a decision to move the court for review.

32. The learned trial magistrate held that the Appellant was in the face of this delay guilty of laches. This is a position I agree with. The Appellant has relied on the Nairobi City Council case where the application for review was filed approximately six months down the line to advance the argument that delay in applying for review in the current dispute ought to be countenanced.

33. However, in my view the unexplained delay of one year and seven months looks inordinate. It would perhaps have made some difference had the Appellant attempted an explanation for such delay. Discussing the same subject the court in ***Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR*** quoting previous views reiterated the point as follows:-

''An unexplained delay of two years in making an application for review under Order *44 Rule I* (now Order 45 Rule 1) is not the type of 'sufficient reason' that will earn sympathy from any court''.

34. The upshot of the foregoing analysis is that although the issue regarding jurisdiction that the Appellant raised in the application for review was of critical significance, it was perhaps taken up inappropriately. Accordingly and for the reasons set out in this judgment, this appeal lacks merit. I therefore dismiss it with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF NOVEMBER, 2021

B O M MANANI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B O M MANANI

JUDGE