



Orata International Limited v National Environmental Management Authority (Environment and Land Appeal E008 of 2020) [2025] KEELC 4199 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4199 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E008 OF 2020**

**MD MWANGI, J
MAY 22, 2025**

BETWEEN

ORATA INTERNATIONAL LIMITED APPELLANT

AND

**NATIONAL ENVIRONMENTAL MANAGEMENT
AUTHORITY RESPONDENT**

*(In respect of the Amended Notice of Motion dated 11th February,
2024 seeking review of judgment delivered on 27th September, 2023)*

RULING

(In respect of the Amended Notice of Motion dated 11th February, 2024 seeking review of judgment delivered on 27th September, 2023)

Background

1. The Appellant’s amended Notice of Motion dated 11th February, 2024 brought under Order 45 Rule 1 of the *Civil Procedure Rules* and Sections 1A,3A and 80 of the *Civil Procedure Act* seeks review of the judgment of this court delivered on 27th September, 2023 as well as the costs of the Application. The Application which is supported by the Affidavit of the Appellant’s Director, Jacob Iyadi Wambua is premised on grounds that there are sufficient grounds to warrant the review of the judgment of this court delivered on 27th September, 2023.
2. It is averred that the Appellant’s appeal filed at the Environmental Tribunal against the environmental orders issued on 5th March, 2019 was heard and determined on 19th February, 2023. Aggrieved by the Tribunal’s decision, the Appellant lodged an appeal before this court whose determination was made on 27th September, 2023. The Deponent asserts that the court in making its finding never considered the grounds of appeal more so the grounds that the parcel of land is under the factory zone area, the area



has many factories conducting stone crushing business, the Appellant has been operating the factory for over 20 years and that the Respondent never produced any report. It is the Appellant contentions that it is in the interest of justice that its factory ought not to be closed.

3. The Respondent filed grounds of opposition dated 26th November, 2024 imploring the court to dismiss the Application for being unmerited on grounds that;
 - a. The Application is similar to the Appellant's Application dated 21st May, 2021 withdrawn on 22nd February, 2022 by consent of the parties.
 - b. No positive decision or order can be stayed or exists as the Appeal was dismissed on 27th September, 2023 after being heard.
 - c. There is no decision or order of the court save that of dismissal of the appeal; the status quo now obtaining being the Respondent's decision requiring closure of the Appellant's facility.
 - d. The Appellant only possible remedy is in the Court of Appeal as this court cannot issue an injunction or stay of execution of its judgment as it is *functus officio*.
 - e. The Application is unmerited as it has not met the statutory requirements of Order 45 of the Civil Procedure Rules because there is no new evidence as alleged neither is the allegation of mistake accurate.
 - f. The Respondent has powers to take actions complained of under Section 9 and 117 of the EMCA and this court should not ordinary fetter the same.

Directions

4. On 26th February, 2025, the Court directed that the Application be dispensed off through written submissions. The Appellant through its submissions dated 10th March, 2025 argues that the basis of the Respondent order dated 25th October, 2016 was relocation of their factory to a new site in Athi River and not failure to mitigate noise and dust pollution as was held by the trial court.
5. The Respondent submissions dated 28th March, 2025 raise three issues being whether the Applicant has come to court with clean hands, whether stay of execution issue can issue against a negative order and whether the Application for review is the best suited in the circumstances of this case.

Issues for determination

6. Upon a critical reading of the Application, grounds of opposition as well as the parties' submissions, the singular issue for determination is whether there is sufficient ground to justify review of the judgment herein.

Determination

7. As noted by the Supreme Court in Murgani v Kenya Revenue Authority [2014] KESC 2 (KLR), the power of court to revisit its decision is only applicable in circumstances permitted by law;

“It is a general principle of law that a Court after passing Judgment, becomes *functus officio* and cannot revisit the Judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law. In Lakshamsbi Brothers v. Raja & Sons [1966] EA 313 the then Court of Appeal held as follows:

“This court is now the final Court of Appeal and when this court delivers its judgement, that judgement is, so far as the particular proceedings are concerned, the end of the litigation. It



determines in respect of the parties to the particular proceedings their final legal position, subject as I have said to the limited application of the slip rule.”

8. The circumstances under which a court can review its own decision is specified in Section 80 of the *Civil Procedure Act* as well as Order 40 Rule 1 of the *Civil Procedure Rules*. They include discovery of new and important matter or evidence, mistake or error apparent on the face of the record and sufficient cause. (emphasis)
9. In *Parliamentary Service Commission -vs- Wambora & 36 others* [2018] KESC 74 (KLR), the Supreme Court while quoting the decision of *Mbogo and Another v Shah* indicated that the following principles ought to guide courts while exercising their discretion on review of their decisions.

“Consequently, drawing from the case law above, particularly *Mbogo and Another v Shah*, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows;

- i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court.
 - ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
 - iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application;
 - iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically
 - v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
 - vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
 - a. as a result a wrong decision was arrived at; or
 - b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”
10. The litigation history of the Appellant’s claim is that it challenged the Respondent’s restorative orders dated 5th March, 2019 before the National Environment Tribunal through a Notice of Appeal dated 2nd May, 2019 in *Tribunal Case No. NET 12 of 2019*. The Order sought closure of its factory. The Respondent contended that it was empowered by statute to ensure enjoyment of the right to clean and healthy environment of all Kenyans. According to the Respondent, the Appellant’s actions in its factory resulted in dust and noise pollution despite several improvements notices being issued to it. Through a judgment delivered on 19th February, 2021, the Tribunal dismissed the Appeal.
 11. Undeterred, the Appellant lodged a memorandum of appeal before this court dated 5th March, 2021 seeking to set aside the Tribunal’s decision. While dismissing the Appeal, the trial court noted that the Appellant failed to comply with the Respondent’s restorative orders despite complaints from its neighbours that its actions were violating their right to a clean and healthy environment.



12. Though camouflaged as an application for review, the Application which is the subject of this Ruling is drafted in a manner likely to suggest that it is an appeal against the decision of this court. I agree with the Respondent's arguments that this court became functus officio upon delivery of its judgment. If the Appellant is desirous of any remedy against the judgment of this court, then it ought to approach the Court of Appeal and raise the concerns averred in its affidavit.
13. From the foregoing, I am not satisfied that the Appellant has fulfilled and met the threshold set out in Order 45(1) of the *Civil Procedure Rules* to warrant the review of the judgment of this court delivered on 27th September, 2023. In making this finding, I am guided by the Court of Appeal decision in *Daniel Lago Okomo v Safari Park Hotel Ltd & another* [2018] KECA 261 (KLR), wherein the court stated as follows while dismissing an appeal seeking a review of its decision;
- “Having made every effort to discover what there is in the application before us to justify our review of the judgment of this Court, we come to the inevitable conclusion that there is nothing. We do not review judgments just because a losing litigant is unhappy and despondent. We have no jurisdiction to do so. And we must state quite categorically that the proliferation of applications for review of this Court's judgments in recent times is a trend that must be checked.”
14. Accordingly, the Appellant's amended Notice of Motion dated 11th February, 2024 is hereby dismissed with costs to the Respondent.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 22ND DAY OF MAY 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Kahuria h/b for Mr. Gitonga for the Respondent

N/A by the Appellant/Applicant

Court Assistant: Mpyoe

M.D. MWANGI

JUDGE

