



REPUBLIC OF KENYA



**KENYA LAW**  
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**Osugo v Mogaka & 2 others (Civil Appeal E031 of 2023)  
[2024] KEHC 8275 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8275 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL APPEAL E031 OF 2023  
WA OKWANY, J  
JUNE 20, 2024**

**BETWEEN**

**BENARD NYAKUNDI OSUGO ..... APPLICANT**

**AND**

**ENOCK ONYANCHA MOGAKA ..... 1<sup>ST</sup> RESPONDENT**

**JENNIFER OJENGO ..... 2<sup>ND</sup> RESPONDENT**

**NYAATA MULTI-PURPOSE CO-OPERATIVE SOCIETY ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling is in respect to the Application dated 15<sup>th</sup> January 2024 wherein the Applicant seeks orders to review the judgment rendered on 14<sup>th</sup> December 2023. The Applicant further seeks the following orders: -
  1. That the Respondents never filed a response to the appeal.
  2. That third Respondent (Nyata Cooperative Society) is not a Cooperative Society (Legal Entity).
  3. That the Respondents never raised any objections as to the issue of jurisdiction in the lower court.
  4. That the Respondents admitted jurisdiction of the honourable court in their joint statement of defence dated 28<sup>th</sup> June 2016.
  5. That costs be provided for by the Respondents.
2. The Application is supported by the Applicant's affidavit and is premised on the following grounds: -



- a. That this honourable Court's judgement/order dated 14<sup>th</sup> day of December 2023 be reviewed upon the ground that the Applicant is not a member of Nyata Co-operative Society neither did he have shares on the same.
  - b. That the Applicant was granted a loan facility through the front office operations.
  - c. That the Applicant avers that jurisdiction only affects members of the back-office operations.
  - d. That if the Application is allowed, the Respondents will not suffer any loss and damage.
3. The 1<sup>st</sup> Respondent opposed the Application through the Replying Affidavit dated 12<sup>th</sup> April 2024 wherein he avers that the Application is misconceived, incompetent, an abuse of the court process and does not meet the threshold set for the granting of orders for review. He further avers that the Applicant should have preferred an appeal against the impugned judgment instead of making an application for review.
  4. The Application was canvassed by way of written submissions.
  5. The Applicant submitted that Section 80 of the *Civil Procedure Act* and Order 45 grants this court the jurisdiction to review its own decision upon the discovery of new and important matters or evidence, or to correct a mistake or error apparent on the face of the record or for other sufficient reasons. It was submitted that membership to the Sacco was through shares and not savings and that the Applicant denied being a member of the Society; that if he was a member, the Respondents ought to have produced their membership register and allocate him a specific membership number, that they should have proved that he had a certain value of shares, that he should have been earning dividends annually and that he should have been invited to participate in Annual General Meetings and General Elections.
  6. It was submitted that the 3<sup>rd</sup> Respondent is not a Co-operative Society because it did not tender any documentary proof of incorporation or any other document to show that it is permitted to conduct back office operations as a society thus rendering it a stranger to the co-operative tribunal. It was submitted that the Applicant's claim before the trial court was in respect to the legality of the Respondents' unlawful activities.
  7. The Respondents, on their part, submitted that the Application does not meet the threshold set for the granting of orders for review as set out under Order 45 Rule 1 of the *Civil Procedure Rules*. Counsel urged the Court to dismiss the Application for want of merit.
  8. I have carefully considered the pleadings filed herein together with the parties' rival submissions. I find that the main issue for determination is whether the Applicant has made out a case for the granting of orders for review.
  9. Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules* stipulate 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 allowed by this *Act*,  
May apply for a review of judgement 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



- (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 review of judgement to the court which passed the decree or made the order without unreasonable delay.

10. The scope of an order for review was outlined by the Supreme Court of India in the case of *Ajit Kumar Rath v. State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608 thus:-

“the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” ..... means a reason sufficiently analogous to those specified in the rule.”

11. In *Republic v. Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR, Mativo J. (as he then was) expounded on the principles governing applications for review as follows: -

- 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.
  - ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
  - x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.”
12. In the instant case, I note that the Applicant took issue with the 3<sup>rd</sup> Respondent’s legal status and submitted that no documentary proof was presented to the establish such status. My finding is that lack of proof of status does not amount to an error or mistake on the face of the record or discovery of new material so as to qualify as a ground for review as envisaged under Order 45 Rule 1 of the Civil Procedure Rules.
  13. On the Applicant’s argument that he was not a member of the 3<sup>rd</sup> Respondent Sacco and was therefore not required to file his claim before the Cooperatives Tribunal in the first instance, I find that the issue of membership does not fall within the circumstances under which an application for review can be made. In any event, this court notes that the Applicant admitted, at the hearing before the trial court, that he was a member of the Society. I note that he also produced a Passbook (P.Exh 1) for Savings and Shares from the 3<sup>rd</sup> Respondent which showed that he was a member of the society.
  14. This court is of the view that there is no way that the Applicant could have secured a loan from the 3<sup>rd</sup> Respondent if he was not their member. It is trite that litigation must come to an end and that a court of law cannot be an avenue for making several Applications to seek different outcomes under the guise of a review.
  15. Looking at the direction taken by the applicant in this application, I get the feeling that all that the Applicant seeks is to set aside the judgment simply because he does not agree with it. To my mind, this would amount this court sitting on an appeal against its own judgment which is beyond its mandate. I find guidance in Daniel Lago Okomo v Safari Park Hotel Ltd & Another [2018] eKLR where the court expressed itself thus: -

“We do not review judgments just because a losing litigant is unhappy and despondent. We have no jurisdiction to do so.”
  16. In conclusion, I find that the instant application does not meet the threshold set for the granting of orders for review. Consequently, I dismiss the application with no orders as to costs.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS AT NYAMIRA THIS 20<sup>TH</sup> JUNE 2024.**

**W. A. OKWANY**

**JUDGE**

