



**Abdulla t/a Gulshan Restaurant v Karimjee (Civil Suit
78 of 2013) [2023] KEHC 27577 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 27577 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 78 OF 2013
F WANGARI, J
JULY 28, 2023**

BETWEEN

IBRAHIM SHEIKH ABDULLA T/A GULSHAN RESTAURANT PLAINTIFF

AND

ZAFFER IBRAHIM TAYABALI KARIMJEE DEFENDANT

RULING

1. The Notice of Motion dated 15/7/2022 sought this court to the review, vary, set aside or vacate orders of the entire ruling of 24/5/2022 delivered by the Hon. Lady Justice Olga Sewe.
2. The application is based on ground that the court was wrong in dismissing the plaintiff's suit for want of prosecution. The court ignored the Replying Affidavit dated October 7, 2021. The Applicant allegedly has reasons justifying the delay. The reason is that there was another suit which he wanted to proceed with first in the land court.
3. The ruling was annexed. It stated that there was an 8-year delay in prosecuting their case. The explanation by counsel for the Plaintiff/Applicant is dealt with from page 3 of the ruling going to page 4. The Respondent's Submissions are also dealt with.
4. The court upon considering the evidence, the court made a decision on the application for dismissal of the suit. If the applicant believed that the court was wrong, the avenue available was to appeal.
5. Article 164 (3) of the Constitution provides as follows;

“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’



6. This court may be rendered with no work, if the Applicants come back to the same court to Appeal from what they think is an error of law. That court is entitled to hear appeals where the court is wrong or “disregards” evidence. There is absolutely no room to appeal before this court while disguising it as review. This court is not the place of the court to deal with errors of a court same status.
7. Discretion is defined in the *Black’s Law Dictionary (Tenth Edition)* as:

“The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court’s power to act or not act when a litigant is not entitled to demand the act as a matter of right.”
8. Madan JA (as he then was) in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A stated as follows regarding discretion;

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”
9. If the court of Appeal cannot interfere with discretion of the court, the same court can also not sit on Appeal from its own decision. It therefore follows that if this court was wrong in exercise of its discretion, then it is the Court of Appeal that has power to set it aside.
10. The basis for orders for review is found under Section 80 of the *Civil Procedure Act* provides as follows;

“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.
11. Order 45, Rule 1 of the *Civil Procedure Rules* provides 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.

12. The only plausible remedy was to appeal from that ruling. There can be no review from exercise of discretion or any error of law. In the case of *Patrick Miano v Mathira Coffee Farmers Housing Cooperative Society Ltd* [2017] eKLR Ngaah Jairus J, stated as follows;

“Even if the appellant’s argument that the trial court lacked jurisdiction was to be accepted as plausible and therefore it either misapprehended the law or misdirected itself in that regard when it proceeded to hear and determine the dispute before it, that cannot be a ground for review. As always, a difference of opinion on the interpretation of the law or a legal principle cannot be a ground for review. I have previously stated elsewhere (HCCC No. 12 of 2014(Nyeri) *Ecobank Ltd v David Njoroge Njogu and Ann Wanjiru Njogu*) that where a party aggrieved by an order or a decree is of the conviction that the order or the decree was based on a misapprehension of the law, the correct course would be to appeal against that decree or order rather than file a review application which, in my humble view, puts the judge or the magistrate who made it in a somewhat awkward position of explaining or defending the order or the decree.”

13. In the case of *Kenya Orient Insurance v Zachary Nyambane Omwagwa* [2021] eKLR, the court stated as doth: -

“The Supreme Court of Uganda in *Edison Kanyabwera v Pastori Tumwebaze* (2005) UGSC 1, provided for what constitutes an error apparent on the face of the record, it stated as follows;

“it is stated that in order that an error maybe a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on the record. The error maybe one of fact, but it is not limited to matters of fact, and includes also error of law.”

13. In the case of *National Bank of Kenya Limited v Ndungu Njau* (1997)eKLR it was stated as follows;

“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. The error or omission must be self-evident and should not require an elaborate argument to be established.”

13. From the above authorities, it is clear that under this application for the order of review, there is no discovery of new evidence, there is no mistake or apparent error on the face of the record, and neither did the Applicant provide sufficient reasons warranting the granting of the orders being sought for.

14. The case was in court for 8 years unprosecuted. The court analyzed the evidence on record and found that there were no sufficient reasons given for the delay, and the suit was dismissed for want of prosecution. I find that there is no ground for review or setting aside of the orders of the court given on 24th May 2022 given by the Honourable Justice Olga Sewe.

15. In the circumstance this application lacks merit. The upshot of the foregoing, I make orders as hereunder;

- a. The Application dated July 15, 2022 lacks merit and is hereby dismissed.



b. Costs awarded to the defendant.

c. The file is closed

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 28TH DAY OF JULY, 2023.

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F. WANGARI

JUDGE

___ **In the presence of: -

N/A for the Plaintiff

Ondieki Advocate h/b for Mogaka Advocate for the Defendant

Abdullahi, Court Assistant.

