IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA & GATEMBU, JJ.A.)

CIVIL APPEAL (APPLICATION) NO.282 OF 2004

BETWEEN

BANK OF BARODA (KENYA) LIMITED.....APPLICANT

AND

MARGARET NJERI MUIRURI.....RESPONDENT

(An application to review, vary and/or set aside the Judgment of this Court (Waki, Warsame and Gatembu, JJ.A.) delivered on 10th October 2014

in

Civil Appeal No. 282 of 2004.)

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RULING OF THE COURT

1. On 10th October, 2014 this Court, (**Waki, Warsame and Gatembu, JJ.A**), delivered a considered judgment and held, *inter alia*, that there was no evidence that the interest rate charged by the applicant was in accordance with **section 44** of the **Banking Act**; that the interest was manifestly excessive and morally wrong and consequently made the following orders:-

***a) An order in terms of prayer (c) of the plaint dated 19th October 2000. To give effect thereto,* we order that:-**

(i) The Bank shall, within 60 days from the date of delivery of this Judgment, furnish to the appellant and to the High Court, detailed statements of account in relation to both the loan and current accounts from the inception of both accounts showing all debits and credits and interest rates charged at different times so as to arrive at the balance claimed by the Bank to be outstanding on each account.

(ii) In default of compliance by the Bank, the appellant and the estate of the deceased shall stand discharged from all claims by the Bank.

b) Upon compliance with this order, the matter shall be remitted back to the High Court for determination of the following,

and any other, issues that may arise and for disposal by any Judge excluding Kasango J:

(i) Whether the interest charged by the Bank on the loan and current accounts of the borrower from time to time was in accordance with the terms of the agreement between the parties and the law.

(ii) Whether the appellant is indebted to the Bank, and if so, to what extent.

(iii) The liability of the appellant and the estate of the deceased if any and the extent thereof.

c) As the appellant has been successful in this appeal, the costs of the appeal shall be borne by the respondent, but otherwise, each party shall bear its own costs of the proceedings before the High Court.

Orders accordingly."

2. Subsequent to delivery of the aforesaid judgment, the applicant filed an application under the provisions of **sections 3, 3A** and **3B** of the **Appellate Jurisdiction Act** and **rule 42 (1)** of this Court's Rules seeking a review and setting aside of the entire judgment. The applicant further urged the Court to substitute the impugned judgment with an order dismissing the respondent's appeal with costs.

3. The application for review was made on grounds that:-

"1. There exists an error of law in the judgment of the court of 10th October, 2014. The court held that Section 44 of the Banking Act applies to interest rates charged by banks against loans advanced by banks to the extent that banks are required to seek the approval of the Minister in charge of finance before varying the interest rates. Interest and Section 44 was never an issue before the High Court or the Court of Appeal. The issue was not pleaded and was not before the courts.

2. The effect of this finding is that where a bank has increased the rate of interest charged on an advance without the approval from the Minister in charge of finance matters, the interest charged as a result will be illegal and irrecoverable.

3. Section 44 of the Banking Act does not apply to interest rates and the court erred in finding that section applies to" rates charged by banks. Interest used to be governed by Section 39 of the Central Bank of Kenya Act and is now governed by Section 44 of the Banking Act.

4. The decision of the court is unfair and unjust to the applicant in that the court has already held that the increase of the interest rates by the applicant bank without approval of the Minister in charge of finance was not in accordance with law and even after holding so, the court has gone ahead to direct that the matter be remitted back to the High Court for the determination of the same question.

5. In the circumstances, it is highly unlikely that the High Court will arrive at a different conclusion from that of this court even if the case is remitted to a different judge.

6. The applicant is likely to suffer further injustice or failure or miscarriage of justice unless the court's decision is reviewed, varied and or set aside.

7. There also exists a fundamental error apparent on the face of the record in that the judgment of the court contains excerpts supposedly of the applicant's witness' testimony given in the High Court but which testimony is not at all reflected in the proceedings on the record.

8. The court relied heavily on the excerpts supposedly of the applicant's witness' testimony given in the High Court in arriving at its decision and the decision of the court was based on material not on record thereby necessitating a review."

4. The application was supported by an affidavit of one, **David Ogega Nyaboga**, a manager of the applicant at the Industrial Area Branch which basically amplifies the aforesaid arguments.

5. The respondent opposed the review application and filed a replying affidavit. She stated that the issue of whether the Bank, (the applicant), had complied with section 44 of the Banking Act was before the High Court and this Court; that in the circumstances it matters not whether the deponent of the applicant's affidavit, David Ogega Nyaboga, was cross examined on the same or not; that this Court is now *functus officio* and has no jurisdiction to revisit the issue; that section 44 of the Banking Act applies to interest rates as they are part of bank charges; that this Court was right in ordering that the matter be remitted to the High Court for determination of the questions it raised; that the test to be applied on the judgment is the legal position of the said section but not the effect the same may have on the banking industry; and that the applicant does not deserve the discretionary orders it was seeking as it is in contempt of court orders on the issue of providing accounts.

6. **Mr. Fraser**, Senior Counsel appearing for the applicant, submitted that the issue of compliance with section 44 of the Banking Act had not been pleaded and was therefore not before the trial court. This Court has power to review its own decisions in appropriate circumstances, senior counsel submitted, and in support thereof cited **Benjoh Amalgamated Limited & Another v Kenya Commercial Bank Ltd [2014] eKLR** and **Standard Chartered Financial Services Ltd & Another v Manchester Outfitters (Suiting Division) Ltd & others [2016] eKLR**.

7. Mr. Fraser further submitted that the issue of section 44 of the Banking Act having not been pleaded before the High Court did not fall for determination at all. In that regard, he referred the court to the agreed issues for determination. He therefore urged the court to review and set aside its judgment as prayed.

8. **Mr. Musyoki**, learned counsel for the respondent, submitted that the issues raised in the review application were submitted on before the High Court and this Court; that the issue of section 44 of the Banking Act was raised before the High Court; that pleadings need not contain the law; that in his view this is not a suitable matter for review and if the applicant is not satisfied with this Court's decision, the right thing is to prefer an appeal to the Supreme Court.

9. We have considered the application before us and submissions by counsel.

It is not in dispute that this Court has jurisdiction to review its own decisions in certain instances. In **Benjoh Amalgamated Limited & Another v Kenya Commercial Bank Ltd** (supra) this Court held:-

"It is our finding that this Court not being the final court has residual jurisdiction to review its decisions to which there is no appeal to correct errors of law that have occasioned real injustice or failure or miscarriage of justice thus eroding public confidence in the administration of justice. This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice. The finality principle is urged on the basis of public interest as a public policy issue and is premised on the need for stability and consistency in law while the justice principle is urged on the basis of justice to the parties."

10. In **Parliamentary Service Commission v Martin Nyaga Wambora & others [2018] eKLR** the Supreme Court summarized the principles for an

application for review as follows:-

"66. [31] Consequently, drawing from the case law above, particularly *Mbogo and Another v Shah***, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:**

(i) A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court.

(ii) Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;

(iii) An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.

(iv) In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.

(v) During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.

(vi) The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:

(a) as a result a wrong decision was arrived at; or

(b) it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice."

11. In this application, the central issue for our consideration is whether this Court found erroneously that section 44 of the Banking Act applied to interest rates charged by the applicant; and whether the question of interest and the aforesaid section were in issue in the High Court proceedings and in the appeal that was before this Court. The section states as follows:-

"44. No institution shall increase its rate of banking or other charges except with the prior approval of the Minister."

12. Did the issue of interest and compliance with section 44 of the Banking Act ever arise before the High Court" Our answer is in the affirmative. The issue of interest chargeable by the Bank arose in the pleadings. In the list of agreed issues for determination, issue No. 8 reads as follows:-

"8. What interest was applicable to the charge" Was this agreed between the Bank and the borrower""

13. During the proceedings the issue was also canvassed. The respondent, who was then PW1, is recorded to have told the trial court that the interest charged on the principal debt was "*not imaginable*", that it was like robbery; and that it was not according to the loan agreement. The applicant's witness, David Ogega Nyaboga, (DW1), told the trial court that he was not aware whether there was any approval of the rate of interest by the minister.

14. In its judgment, the trial court made reference to the aforesaid arguments by the parties and also cited submissions by counsel with specific reference to section 44 of the Banking Act. The learned judge stated:-

"The plaintiff in her evidence stated that the rate of interest charged by the defendant to be "robbery' and the court is of the view that indeed considering the amount of the facility, of Kshs.6 million and the amount now being claimed by the defendant being close to Kshs.200 million that the rate of interest not only is it exorbitant but is morally wrong."

That notwithstanding, the learned judge concluded that the contract between the parties provided that the Bank could vary the rate of interest at its absolute discretion.

15. In the appeal that was argued and determined by this Court, the learned judges carefully perused the record of appeal and made the following conclusion:-

56. We have found in the above discussion that there was no evidence that the interest rate charged by the respondent was in accordance with Section 44 ***of the*** *Banking Act****. We have found that it was manifestly excessive, and, in the words of the trial judge, morally wrong. We have further expressed the view that the clause relied on to charge the interest that led to this exhorbitant indebtedness was not only unconscionable and without notice to the appellant, but was bad for failure to accord with the relevant provisions of the law. In addition we have found that the bank owed a statutory and fiduciary duty of care to the appellant and the deceased's estate.***

16. In view of the foregoing, we do not agree with the applicant that *"interest and section 44 was never an issue before the High Court or the Court of Appeal."*

It appears to us that the applicant's real intention in their current application is to have another bite at the cherry, which cannot be entertained in an application for review.

17. In **Parliamentary Service Commission v Martin Nyaga Wambora & others**, *(supra)* this Court reiterated as follows:-

[30] We further add that the review window so envisaged is not meant to grant an applicant a second bite at the cherry. It is not an opportunity for an applicant to re-litigate his/her case… at the core of the application is the Court's exercise of discretion. It is the Court/Judge's decision that is impugned and not the substantive application being re-argued. Hence an applicant is under a legal burden to lay a basis, to the satisfactory of this Court, that in exercise of its discretion, the limited Bench acted whimsically or misdirected itself in reaching the decision it made."

We respectfully adopt that position in this application.

19. We are of the considered view that this is not an appropriate case for this Court to exercise its residual jurisdiction of review of its own decision as the applicant has not satisfied the required principles. Consequently, the applicant's application dated 17th December, 2014 is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 25th day of October, 2019.

P. N. WAKI

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR