



REPUBLIC OF KENYA



KENYA LAW
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**Muthigani v Ndekere & another (Civil Appeal 126 of 2019)
[2022] KEHC 13142 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13142 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 126 OF 2019
TW CHERERE, J
SEPTEMBER 22, 2022**

BETWEEN

JOBU MUTHIGANI APPELLANT

AND

SHADRACK MACHARIA NDEKERE 1ST RESPONDENT

MBAABU JACOB JULIUS 2ND RESPONDENT

RULING

1. By a judgment dated May 20, 2021, this court made orders that:
 - i. A declaration be and is hereby issued that the transfer of M/V KCA 946W by the Shadrack Macharia Ndekere to himself was illegal, unlawful and fraudulent
 - ii. Having illegally repossessed and unlawfully and fraudulently transferred M/V KCA 946W to himself, Shadrack Macharia Ndekere (1st respondent) shall refund KES 600,000/- to Mbaabu Jacob Julius (2nd respondent) that was admittedly paid for purchase of the said motor vehicle KCA 946W, since it is not practicable to restore the said vehicle to Mbaabu Jacob Julius (2nd respondent)
 - iii. Shadrack Macharia Ndekere (1st respondent) shall refund Kshs. 100,000/- to Jobu Muthigani (appellant).
 - iv. A declaration be and is hereby issued that both Jobu Muthigani (appellant) and Shadrack Macharia Ndekere (1st respondent) breached the agreement dated January 12, 2018 and none is entitled to pay the other Kshs 400,000/- of the consideration price being the liquidated loss
 - v. The sums in (ii) and (iii) shall attract interest at court rates from the date of judgment in the lower court



- vi. Shadrack Macharia Ndekere (1st respondent) shall bear the costs of this appeal and of the proceedings in the trial court
2. By a notice of motion filed on June 9, 2022, supported by an affidavit sworn on August 18, 2021, by the 1st respondent/ seeks an order of review of the judgement dated May 20, 2021 on the following grounds that:
 - 1) There is an error apparent on the face of the record
 - 2) That the court made an order for payment of KES 600,000/- by applicant to 2nd respondent which sum was neither received nor made an issue for trial
3. Appellant/ respondent opposed the application by way of an affidavit sworn on June 24, 2022 on the ground that it is questioning the merits and the reasoning of the court. Applicant has also been faulted for bringing this application more than one year from the date of the impugned judgement which delay is inordinate and has not been explained.

Analysis and Determination

4. I have considered the notice of motion in the light of affidavits on record and the issue in question is whether the 1st respondent/applicant has satisfied the threshold for grant of an order of review.
5. Order 45 of the *Civil Procedure Rules* which as follows:
 1.
 - (1) Any person considering himself aggrieved-
 - (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.
6. In the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR, the Court of Appeal stated: -

“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 require no elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”
7. A careful consideration of this application reveals that the 1st respondent/applicant neither demonstrates discovery of any new or important matter nor any error on the face of the record but instead impugns the merits of the orders made by this court. The more than one-year delay has similarly not been explained.



8. I understand the 1st respondent/applicant to ask this court to take a different view from the previous decision. If the 1st respondent/applicant is aggrieved, he has a right to challenge the determination of this court in the proper forum for the reason that this court cannot sit on appeal on its own judgement.
9. In the end, I find that the notice of motion filed on June 9, 2022 has no merit and it is dismissed with costs to the appellant.

DATED AT MERU THIS 22ND DAY OF SEPTEMBER 2022

WAMAE. T. W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For Appellant - Mr. Thangichia for M/s. Thangichia M.David & Co. Advocates

For 1st Respondent - Mr. Kiget for Kiget & Co. Advocates

For 2nd Respondent - N/A for Mbaabu MInoti & Co. Advocates

