IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, H. OKWENGU & J. MOHAMMED. JJ.A)

CIVIL APPLICATION NO. 23 OF 2016

BETWEEN

THOMAS OWEN ONDIEK……..1ST APPLICANT

EDDAH AMAKOBE INGUTIA……..2ND APPLICANT

VERSUS

NATIONAL BANK OF KENYA LTD……..1ST RESPONDENT

CENTRAL BANK OF KENYA……..2ND RESPONDENT

(Being an application for review and or setting aside in toto judgment dated 29th October, 2015 by Judges of Appeal Court, D. K. Maraga, D. K. Musinga and S. Gatembu Kairu, FCIArb

in

CIVIL APPEAL NO. 182 OF 2011

****

RULING OF THE COURT

[1] This is a review application by which the applicants ask the court to review its judgment delivered on 29th October, 2015 in Court of Appeal Civil Appeal No. 182 of 2011 and order a re-trial of Eldoret High Court Civil Suit No. 175 of 1999.

[2] The primary facts as stated below on which the review application is based are not in dispute.

2.1 The 1st applicant was an employee of the 1st respondent at its Eldoret branch. The 2nd applicant is the 1st applicant's wife.

On 7th April, 1999, following a complaint by a customer regarding the operation of his account, the officers of the 1st and 2nd respondents went to the Eldoret branch. A search was done at the 1st applicant's office and later at his house. Some cash, staff cheques and debit slips were collected from his house. On the same day, the 1st respondent by a letter terminated the 1st applicant's employment

on the ground that he was engaged in money lending activities contrary to his terms of employment.

2.2 On 7th of June 1999, the 1st applicant filed High Court Eldoret civil suit No. 115 of 1999 claiming that the termination of his services was illegal and wrongful, general damages for wrongful termination of employment, terminal benefits and return of his personal effects carried during the search at his house. At the trial, the 2nd applicant gave evidence of the 1st applicant. After the trial, the High Court made a finding that the 1st respondent (Bank) had not proved that the 1st applicant was involved in money laundering. The court found that the 1st applicant's employment was unlawfully terminated and that the 1st applicant was entitled to terminal benefits. There was uncontroverted evidence that the Bank had paid the 1st applicant terminal benefits. However, the court ordered that terminal benefits be computed by the Deputy Registrar of the court. The 1st applicant's claim for general damages and for return of the goods were dismissed.

2.3 The 1st respondent appealed to the Court of Appeal in Civil Appeal No. 116 of 2012. By a Judgment delivered on 5th February 2016, this Court allowed the appeal on the ground that the judgment appealed from was a nullity as it was neither dated nor signed by the trial Judge. However, the Court remitted the suit to the High Court for a re-trial. The Court observed in the judgment that the 1st applicant had filed a motion in the High Court for assessment of the terminal benefits as ordered but the trial Judge had on 27th July 2004, declined to do so in the absence of an original file which was missing but nevertheless the Deputy Registrar thereafter proceeded to compute the terminal benefits which was delivered as a final ruling on 6th July, 2005.

2.4 On 31st August 1999, less than three months after filing the 1st suit, the two applicants filed High Court Civil Suit No. 175 of 1999 against the two respondents. In the second suit, the 1st applicant claimed, inter alia, that his employment was maliciously terminated; the termination made it impossible for him to service a loan of Kshs. 1,285,650.50 which had been advanced to him by the 1st respondent. That during the illegal search at his house goods worth Kshs. 6,911,940.00 were taken including Kshs. 824,800.00 and that the action of the respondent had defamed him. The applicants claim included damages for loss of business, general damages for illegal search, and general damages for defamation. Compensation for goods taken from the house during the illegal search and that the payment of the loan be limited to Kshs. 1,285,650.50 on the amount outstanding at the time his employment was terminated.

2.5 After trial the High Court reviewed the evidence, dismissed the suit and in essence, made the following findings:

i. The claim for wrongful termination was res judicata and unmaintainable having been decided in HCCC No. 115 of 1999.

ii. Damages for loss of income and salary could not be awarded as the 1st applicant had been awarded three months' salary in lieu of notice in HCCC No. 115 of 1999.

iii. As evidence regarding the search was contradictory in material respects, there was no search as alleged.

iv. The alleged search did not amount to defamation and the claim for defamation was time- barred.

v. The claim for return of the seized goods was not proved and was an afterthought as it should have been incorporated in the HCCC No. 115 of 1999.

vi. The loans advanced to the 1st Applicant were governed by the terms and conditions of the contract

and the Court would not re-write the contract between the parties.

vii. The suit was res judicata as all matters raised in the suit ought to have been raised in HCCC No. 115 of 1999.

2.6 The applicants having been dissatisfied with the Judgment, filed an appeal in Court of Appeal, Civil Application No. 182 of 2011. By a Judgment delivered on 29th October 2015, the appeal was dismissed with costs on the grounds that the 1st applicants' claims were *res judicata* and unproven.

[3] The applicants seek review of the judgment, in Civil Application No. 182 of 2011 on the grounds that:

a) The two decisions of the Court contradict in principle and substance as the orders in Eldoret of Civil Appeal 182 of 2011 were pegged on the proceedings in Eldoret HCCC No. 115 of 1999 which were nullified.

b) The effect of the nullification of the proceedings in HCCC No. 115 of 1999 means that the proceedings are non-existent and as a consequence a matter cannot be res judicata if the comparable does not exist.

c) It is only fair that this Court reviews its decision in Civil Application 182 of 2011 so as to bring it in tandem with the decision in Civil Appeal No. 116 of 2012."

[4] The application, is brought under various Articles of the Constitution, Section 3 of the Appellate Jurisdiction Act, Rule 1(2) of the Court of Appeal rules and order 45 of the Civil Procedure rules 2010. It is supported by the affidavit of the 1st applicant who appeared in person and by his bulky supplementary affidavit sworn on 19th September, 2015. The respondents have filed a replying affidavit sworn by Habel A. Waswani on 11th August, 2016 in opposition to the application. The respondents depone, inter alia, that the applicants lack *bona fide* and are acting in abuse of the process of the Court as the first suit is pending for re-trial and has not been withdrawn. However, the 1st applicant depones in paragraph 5 of the supplementary affidavit that HCCC No. 115 of 1999 is no longer active as he withdrew it on 25th July, 2017. He annexed a notice of withdrawal of the suit dated 25th July, 2017 and filed in the High Court on or about 25th July, 2017.

[5] The applicants seek the review of this Court's Judgment in Civil Appeal 182 of 2011, which was delivered on 29th October, 2015, mainly on the ground that the decision of the High Court in HCCC No. 115 of 1999 on the basis of which a finding of *res judicata* was made was subsequently, on 5th February, 2016, set aside in Civil Appeal 116 of 2012 and the suit remitted to the High Court for re-trial. In addition, the applicants deponed that the re-trial cannot occur as they subsequently withdrew the suit by a notice of withdrawal filed in the High Court on or about 25th July, 2016.

[6] Unlike in the case of trial courts, there is no constitutional or statutory provisions which confers to this Court as an appellate Court, the jurisdiction to substantively re-open an appeal. However, this Court has discretionary residual jurisdiction to re-open a concluded appeal in cases of fraud, bias or other injustice that have occasioned real injustice likely to erode public confidence in the administration of justice in exceptional circumstances. [See **Benjoh Amalgamated Limited & Another -vs- Kenya Commercial Bank Limited [2014] eKLR.** The circumstances which justify the review or the re-opening on appeal and which tainted the impugned decision must be in existence at the time the decision was rendered although they may be discovered later.

[7] Firstly, the applicants are relying on the Order for re-trial which was not in existence at the time the

appeal was dismissed on 29th October, 2015. The Order for re-trial in Civil Appeal No. 116 of 2012 was made on 5th February, 2016 over three months after the appeal was dismissed. The Court determined the appeal on the basis of the facts as they existed at the time of decision. The decision cannot be reversed on the basis of an event which occurred after the decision was rendered.

[8] Secondly, the contention of the applicants that the principle of *res judicata* does not apply if the initial decision is a nullity and thus, does not exist in law is with respect, erroneous. As section 7 of the Civil Procedure Act shows, res judicata applies not only to decided suits but also to any matters which should have been raised in the previous proceeding. This is clear from explanation 4 of section 7 aforesaid which states;

"Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit".

In **Henderson -vs- Henderson (1843) Hare 100, 115,** the principle was enunciated partly thus;

"The plea of res judicata applies except in special cases, not only to points upon which the Court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject litigation and which the parties exercising reasonable diligence might have brought forward at the time." [See also Pop- In (Kenya) Ltd & 3 Others -vs- Habib Bank A.G Zurich (1990) eKLR.

This principle was expressly and correctly applied by this Court in the impugned judgment and the Court correctly held that the claims raised in of HCCC No. 175 of 1999 ought to have been canvassed in the previously instituted suit - HCCC No. 115 of 1999.

[9] Thirdly, it is apparent from the judgment in CA No. 182 of 2011 that the decision of the Court was not solely based on the principle of re judicata. In addition, the Court considered the merits of the appeal and came to the conclusion that the claims had not been proved to the required standard.

[10] Fourthly, although the applicants state that the purpose of the review is to bring the decision in C.A No. 182 of 2011 in tandem with the decision in C.A No. 116 of 2012, the real object which applicants expressly seek is a re-trial of HCCC No. 175 of 1999. The applicants have already filed a notice to withdraw HCCC No. 115 of 1999. That is not surprising because, as the judgment in Civil Appeal No. 116 of 2012 indicates, his Advocate Mr. Miyienda submitted that the appeal had been overtaken by events because the 1st applicant had already been paid the awards ordered in the judgment. That means that the re-trial of the suit as ordered would not be in the interest of the 1st applicant. In the circumstances, the contention by the 1st respondent is correct that the applicants are trying to hood wink the Court with a view to re-opening and re-litigation of HCCC No. 175 of 1999. Thus, allowing the application would be in contravention of the principle of finality.

[11] Lastly, the applicants are the authors of their misfortune. Although the applicants now appear in person, they were represented by a counsel in the two suits who should have been aware of the scope of the principle of res judicata and taken a remedial action before the first suit was prosecuted.

[12] For the foregoing reasons, the application has no merit. It is hereby dismissed with costs to the respondents.

Dated and delivered at Eldoret this 5th day of October, 2017.

E. M. GITHINJI

……

JUDGE OF APPEAL

HANNAH OKWENGU

……..

JUDGE OF APPEAL

J. MOHAMMED

……

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

……

DEPUTY REGISTRAR