



REPUBLIC OF KENYA



**Kalume v Barasa (Civil Appeal 2 of 2018) [2023] KEELC 449 (KLR) (1 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 449 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
CIVIL APPEAL 2 OF 2018  
MAO ODENY, J  
FEBRUARY 1, 2023**

**BETWEEN**

**EVANS TUMA KALUME ..... APPELLANT**

**AND**

**MOSES MASIVAI BARASA ..... RESPONDENT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated January 21, 2022 by the Appellant/Applicant seeking the following orders: -
  - a. Spent
  - b. That this Honourable Court be pleased to review its directions issued pursuant to the Respondent's application dated November 4, 2021 by finding that Khaminwa & Khaminwa Advocates were properly on record at the time of filing the said application and proceed to issue requisite and further directions with regard to the same.
  - c. That in the meantime the Honourable Court be pleased to stay further proceedings with regard to the sentencing of the Respondent herein for contempt of court pending the hearing and determination of this application and the application dated November 4, 2021.
2. The application was supported by the affidavit of Kizambo Mwadilo sworn on the 21<sup>st</sup> day of January, 2022 where he deponed that the firm of Khaminwa & Khaminwa advocates were instructed by the Respondent to take over the matter from his previous advocates of which they filed a Notice of Change of Advocates on October 19, 2021.
3. Counsel stated that the firm came on record on November 19, 2021 and since the Respondent was acting in person in Mombasa BPRT Case No 35 of 2017 the provisions of Order 9 rule 9 of the [Civil Procedure Rules](#) with regard to Change of Advocates did not apply in this appeal which is yet to be heard and determined.



4. The Respondent filed Grounds of Opposition dated April 11, 2022 where counsel stated that the application is merely an attempt at delaying the court giving directions on sentencing of the Applicant for contempt of Court. That the orders of stay sought in the present application and the application they seek to reinstate is now res judicata being the same orders sought by the Applicant in the application dated June 24, 2021 which was heard and determined.

### **Applicant's Submissions**

5. Counsel reiterated the contents of the affidavit and submitted that the appeal herein is pending determination thus the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* do not apply. Counsel relied on the case of *Ngome vs Plantex Company Limited* (1984) 792 and urged the court to allow the application as prayed.

### **Respondent's Submissions**

6. Counsel for the Respondent identified two issues for determination namely, whether the orders dismissing the application dated November 4, 2021 ought to be reviewed and whether a stay of proceedings of sentencing of the Respondent/ Applicant for contempt of court pending the hearing and determination of this application ought to issue.
7. Counsel submitted that the grounds relied on for an application for review do not warrant orders of review as they have not pleaded error apparent on the face of the record, or discovery of new evidence that was not within the applicant's knowledge.
8. Counsel further submitted that this Honourable Court correctly decided that the firm of Khaminwa and Khaminwa Advocates were improperly on record having failed to apply for leave to act for the Respondent/ Applicant and that it would then follow that the application of January 21, 2022 lacks merit.
9. It was counsel's submission that this application is a backdoor way in which the Applicant wants the Court to sit on appeal on its own decision which cannot stand and cited the case of *Republic v Cabinet Secretary for Interior and Coordination of National Government Ex parte Abulahi Said Salad* (2019) Eklr.
10. On the second issue for determination, counsel submitted that the Respondent/ Applicant seeking stay of sentencing is res judicata as the same had been heard and determined in the application dated June 24, 2021 and one dated November 4, 2021 and urged the court to dismiss the application with costs.

### **Analysis And Determination.**

11. The issue for determination is whether the application for review or orders granted on November 4, 2021 is merited and whether the court should stay further proceedings with regards to sentencing of the Respondent.
12. It is on record that the Applicant had previously filed two applications, dated June 24, 2021 and November 4, 2021 respectively seeking similar orders as those being sought in this present application. The order that was made pursuant to filing the application dated November 4, 2021 was that the application be expunged from the record since the Notice of Change was unprocedural. The Applicant has now purported to attach a Notice of change which Notice of change of advocates has not been served on any of the concerned parties.



13. The provisions of Section 80 of the *Civil Procedure Act* Cap 21 provide 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.”

Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 provides as follows: -

“1.(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.”

14. In the case of *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* (2019) eKLR the court held as -

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. The expression “any other sufficient reason” appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.



- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
15. The Application is not for review; in fact, it borders on abuse of court process. If the Applicant was aggrieved by the orders of the court, then the correct avenue was to appeal. This is a delaying tactic for the finalization of this case. Counsel correctly stated that the appeal is still pending and should be interested in the finalization of the appeal instead of side shows.
16. I find that the application lacks merit and is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2023.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

