



**Opany v Odhiambo (Environment and Land Appeal 42 of 2021)
[2023] KEELC 18979 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18979 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 42 OF 2021
GMA ONGONDO, J
JULY 25, 2023
(FORMERLY MIGORI ELC APPEAL NO. 12 OF 2020)**

BETWEEN

SAMUEL ODOYO OPANY APPELLANT

AND

RONALD OCHIENG ODHIAMBO RESPONDENT

RULING

1. This ruling is in respect of the respondent's Notice of Preliminary Objection dated October 31, 2022 and filed in court on November 9, 2022 (The Preliminary Objection herein).
2. The gist of the preliminary objection is that this court is *functus officio* having rendered its judgment on the matter in dispute. That therefore, a review of that decision cannot be entertained by this court.
3. On May 22, 2023, this court ordered and directed that the Preliminary Objection be heard by way of written submissions in the spirit of Article 159 (2) (b) of the [Constitution of Kenya, 2010](#); see also [Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others](#) (2013) eKLR.
4. Accordingly, the respondent through Tom Mboya and Company Advocates, filed submissions dated May 16, 2023 on May 22, 2023. Counsel submitted that this court is now *functus officio*, having rendered its judgment on the matter. That the applicant intends to appeal this matter in the form of review. To buttress the submissions, counsel relied on various authorities including the case of [Raila Odinga and others v IEBC and others](#) (2013) eKLR.
5. The appellant did not file submissions in respect to the instant preliminary objection.
6. It is noteworthy that, by way of a notice of motion application dated July 18, 2022 and filed herein on even date, the appellant, being dissatisfied with the judgment of this court delivered on June 21,



- 2022, sought, among other orders, to have the said judgment reviewed on account of discovery of new evidence.
7. The respondent opposed the application vide grounds of opposition dated August 17, 2022. The respondent also filed the instant preliminary objection.
 8. I have duly considered the Preliminary Objection. So, is the Preliminary Objection sustainable?
 9. It must be noted that the Preliminary Objection is on a point of law and may dispose of the suit; see *Mukisa Biscuits* case (infra).
 10. The Preliminary Objection is grounded on Section 80 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya and Order 45 Rule 1 of the [Civil Procedure Rules, 2010](#).
 11. In the locus classicus case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 the Court of Appeal pronounced itself on what constitutes a preliminary objection as follows:

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration...”
 12. Having considered the preliminary objection, the main issue that arises therein is one concerning the jurisdiction of this court to hear the appellant’s application for review. Simply put, whether this court has jurisdiction to re-open and review its decisions in a concluded appeal.
 13. In the case of [Owners of Motor Vessel “Lillian S” v Caltex Oil \(K\) Ltd](#) [1989] KLR 1 , it was stated that:

“Jurisdiction is everything. Without it a Court has no power to take one more step, where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending the evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”
 14. In [Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others](#) [2012] eKLR, the Supreme Court of Kenya rendered itself in part;

“...a court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”
 15. The Environment and Land Court is established under Article 162 (2) (b) of the Constitution of Kenya, 2010. Section 13 (1) of the [Environment and Land Court Act](#) 2015 (2011) stipulates the jurisdiction of the Environment and Land Court as follows:
 - (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 16. Section 80 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya, provides for review as follows:
 80. 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 hereby 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.
17. Order 45 of the [Civil Procedure Rules, 2010](#) sets out the procedure and conditions that an applicant must satisfy in an application for review. Equally, it makes it clear that a party cannot seek review of an order and appeal from the same order.
18. In the case of [Fredrick Otieno Outa v Jared Odoyo Okello & 3 others](#) [2017] eKLR, the Supreme Court of Kenya held in part:
- “...Of course, litigation must come to an end. But should litigation come to an end, even in the face of an absurdity? The Supreme Court is the final Court in the land. But most importantly, it is a final Court of justice. This being the case, the Court is clothed with inherent powers which it may invoke, if circumstances so demand, to do justice. The Constitution from which this Court, and indeed all Courts in the land, derive their legitimacy decrees that we must do justice to all...” (Emphasis added)
19. In [Manchester Outfitters \(Suiting Division\) Ltd \(now known as King Wollen Mills Ltd\) & another v Standard Chartered Financial Services Ltd & 2 others](#) [2019] eKLR, the learned judges of the Supreme Court of Kenya stated as follows:
- “... we note for example that the High Court, not being a Court of final determination of disputes, as was the Court of Appeal prior to 2010, has the jurisdiction to review its judgments by dint of powers conferred by Section 80 of the [Civil Procedure Act](#) as read with Order 45 of the Civil Procedure Rules. It would be absurd that the Supreme Court, following the Rai and Outa decisions can review its decisions as the Apex Court while the Court of Appeal should not, in appropriate cases, exercise the same power...” (Emphasis laid)
20. Thus, the learned judges of the Supreme Court of Kenya held as follows:
- “...In the end, we find no justifiable fault in the decision of the appellate court to re-open and hear fresh the matter before it, as the previous Judgment, based on their consideration of the facts and circumstances, would be deemed as one in which the issues in context must be relooked at afresh...”
21. In addition to setting out the conditions that an applicant in an application for review must satisfy in order to get the application granted, Order 45 rule 1(a) and (b) (supra) reiterates the proviso of Section 80(a) and (b) which in my view makes it clear that the options of a review and an appeal are not simultaneously available to an aggrieved party. In the instant case, no appeal has been filed against the decision of this court delivered on June 21, 2022.
22. In light of the foregoing, it is my considered view that this court has jurisdiction to entertain the appellant’s application dated July 18, 2022.
23. To that end, the respondent’s Notice of Preliminary Objection dated October 31, 2022 is not merited in the circumstances. I proceed to disallow the same.



24. Costs to be in the cause.

25. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 25TH DAY OF JULY 2023.

G.M.A ONG'ONDO

JUDGE

Present

Okello, Court Assistant

