



**Gorasia v Republic (Criminal Revision E366 of 2021)
[2022] KEHC 3314 (KLR) (Crim) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 3314 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E366 OF 2021
LN MUTENDE, J
JUNE 29, 2022**

BETWEEN

RAMESHCAHNDRA GOVIND GORASIA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Rameshchandra Govind Gorasia, the applicant, approached this court through a Notice of Motion dated 28th day of September, 2021 seeking orders as follows:
 - i. That this honourable court do issue an order of stay of execution of the judgment delivered on September 21, 2021 and sentences order delivered on September 24, 2021 pending the hearing and determination of this application.
 - ii. That the honourable court do call for and examine the record in Milimani Chief Magistrate's Court Criminal Case No. 1043 of 2016, and review and set aside the judgment delivered on September 21, 2021 and sentence order delivered on the 24th day of September, 2021 by Hon. Andayi W. Francis (PM) and further consequential orders arising therefrom.
 - iii. That the honoralbe court be pleased to issue an order directing that any fines and compensation paid pursuant to the impugned conviction and sentence be refunded to the applicant forthwith.
2. In a supporting affidavit, deposed by the appellant, he avers that following arraignment he denied the charges of forgery and forcible detainer, was tried, convicted and the court directed him to surrender the title deed in respect of the land in question to court for onward transmission to the Land Registry.



This, according to him was an error in law and fact and the sentence passed was not anchored on law therefore illegal.

3. That there is an ongoing civil case involving parties regarding the suit property, therefore, the order of the trial court was prejudicial to the ongoing civil matter.
4. On the March 15, 2022 the respondent filed a Notice of Preliminary Objection on the ground that the applicant had filed an appeal No. E085/2021 which has been admitted bearing the same prayers as the application which makes this application res-judicata as facts and issues raised are similar since they dwell on the conviction and sentence by Hon. Andayi W. F. CM in Milimani Nairobi Criminal Case No. 1043 of 2016 delivered on September 24, 2021, and, that the application was dismissed by orders of Bwonong'a J. dated February 3, 2022.
5. The application was canvassed through written submissions. It was urged by the respondent (applicant) in the Preliminary Objection) that this court lacks jurisdiction to determine the instant application having been dismissed by Bwonong'a J. on February 3, 2022. An order was premised on grounds that there was existence of an appeal No. E085 of 2021 that has been admitted and bears similar prayers as the instant application. That the court of concurrent jurisdiction will determine the appeal thus the fear of the two (2) courts rendering conflicting decisions based on the same material facts which is not acceptable in law. It called upon the court to consider what is provided by section 364(5) of the Criminal Procedure Code as the court hearing an appeal would not entertain a revision from the same matter.
6. The applicant urged that at the outset Bwonong'a J. dismissed the application because Counsel who held brief for the applicant's Counsel had limited information about the matter and when the issue was brought to the attention of the Judge it was reinstated.
7. On the question of jurisdiction, it was argued that the power of the court to review directions of the lower court emanates from article 165 (6) (7) of the Constitution of Kenya, 2010 and section 362 of the Criminal Procedure Code.
8. On the issue of *resjudicata*, it was submitted that issues raised in Criminal Revision No. HCCR Rev/ E366 of 2021 and Criminal Appeal No. Eo85 of 2021 are different as in Criminal Revision No. HCCR Rev. E366/2021.
9. It has been urged that the matter is res-judicata. This means that the instant court is precluded from determining the matter having been decided by a court of competent jurisdiction to finality.
10. On February 3, 2022 when this court was not sitting the matter was placed before Bwonong'a J. who made an order thus:

“Application for revision dismissed in view of the fact that there is in place an appeal which has been admitted into hearing.”
11. On March 1, 2022, following an application by Counsel for the Applicant for reinstatement of the matter on grounds that the matter was to be dealt with by this court, and there being no objection by Counsel for the State the court reinstated the application and directed it to be placed before this court.
12. To establish the plea of res-judicata, the applicant was required to demonstrate that issues in the former suit are similar to the issues in the current suit and those issues were substantially resolved by the court seized of jurisdiction. Circumstances pointed out clearly show that the application was reinstated therefore was not heard and determined.



13. It is not in dispute that the applicant herein filed an appeal against the judgment of the lower court. He seeks quashing of the conviction and setting aside the sentence meted out. The contention put up is however that the revision on the question of legality, correctness and propriety of the sentence and refund of the fine paid.
14. The appellate jurisdiction of the court is wider, the court will be enjoined to re-assess, re-analyse and examine the entire record afresh which includes the power to reverse and modify the lower court's decision and setting aside the sentence.
15. It is pointed out that the appeal has already been admitted to hearing which means that the applicant is pursuing both the revision and appeal simultaneously, which demonstrates that he is engaged in multiplicity of cases.
16. In the case of *Martin Maruti Kituyi v Republic*, BGM HCCR Revision No 27 of 2013 the court held that:

“(13) The exercise or not of the discretion of the court should, therefore, depend on the circumstances of each case, and the nature of the things the court is being asked to probe and put right. Those which are clearly illegal as to constitute a breach of fundamental rights or freedoms guaranteed by the *Constitution* should ordinarily attract the exercise of Revision jurisdiction of the court unless they are matters which the court feels should be left for a claim for damages. But where the aggrieved party is proposing an Appeal from his pleadings, then the court should hesitate to exercise the discretion under Revision jurisdiction. In making this proposition, I am well aware of section 364 (1) (a) of the CPC which allows the High Court in a Revision cause to exercise the powers conferred on it as an Appellate Court in sections 354, 357 and 358 of the CPC. Except, it must be understood that those powers will only come to bear after the court is satisfied that the case is fit for the exercise of discretion under Revision jurisdiction. On that basis, there should be no room to read a contradiction in what I have said.” (Emphasis mine)

17. In as much as the court is seized of the discretion to determine the revision, in exercising the discretion, as set out in section 362 as read with section 364 of the *Criminal Procedure Code*, the court had the duty of considering administration of justice, Public Policy and avoidance of abuse of the process. With that in mind, I find that it would have been imperative for the applicant to make a decision as to which matter out of the two to proceed with instead of gambling as to which orders may be obtained from either of the two.
18. Considering reliefs sought in both the appeal and revision, the appellate court will re-consider the entire evidence prior to reaching its conclusions. That will be the appropriate court to deal with the matter.
19. In the result, the Preliminary Objection raised is meritorious, consequently, it is upheld and the application herein is struck out.
20. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI, THIS 29TH DAY OF JUNE, 2022.

L. N. MUTENDE



JUDGE

In The Presence Of:

Lumbasi holding brief for Mr. Katisya for Applicant

Mr. Kiragu for the State

Court Assistant - Mutai

