



**Nganga & another (The Joint Legal Representative to the Estate of Ndungu Gichuhi Njoroge) v
Maina & another (Civil Appeal E021 of 2021) [2024] KEHC 9906 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9906 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E021 OF 2021
DKN MAGARE, J
JULY 29, 2024**

BETWEEN

JANE WANJIRU NGANGA 1ST APPELLANT

SUSAN WAIRIMU NDUNGU 2ND APPELLANT

**THE JOINT LEGAL REPRESENTATIVE TO THE ESTATE OF NDUNGU
GICHUHI NJOROGE**

AND

DAVID MWANGI MAINA 1ST RESPONDENT

PETER MAINA NGETHA 2ND RESPONDENT

RULING

1. This is an application dated 22/9/2023. It seeks the following orders:-
 - a. That the Respondent be granted leave of the court to effect a change of Advocate from M/s Kimondo & Gachoka Advocates to M/s Kinyua Kiama & Co. Advocates.
 - b. That this court be pleased to review its judgment delivered on the 20th April, 2023 and to substitute it with an order dismissing the Appeal and file suit in the lower court with costs for want of pecuniary jurisdiction.
 - c. That the costs of this application be borne by the Appellant/Respondent.
2. This is based on the grounds that the Respondents desired to change advocates. They stated that the suit was filed in a court without jurisdiction. They state that the amount exceeds the monetary limit of 3,000,000/=.
3. The judgment in the lower court is as follows:



- i. Liability – 100%
 - ii. Pain and suffering – 500,000/=
 - iii. Fatal accident – 2,068,146/=
 - iv. Specials – 62,980/=
- Total - 2,531,126/=
4. Justice Muchemi set aside the judgment and substituted the same with:
 - a. Loss of dependency – 7,228,936/=
 - b. Pain and suffering – 500,000/=
 - c. Special damages – 62,980/=
 - d. Loss of expectation of life – 100,000/=

Total - 7,891,916/=
 5. This is the judgment sought to be reviewed and set aside. The jurisdiction of the High Court is set out in Article 165(5)-7 of the [Constitution](#) as doth:-
 - “(5) The High Court shall not have jurisdiction in respect of matters-
 - (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).
 - (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”
 6. The High Court has no jurisdiction to hear appeals from the High Court. The orders sought can only be issued by a court sitting pursuant to Article 164(3) of the [Constitution](#) as doth:-
 - “(3) The Court of Appeal has jurisdiction to hear appeals from:-
 - (a) the High Court; and
 - (b) any other court or tribunal as prescribed by an Act of Parliament.”
 7. The Jurisdiction of Review is provided under section 80 of the [Civil Procedure Act](#) which states that:

“ Any person who considers himself aggrieved—



- (a) 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 made the order, and the court may make such order thereon as it thinks fit”.

Section 63 (e) of the [Civil Procedure Act](#) states that:

“In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient.”

8. Order 45 of the [Civil Procedure Rules](#) provides for Review and it states as follows:

- “(1) Any person considering himself aggrieved—
 - (a) 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 the 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 for the review”

9. I associate myself with the reasoning of Kuloba J (as he then was) in *Lakesteel Supplies v Dr. Badia and another* Kisumu HCCC No 191 of 1994 where he opined that:

“The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends



of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."

10. All the questions raised are questions of law for which only an appeal could have settled. It is unnecessary to go through the humongous submissions.
11. The court cannot appeal to the same court. The issue of whether the court can enhance damages to an amount beyond the jurisdiction of the court of first instance is a question of law and as such it is not a question for review.
12. In the case of *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others* (2021) eKLR, Mativo J, as he then was stated as doth:-

"The power of review can be exercised by the court in the event discovery of new and important matter or evidence which despite exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the order was made. As the Supreme Court of India [15] stated: -

"the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" means a reason sufficiently analogous to those specified in the rule"

13. This court will be overstepping its mandate in reviewing lawful judgment. It does not matter that had this court been sitting it would have come to a different conclusion. The decision is only appealable.
14. Leave for the new advocates to come on record is however merited for whatever it is worth.

Determination

- a. Leave be and is hereby granted to the firm of M/s Kinyua Kiama & Company Advocates to come on record in place of M/s Kimondo Gachoka & Company Advocates for the Respondent.
- b. The application for review is unmerited and as such dismissed with costs of Kshs 10,000/=.
- c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 29TH DAY OF JULY, 2024.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE



In the presence of:

Kinyua Kiama for the Applicant

Mr. Kamande for the Respondent

Court Assistant – Jedidah

