IN THE COURT OF APPEAL AT NAIROBI

(CORAM: NAMBUYE, OTIENO-ODEK & KANTAI, JJA)

CIVIL APPEAL NO. 16 OF 2014

BETWEEN

SAMUEL AMUGUN..... 1ST APPELLANT

WILLIAM MWANGI KAIBERE..... 2ND APPELLANT

MICHALE NDUNGU KIBUKU.....3RD APPELLANT

PAL MUTEE ..... 4TH APPELLANT

WILLIAM MAJANI ..... 5TH APPELLANT

AND

THE ATTORNEY GENERAL ..... RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Nairobi (Ougo, J.) dated 29*th November 2013* in H.C.C.C No. 1897 of 1997)

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AS CONSOLIDATED WITH H.C.C.S No. 743 of 2002)

JUDGMENT OF THE COURT

1. This is an appeal against the Ruling of the High Court(R. Ougo, J.) dated 29th November 2013 dismissing the appellants' application for review of the Judgment of the High Court, Lenaola, J. (as he then was) delivered on 8th October 2004. In **Evan Bwire vs. Andrew Aginda Civil Appeal No. 147 of 2006** cited in **Stephen Githua Kimani vs. Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR** this Court stated as follows:

"An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh…"

2. By Notice of Motion dated 28th January 2013, the appellant moved the High Court to review the judgment of the trial court

delivered on 8th October 2004. In support of the application, it was urged that the appellants had discovered new evidence which was not within their knowledge and could not be produced at the time the judgment was delivered; that it was in the interest of justice and fairness that the review sought be granted. The affidavit in support of the application was deposed by ***Mr. Christopher Maloba*** and dated 28th January 2013.

3. The appellants are retirees and former employees of the ***East African Railways (EA Railways)*** in the defunct ***East African Community (EAC)*** which collapsed in 1977. Upon collapse of the Community, the appellants were given two options either to retire from the service of the Community and receive their pension or be employed in the newly established ***Kenya Railways Corporation*** and work until retirement when computation of each individual's pensionable sum would be done taking into account the period served under the EA Railways and the EAC.

4. The appellants chose to continue service under Kenya Railways Corporation. Upon retirement with Kenya Railways Corporation, they were paid pension. However, a dispute arose in relation to the sum of £21,841,427/= which was paid by the United Kingdom (UK) Government, through Crown Agents, to the Governments of the EAC countries (Kenya, Uganda and Tanzania). This money was to be paid to the EAC citizens who had worked for the Community as the UK government terminal dues and pension contribution. This money was to be divided between Kenya, Uganda and Tanzania who were the Partner States of the EAC. Kenya received 42% of that amount.

5. The appellant's claim against the Kenya Government represented by the respondent is that they have not received their pension dues from the sums of money paid to the Kenya government on their behalf by the British Government.

6. In their application to review the judgment by Lenaola, J. the appellants asserted that post-judgment, they have discovered new evidence that reveal the Governments of Uganda and Tanzania have paid their former colleagues at the EA Railways; they have discovered new evidence that show the exact amount of money Kenya received from the British Government; they have discovered that part of the money received by the Kenya Government is still being held by the Central Bank and has not been paid out to the beneficiaries. In the supporting affidavit, it was deposed that all these new evidence and payments made by the Governments of Tanzania and Uganda were not within the knowledge of the appellants during the trial and prior to delivery of the judgment sought to be reviewed. The appellants aver that it is in the interest of justice to review the judgment of the High Court to enable the respondent to account for and pay out all monies received by the Government of Kenya on their behalf.

7. In dismissing the application for review, the learned judge held as follows:

"I note the judgment the applicants seek to review was delivered on 8*th October 2004, 9 years ago. The applicants do not explain the delay in filing this application nor do they state when they came across the information or how this information affects the decision that was given by the court. It is not this court's duty to look at the paragraphs and conclude that the information therein is sufficient to seek a review or warrant an intervention. The grave error apparent on the face o*f the record has also not been explained by the applicants. In my view, if the applicants were dissatisfied with the judgment of the court, they should have appealed. I find no merit in the application, the applicants have failed to bring themselves within the ambit of Order 45 Rule 1 and I therefore dismiss the application dated 28*th January 2013 with no order as to costs."*

8. Dissatisfied with the Ruling, the appellants have lodged the instant appeal citing the following grounds:

"(i) The judge fundamentally and grossly erred in failing to properly apply the principles for review under Order

45 of the Civil Procedure Rules

2010.

(ii) The judge erred in failing to appreciate, apply and give effect to the provisions of Article 159 (2) (d) of the 2010 Constitution.

(iii) The judge erred in dismissing the application for review despite finding there was new evidence.

(iv) The judge erred in finding there was delay in filing the application for review when the same had been explained away by the applicants."

9. At the hearing of this appeal, learned counsel Mr. Kibe Mungai appeared for the appellants while Mr. Kepha Onyiso, the Principal State Counsel represented the respondent. The appellants filed written submission and case digest in the matter.

10. Counsel for the appellants rehashed the background facts to the present dispute. He urged that the learned judge erred and failed to appreciate the new evidence which was not in the knowledge of the appellants. The new evidence included a consent judgment entered in the High Court of Uganda at Kampala **Civil Suit No. 1010 of 1996** dated 27th October 2000 and a Deed of Settlement filed in the High Court of Tanzania at Dar-es-Salaam **Civil Suit No. 95 of 2003** dated 28th September 2006. The dispute in the instant matter as well as the cases in Uganda and Tanzania is similar as they all involve pension and retirement monies owed to retired former employees of the East African Railways and more particularly monies received from the United Kingdom Government.

11. In explaining delay in filing the review application, the appellants faulted the learned judge for failing to appreciate that since the appellants had no knowledge of the new items of evidence, in the interim they took reasonable steps to embark on political settlement of the dispute as evidenced by the debates in Kenya's National Assembly as per Hansard Proceedings of 5th August 2009 and 19th September 2012. The appellants also took prompt action and instituted a suit before the East African Court of Justice seeking payment of their pension dues; that upon all these efforts and initiatives failing, the appellants came across the new evidence and promptly moved the High Court to review the judgment dated 8th October 2004. Counsel submitted that the appellants have neither been in slumber nor indolent, but have actively been in pursuit of their pension claims using all available legal and political channels.

12. The appellants cited ***Sections 80*** of the **Civil Procedure Act** and ***Order 45*****n of the Civil Procedure Rules** as well as various judicial authorities. Citing **R vs. The Anti- Counterfeit Agency & Others, exparte Surgipham Misc. Application No. 11 of 2012**, it was submitted that a litigant has an unfettered right to apply for review upon discovery of new and important matter or evidence that was not within his knowledge or could not be produced at the time when the decree was passed. The appellants relied on **National Bank of Kenya Limited vs. Ndungu Njau Civil Appeal No. 211 of 1996** as cited in **Pancras T. Swai vs. Kenya Breweries Limited 2014 eKLR** where it was held that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court.

13. On delay in filing the review application, the appellants submitted that the delay of nine (9) years was explained, namely, the resolution of the pension dispute between the parties is both a political and legal process and the appellants have tried in vain to invoke both the legal and political process as well as invoking the jurisdiction of the East African Court of Justice to no avail. It was submitted that the delay was reasonably explained and the learned judge failed to fathom the explanations. In concluding his submissions, counsel urged this Court to consider the overriding objective to do substantial justice to the parties; that the ruling by the learned judge has led to miscarriage of justice upon the applicants.

14. The respondent in opposing the appeal urged that the learned judge did not err. There is no new evidence; the appellants were given two options upon the collapse of the defunct EAC and they opted to continue service under the auspices of KR Corporation; the appellants duly retired from Kenya Railways and have been paid all their dues; the period served under the defunct East African Railways was considered in the computation of each individual pension dues; having been paid all their retirement dues, it is not clear what the appellants are claiming.

15. The respondent further submitted that there was unexplained delay of nine years in making the application for review; if the appellants were dissatisfied with the trial court's judgment, they ought to have appealed within the stipulated time lines and not filed an application for review. The respondent cited the decision of this Court in **Alfred Asidaga Mulima vs. Attorney General & 8 others, Civil Appeal No. 179 of 2015.** In the ***Alfred Asidaga case***, *(supra)* the dispute was between the employees of the former East African Airways of the defunct East African Community; this Court in a judgment delivered in March 2017 directed the respondent, the Attorney General,to publish the list of all former employees of the East African Airways who had been paid their pension dues by the Government of Kenya. Counsel urged us to analyze the reasoning in this case to guide us in determination of this appeal.

16. We have considered submissions by counsel and authorities cited. This appeal is not interlocutory but an appeal from a ruling dismissing an application to review a final judgment delivered by the trial court on 8th October 2004. We remind ourselves in this appeal that it is not for us to review the judgment of the trial court delivered on 8th October 2004, rather, the issue before us is whether the learned judge was correct in dismissing the application for review.

17 In **Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (deceased) vs. Kariuki Marega & another [2018] eKLR**, this Court in considering an appeal against dismissal of an application for review of judgment under ***Order 45*** of the **Civil Procedure Rules** expressed itself as follows:

"The broad question ….. is whether the learned Judge, in dismissing the application for review exercised her discretion in accordance with the justice of the case and the law. Put differently; did the appellant prove the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made""

18. ***Section 80*** of the **Civil Procedure Act** which is the substantive law relating to Review provides as follows:

"80 Any person who considers himself aggrieved by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred.

or

(b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or order therein as it thinks fit".

19. To operationalize ***Section 80*** aforestated, the procedural provisions of ***Order 45 (1)*** of the **Civil Procedure Rules** provide that:

"45 (1) Any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from

which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies to the review".

20. An application for review of a judgment is guided by the principle of discovery of a new and important matter or an error apparent in the face of record. In **Muyodi vs. Industrial & Commercial Development Corporation & Anor., (2006) 1 EA 243***)*, this Court stated*:*

"For an application for review under Order XLV, Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important matter or evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay".

21. Under the provisions of ***Order 45*** of the **Civil Procedure Rules**, a party who chooses to proceed by way of review loses the right of appeal. In the instant case, the appellant chose the route of review of the judgment of the trial court dated 8th October 2004 and has lost the right of appeal when the review was declined.

22. In the instant appeal, in our consideration of the learned Judge's exercise of discretion in declining review, we remind ourselves of holding dicta from **Mbogo & Another vs. Shah (1968) E.A. 93** at page 95, where ***Sir Charles Newbold P.*** held:

"…a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice…."

23. Comparatively, in the Indian case of **Aribam Tuleshwar Sharma vs. Ariban Pishak Sharma (1979) 45CC 389, 1979(11) UJ 300 SC**, it was held that:

"The power of review may be exercised on the discovery of new and important matter or evidence which, after exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made, it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits that would be province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court."

24. One of the grounds urged in this appeal is that the judge erred in finding that there was no error apparent on the face of the judgment by the trial court. The judge in dismissing the application for review made a finding that the grave error apparent on the face of the record was not explained by the appellants. Counsel submitted that:

"the gross error apparent on the face of the record is the new evidence discovered by the appellants; this new evidence also constitutes an apparent error or omission on the part of the court that it ought to correct."

25. The submission by the appellant is perplexing. An error cannot be said to be apparent on the face of the record if one has to travel beyond the record to see whether the judgment is correct or not. In **Chandrakhant Joshibhai Patel vs. R [2004] TLR, 218** it was held that an error stated to be apparent on the face of the record:

"....must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions."

26. In **Pancras T. Swai vs. Kenya Breweries Limited [2014] eKLR,** this Court stated as follows:

"The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 (now Order 45 in 2010 Civil Procedure Rules) relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the court is deemed to be alive to."

27. In our considered view, the submission by the appellant is not in tandem with the legal meaning of error on face of the record. The appellant urged the judgments by Uganda and Tanzania High Court's constitute new evidence which are errors on the face of the record of the judgment by the trial court. In effect, the appellant urged us not to look at the judgment by the trial court to determine if there was an error on its face but to go beyond and look at material and information from Uganda and Tanzania that was not before the trial judge. Such extraneous material cannot constitute an error on the face of the record. This ground of appeal fails. We affirm the reasoning of the learned judge that the appellants did not demonstrate that there was the alleged error on the face of the record.

28. On delay, the *ratio decidendi* of the impugned ruling by the learned judge is that there was a period of nine-year delay in filing the application for review. The appellants contend that the delay was sufficiently explained. Conversely, the respondent submitted that there has been an unexplained inordinate delay.

29. An application for review should also be promptly filed. (See **Michael Mungai vs. Ford Kenya Elections & Nominations Board & Ors. (2006) eKLR** and **Nyamogo & Nyamogo Advocates va. Kago (2001) 2 EA 173**. What is or is not inordinate delay depends on the facts of each particular case. If a credible excuse is made out, the natural inference would be that the delay is excusable. An applicant must also show that the respondent will not be prejudiced if the delay is excused. However, as a rule the longer the delay the greater the likelihood of prejudice.

30. On our part, we have analyzed the affidavit filed in support of the application for review dated 28th January 2013 deposed by Mr. Christopher Maloba. The affidavit discloses new and additional evidence that was not before the trial court on 8th October 2004 when judgment was delivered. We note that the judgment of the Uganda High Court at Kampala in Civil Suit No. 1010 of 1996 is dated 27th October 2000. The Deed of Settlement filed in Tanzania High Court at Dar-es-Salaam in Civil Suit No. 95 of 2003 is dated 28th September 2006. These dates come after the date of judgment by the trial court on 8th October 2004. Whether the Uganda and Tanzania judgment and Deed respectively are relevant is a matter to be determined on the merits of an application for review by the trial court.

31. Further, the appellants have demonstrated to our satisfaction that it was not until the Parliamentary debates as reported in the Hansard Proceedings of 5th August 2009 and 19th September 2012 that they came to know the amount the Government of Kenya had received from the British Government. It is through Hansard Parliamentary proceedings that they came to know that the sum of £ 21,841,427/= was received. Upon this fact coming to their knowledge, we are satisfied that the appellants did not delay to seek review of the judgment of the trial court and pray for account of the monies received by the Kenya Government from the United Kingdom Government. In this context, the Kenya Government is trustee of the monies received and the appellants aver that they are part of the beneficiaries of the money. The application for review was filed on 28th January 2013. These facts remind us the provisions of ***Section 20*** of the **Limitation of Actions Act** which provides as follows:

"20 (1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action:

(a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.

(2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period of limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date on which the right of action accrued: (Emphasis supplied)

Provided that the right of action does not accrue to a beneficiary entitled to a future interest in the trust property, until the interest falls into possession."

32. In this matter, we are satisfied that the Government of Kenya as represented by the respondent will not be prejudiced having received monies from the British Government as a trustee for former employees of the defunct East African Community who are the beneficiaries of the sums received. It would be unconscionable and not in the interest of justice for a trustee to lock out beneficiaries and retain trust funds on account of delay. The respondent invited us to consider the decision of this Court in **Alfred Asidaga Mulima & 2 others vs. Attorney General & 8 others [2017] eKLR.** We have considered the same and it is not relevant in this appeal particularly at this instant stage of the dispute between the parties. However, we appreciate the dicta therein where it was expressed thus:

"65. In our view, even in cases where undisputedly there was violation of a party's constitutional rights where there has been inordinate delay in instituting a claim, the court should always consider whether the delay was unreasonable and whether it is prejudicial to the respondent….."

33. In the instant matter, we have considered the statement by the judge in the impugned ruling where the judge stated as follows:

"***I*t is not this court's duty to look at the paragraphs and conclude that the information therein is sufficient to seek a review or warrant or warrant an intervention."**

This statement invites an inference that the judge did not look at all the information contained in the paragraphs before her. With due respect, the statement by the judge is a misdirection in law. It is the duty of the court to look at the pleadings and affidavits and all paragraphs filed to determine if the information therein is sufficient to seek a review and to make a determination on the merits of the application. This statement and misdirection by itself, invites us to set aside the ruling by the learned judge.

34. In totality, this appeal has merit. We hereby set aside the ruling of the High Court dated 29th November, 2013. We remit for review the Judgment dated 8th October, 2004 delivered by Lenaola, J (as he then was) in H.C.C.C. No. 1897 of 1997 as consolidated with H.C.C.S. No. 743 of 2002. The review be limited to consideration of the new evidence presented by the appellants in the Notice of Motion dated 28th January, 2013. The case be heard by any judge other than Ougo, J. Appropriate orders be made upon review.

35. This appeal be and is hereby allowed with no order as to costs.

Dated and delivered at Nairobi this 20th day of December, 2018

R. N. NAMBUYE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR