



REPUBLIC OF KENYA



**Oranja v Mutie (Civil Appeal E1368 of 2024)  
[2025] KEHC 12191 (KLR) (Civ) (7 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 12191 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E1368 OF 2024**

**TW CHERERE, J**

**MAY 7, 2025**

**BETWEEN**

**MOSES ORANJA ..... APPELLANT**

**AND**

**STEPHEN MBALUKA MUTIE ..... RESPONDENT**

**RULING**

“Review is a narrow path—one must wriggle through it with precision, not stride down it with recycled arguments.”

1. By a Notice of Motion dated 22<sup>nd</sup> November 2024, the Appellant sought stay of execution of the judgment delivered on 31<sup>st</sup> October 2024 in Milimani MCCC No. E083 of 2023 pending appeal.
2. By a ruling delivered on 03<sup>rd</sup> April 2025, this Court dismissed that application, finding that the Appellant had failed to demonstrate substantial loss under Order 42 Rule 6(2) of the Civil Procedure Rules.
3. Dissatisfied with the said ruling, the Appellant has now approached this Court by way of Notice of Motion dated 07<sup>th</sup> April 2025, seeking review of the ruling delivered on 03<sup>rd</sup> April 2025. The application is expressed to be brought under Article 50 of *the Constitution*, Sections 1A, 1B, 3A and 80(a) of the *Civil Procedure Act*, and Order 45 Rule 1 and Order 51 of the Civil Procedure Rules.
4. The application is supported by the affidavit of the Appellant sworn on even date. The Appellant contends, inter alia, that:
  1. He had deposited KES. 700,000/- as security for stay;



2. There is imminent danger of execution of the judgment and decree in Milimani MCCC No. E083 of 2023;
  3. He has high chances of success in the appeal.
5. The Respondent opposes the application through a Notice of Preliminary Objection dated 28<sup>th</sup> April 2025, citing the following grounds:
1. That this Court is functus officio;
  2. That the application is res judicata;
  3. That no error apparent on the face of the record has been demonstrated.

### **Issues for Determination**

6. Having considered the notice of motion in light of the supporting affidavit and the grounds of objection, the following issues arise for determination:
  1. Whether the Court has jurisdiction to entertain the application for review;
  2. Whether the application meets the threshold under Order 45 Rule 1 of the Civil Procedure Rules;
  3. Whether the application is res judicata;
  4. Whether the Court is functus officio;
  5. Whether the Appellant has demonstrated grounds to warrant review.
7. Order 45 Rule 1 of the Civil Procedure Rules provides that:

“Any person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred... 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 at the time when the decree was passed... or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, may apply for a review.”
8. The substantive jurisdiction to review a judgment or order is conferred by Section 80 of the [Civil Procedure Act](#), which provides:

“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, and who from the discovery of new and important matter or evidence... 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... may apply...”



## Analysis and Determination

### 1. Jurisdiction and Functus Officio

9. The jurisdiction of this Court to review its own orders is expressly preserved under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.
10. As held in *Telkom Kenya Ltd v John Ochanda* (Suing on his own behalf and on behalf of 996 former Employees of Telkom Kenya Ltd) [2014] eKLR),

“The doctrine of functus officio is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.”
11. The Respondent’s contention that this Court became functus officio merely by delivering its ruling of 03<sup>rd</sup> April 2025 is therefore without merit.

### 2. Whether Grounds Have Been Made to Warrant Review

12. In *National Bank of Kenya Ltd v Ndungu Njau* [1997] eKLR, the Court of Appeal held:

“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 not require an elaborate argument to be established... A review is not an appeal in disguise.”
13. In *Pancras T. Swai v Kenya Breweries Ltd* [2014] eKLR, the same Court reiterated:

“The power of review is available only when there is an error apparent on the face of the record or discovery of new and important matter... and not merely because a party is unhappy with the decision.”
14. The same Court in *Benjoh Amalgamated Ltd & Another v Kenya Commercial Bank Ltd* [2014] eKLR cited with approval the holding in *Niels Bruel -vs- Moses Wachira & 2 others* [2018] eKLR, and stated:

“Starting with the first prayer to re-open the appeal and review the judgment of this Court, it is axiomatic that this Court has jurisdiction to do so. But that jurisdiction is exceptional and has to be exercised sparingly and with circumspection to thwart disaffected parties who merely seek a second bite of the cherry or who invite the Court to sit on appeal from its own judgment.”
15. The grounds advanced by the Appellant in support of the application for review are that the Court declined to grant a stay of execution despite the deposit of KES 700,000 as security, that there is imminent danger of execution and that the appeal has high chances of success.
16. These grounds, however, do not disclose any new or important matter of evidence that was not within the Appellant’s knowledge at the time of the initial application, nor does it identify any error apparent on the face of the record. The issue of the KES 700,000 deposit was expressly raised, acknowledged, and considered by the Court in its ruling of 03<sup>rd</sup> April 2025. The present application, therefore, amounts to a mere repetition of arguments previously advanced and determined.



17. It is well settled that a court cannot sit on appeal over its own decision under the guise of review. The review jurisdiction is narrowly confined to correcting errors apparent on the face of the record, addressing newly discovered material evidence, or intervening where sufficient cause is shown.
18. The Appellant’s invitation for this Court to reassess the same factual matrix on the basis of evidence that has already been evaluated amounts, in substance, to an appeal disguised as a review, which is impermissible in law.
19. The mere apprehension of execution and general assertion of high chances of success in the appeal do not constitute valid grounds for review. In any event, in the absence of a stay order, the Respondent remains lawfully entitled to execute the judgment.

### **3. Whether the Application is Res Judicata**

20. The general principle of res judicata is captured in Section 7 of the *Civil Procedure Act*, which provides:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties... and has been heard and finally decided by such court.”
21. The operative test was restated in *Karia and Another v Attorney General and Others* [2005] 1 EA 83, 89. It requires that the former suit must have been decided by a court of competent jurisdiction; that the matter directly and substantially in issue in the subsequent proceedings must have been directly and substantially in issue in the former suit; and that the parties in both suits must be the same, or litigating under the same title.
22. In the present case, the issue of whether the Appellant satisfied the conditions for stay under Order 42 Rule 6(2) was determined conclusively in the ruling of 03<sup>rd</sup> April 2025. The present application seeks to reintroduce the same issue without new material or changed circumstances.
23. The present application, although presented as a review, is in substance an attempt to reargue the dismissed application for stay under the guise of procedural recasting. That amounts to an abuse of the process and is barred by the doctrine of res judicata.

### **Disposition**

24. The application dated 07<sup>th</sup> April 2025 does not meet the legal threshold for review under Order 45 Rule 1 of the Civil Procedure Rules. No error apparent on the face of the record, no new evidence, and no sufficient reason has been shown. It is, in effect, an invitation to re-argue the same issues that were already determined in the ruling of 03<sup>rd</sup> April 2025.
25. Accordingly, I make the following orders:
  1. The Notice of Motion dated 07<sup>th</sup> April 2025 is hereby dismissed.
  2. Costs of the application shall be borne by the Appellant.

It is so ordered.

**DELIVERED AT NAIROBI THIS 07<sup>TH</sup> DAY OF MAY 2025**

**WAMAE.T. W. CHERERE**

**JUDGE**



Appearances

Court Assistant - Ubah

For Appellant - Mr. Wamalwa for Wesonga, Wamalwa & Kariuki Associates Advocates

For Respondent - Ms. Mugo for Sheila Mugo & Co. Advocates

