



**Ogwari v Ibrahim; Akinyi (Applicant) (Civil Appeal
E223 of 2022) [2024] KEHC 4965 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4965 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E223 OF 2022
DKN MAGARE, J
MAY 9, 2024**

BETWEEN

JERUSHA AUMA OGWARI APPELLANT

AND

IBRAHIM AISHA HERSI ALIAS AISHA HERSI IBRAHIM RESPONDENT

AND

LINET AKINYI APPLICANT

RULING

1. This is a ruling in respect of two Applications, one dated 30/10/2023 and 11/4/2024. The later was made by a non-party. They stated that it seeks to set aside a judgment that I entered herein. The Application is basically an Appeal against a decision I made. They are saying that my decision was wrong, in finding that running down cases cannot be heard in small claims court.
2. Review is provided for under Section 80 of the [Civil Procedure Act](#) states that:
“ 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”.



Section 63 (e) of the *Civil Procedure Act* states that:

“In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient.

3. Order 45 of the *Civil Procedure Rules* provides for Review and it states as follows:

(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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”

4. I associate myself with the reasoning of Kuloba J (as he then was) in *Lakesteel Supplies vs. Dr. Badia and Anor* Kisumu HCCC No. 191 of 1994 where he opined that:

“The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the *Civil Procedure Rules*. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant’s knowledge or could not be produced by him at the time when the ruling was made.”

5. The Applications dated 30/10/2023 and 11/3/2024 is asking me to correct my decision and reverse the same. If the court exceeded its jurisdiction, it is not in the power the court to deal with Appeals. Once



the court makes an order it is final pursuant to Section 38(2) of the small claims court. When the court made the orders it was conscience of what it was stating.

6. I recall the word of Al Gore in the 2000 elections, where he stated as doth: -

“Now the U.S. Supreme Court has spoken. Let there be no doubt, while I strongly disagree with the court’s decision, I accept it. I accept the finality of this outcome which will be ratified next Monday in the Electoral College. And tonight, for the sake of our unity as a people and the strength of our democracy, I offer my concession. I also accept my responsibility, which I will discharge unconditionally, to honour the new President-elect and do everything possible to help him bring Americans together in fulfilment of the great vision that ...

...Just as we fight hard when the stakes are high, we close ranks and come together when the contest is done. And while there will be time enough to debate our continuing differences, now is the time to recognize that that which unites us is greater than that which divides us. (adjusted to UK English).”

7. I see nothing in the Applications that is amenable to Review. The court has no jurisdiction to sit on Appeal of its own orders. There is no error apparent on the face of the record. The parties must learn to live with final decision of the courts. Trumping up applications with a view to defeat a proper suit file in a proper court makes no legal sense. The court has already determined the Appeal in the best way it did. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

8. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. The Applicant must learn to live with the consequences of the decision made. I finding nothing warranting review.

9. Accordingly, the Applications dated 11/3/2024 and 30/10/2023 lack merit and are dismissed for lack of merit.

Determination

10. The upshot of the foregoing, I make the following orders: -

- a. The Notice of Motion Applications dated 30/10/2023 and 11/3/2024 are dismissed.
- b. Each party shall bear their own costs.
- c. The file remains closed.



**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 9TH DAY OF MAY, 2024. RULING
DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Miss Kimani for the Respondent

No appearance for the Applicant

Court Assistant - Brian

