



**Kossar v Ahmed & another (Originating Summons 29 of 2014)
[2023] KEHC 2910 (KLR) (Civ) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2910 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

ORIGINATING SUMMONS 29 OF 2014

JK SERGON, J

MARCH 28, 2023

BETWEEN

SHAHEEN KOSSAR APPLICANT

AND

RAZAK MAQBOOL AHMED 1ST RESPONDENT

SABIA KOSAR 2ND RESPONDENT

RULING

1. The applicant in this instance brought the Notice of Motion dated 22nd November, 2021 under the provisions of section 80 of the *Civil Procedure Act* and order 45, rules 1 of the *Civil Procedure Rules*. The Motion is supported by the grounds laid out on its face and the facts stated in the affidavit of the applicant, who sought for the orders hereunder:
 - i. Spent.
 - ii. That this Honourable Court be pleased to review and set aside/vary its orders of March 3, 2016 and grant further reliefs as it may deem fit and necessary in the circumstances.
 - iii. That this Honourable Court be pleased to dismiss the respondent's application dated February 28, 2017 in its entirety.
 - iv. That this Honourable Court be pleased to direct the 1st respondent to return to the applicant property number Kiambu/Municipality Block 111/133.
 - v. That this Honourable Court be pleased to dismiss the entire proceedings for want of jurisdiction.



- vi. That costs of the application be borne by the respondent.
2. To oppose the Motion, the 1st respondent put in the notice of preliminary objection dated September 14, 2022 containing the following grounds:
 - a) This Honourable Court on 3/3/2016 made a final determination on the issues in controversy after hearing the parties in question.
 - b) The applicant was not satisfied with the said ruling and instead of seeking to review the same, proceeded and filed an appeal before the Court of Appeal in Nairobi being Appeal No 169 of 2016.
 - c) The Court of Appeal heard and determined the appeal on 8/3/2019 affirming the decision of this Honourable Court.
 - d) The application for review having been filed on November 22, 2021, three years after the Court of Appeal had concluded the appeal, deprives this court of the requisite jurisdiction to review its own decision as in doing so, it will be going against the principle of stare decisis.
 3. When the parties attended court on September 21, 2022 it was agreed by consent that the Motion and the preliminary objection be heard and determined together. Consequently, the parties put in written submissions.
 4. At the time of writing this ruling, the responses and/or submissions; if any; by the 2nd respondent, had not been availed for this court's reference.
 5. I have considered the grounds set out on the face of the Motion, the facts deponed in the affidavit supporting it, the notice of preliminary objection, and the contending submissions and authorities cited therein.
 6. A brief background of the matter is that the 1st and 2nd respondents instituted the present originating summons dated December 17, 2013 and sought inter alia, to have the dispute between the parties referred for arbitration and further sought for confirmation on the appointment of Mohammed Yunis Sroya to act as the arbitrator.
 7. Upon hearing the parties on the said summons, this court found merit in the summons and allowed it vide the ruling delivered on March 3, 2016.
 8. Since then, various applications have been filed in the matter, some of which are still pending for determination. Be that as it may, it is the aforesaid ruling that has essentially triggered the instant Motion.
 9. Before I consider its merits; however, I will first deal with the preliminary objection which was raised by the 1st respondent to challenge the jurisdiction of this court to entertain the Motion.
 10. In his submissions supporting the preliminary objection, the 1st respondent argues that the review of a ruling/order can only apply where a party has not preferred an appeal against the ruling/order sought to be reviewed, and that once an appeal has been heard and determined; as is the case here; a party cannot return and seek a review from the court which delivered the original decision.



11. To buttress his point, the 1st respondent cites the case of *Kisya Investments Ltd v Attorney General & another* [1996] eKLR where the Court of Appeal stated the following:

“The crucial date for determining whether or not the term of 0.47 r. 1 are satisfied is the date when the application for review is filed. If on that date no appeal has been filed, it is competent for the Court to dispose of the application for review on the merits notwithstanding of the pendency of the appeal subject only to this that if before the application for review is finally decided, the appeal itself has been disposed of, the jurisdiction of the court hearing the review would come to an end...Review application should be filed before the appeal is lodged. If it is presented before the appeal is preferred, court has jurisdiction to hear it although the appeal is pending. Jurisdiction of court to hear review is not taken away if after the review petition, an appeal is filed by any party. An appeal may be filed after an application for review, but once the appeal is heard, the review cannot be proceeded with...A review application is incompetent after appeal is preferred.”

12. The 1st respondent further submits that in view of the decision rendered by the Court of Appeal, this court is functus officio on the subject of review. The 1st respondent has drawn the attention of this court to the following rendition made in the case of *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission, Ahmed Issack Hassan, Uhuru Kenyatta & William Samoei Ruto* (Petition 5, 4 & 3 of 2013) [2013]:

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

13. In his further submissions, the 1st respondent contends that in any event, the power to grant a review order lies with the court’s discretion and is not a mandatory right owed to any party.

14. Ultimately, the 1st respondent is of the view that in view of the fact that this court lacks jurisdiction, it is only left to dismiss the Motion.

15. In retort, the applicant submits that this court has jurisdiction to review its earlier order and to entertain the Motion as a whole, since the applicant has presented “sufficient reasons” to warrant the review order sought, and which evidence was not available to her at the time of delivery of the ruling of March 3, 2016, relying on the case of *Wangechi Kimita v Wakibiru Mutahi* [1985] eKLR where the Court of Appeal determined that:

“I see no reason why any other sufficient reason need be analogous with the other grounds in the order because clearly section 80 of the *Civil Procedure Act* confers an unfettered right to apply for a review and so the words “for any other sufficient reason” need not be analogous with the other grounds specified in the order: see *Sadar Mohamed v Charan Singh* [1959]EA 793.”

16. The applicant further submits that the review sought would not be in conflict with the decision rendered by the Court of Appeal arising out of the aforementioned ruling.



17. Upon my perusal of the record, it is not in dispute that this court delivered a ruling on March 3, 2016 in respect to the Originating Summons brought by the 1st and 2nd respondents.
18. Upon my further perusal of the record, it is equally not in dispute that being dissatisfied with the aforementioned ruling, the applicant herein challenged the same by way of an appeal lodged with the Court of Appeal and which appeal was heard and determined by way of the judgment delivered on March 8, 2019.
19. It is apparent from the record that the applicant now seeks the indulgence of this court by way of a review of the aforementioned ruling.
20. The provisions of order 45, rule 1(1) of the Civil Procedure Rules, 2010 reaffirmed under section 80 of the Civil Procedure Act cap 21 laws of Kenya, is clear in its reading, that:

“ 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.”

21. From my reading and understanding of the above provisions, a party can seek an order for the review of a decision either where no appeal has been preferred or where no right of appeal is allowed.
22. In the present instance, since it is clear that the appeal against the ruling in question was preferred and determined, I concur with the reasoning by the 1st respondent that the applicant cannot now turn back and seek a review of the ruling.
23. In finding so, I am guided by the Court of Appeal’s decision in the case of Kisya Investments Ltd v Attorney General & another [1996] eKLR cited in the submissions by the 1st respondent, thus:

“The crucial date for determining whether or not the term of 0.47 r. 1 are satisfied is the date when the application for review is filed. If on that date no appeal has been filed, it is competent for the Court to dispose of the application for review on the merits notwithstanding of the pendency of the appeal subject only to this that if before the application for review is finally decided, the appeal itself has been disposed of, the jurisdiction of the court hearing the review would come to an end...Review application should be filed before the appeal is lodged. If it is presented before the appeal is preferred, court has jurisdiction to hear it although the appeal is pending. Jurisdiction of court to hear review is not taken away if after the review petition, an appeal is filed by any party. An appeal may be filed after an application for review, but once the appeal is heard, the review cannot be proceeded with...A review application is incompetent after appeal is preferred.”



- 24. In view of all the foregoing circumstances, I am of the view that this court lacks jurisdiction to entertain and/or grant the order for a review sought. Consequently, the preliminary objection succeeds in respect to the subject of review.
- 25. That being said, as pertains to the remaining orders sought in the Motion; namely the dismissal of the 1st respondent’s application dated February 28, 2017 and the entire proceedings, as well as an order sought directing the 1st respondent to return to the applicant property number Kiambu/Municipality Block 111/133, upon my study of the record, it is apparent that in the abovementioned application dated February 28, 2017 seeks the appointment of a competent arbitrator to handle the dispute, which arises out of a contract.
- 26. In view of all the foregoing circumstances, I find that the applicant has not placed before me any credible evidence or valid arguments to support the orders sought. I am therefore unable to grant any of the remaining orders sought at this stage.
- 27. In the end therefore, I hereby make the following orders:
 - i. The notice of motion dated November 22, 2021 is hereby dismissed.
 - ii. The notice of preliminary objection dated September 19, 2022 is upheld but with no order on costs.
 - iii. In the circumstances of this matter, each party shall bear its own costs of the notice of motion dated November 22, 2021.
 - iv. Parties to approach the Deputy Registrar to fix a date for the hearing of the notice of motion dated February 28, 2017.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 28TH DAY OF MARCH, 2023.

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JK SERGON

JUDGE

In the presence of:

- **for the Applicant**
- **for the 1st Respondent**
- **for the 2nd Respondent**

