



Macharia v Kabaka Ombui & Company Advocates (Commercial Case E063 of 2021) [2024] KEHC 13318 (KLR) (22 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13318 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL CASE E063 OF 2021
MN MWANGI, J
OCTOBER 22, 2024**

BETWEEN

LILIAN WANJIKU MACHARIA APPLICANT

AND

KABAKA OMBUI & COMPANY ADVOCATES RESPONDENT

RULING

1. Before me is a Notice of Motion application dated 19th September 2023, filed pursuant to the provisions of Sections 3A & 63(e) of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules, and all enabling provisions of the law. The applicant seeks orders that this Court reviews, varies, and/or sets aside its ruling delivered on 25th April 2023 dismissing the applicant's reference and all consequential orders and proceedings thereto, and reviews the principal taxation file Misc. No. 754 of 2019 and parties be heard on merit inter partes. Although the applicant's Advocate in her written submissions indicated that the application before this Court for determination is the one dated 29th November 2023, the actual date reflected on the face of the application as being the date of the application is 19th September 2023.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on 19th September 2023 by Lilian W. Macharia, the applicant herein. She averred that this Court dismissed her case for not providing relevant documentary evidence. She however claimed that the necessary documents were already presented during the taxation proceedings in Misc. No. 754 of 2019, but the Deputy Registrar failed to forward the file to the Judge before the ruling of 25th April 2023 was delivered.
3. In opposition thereto, the respondent filed grounds of opposition dated 22nd January 2024, raising the following issues –



- i. That the application is a nullity and devoid of merit as the applicant has not adduced any sufficient reasons to warrant review of the ruling of the Court;
 - ii. The applicant being 86 years and frail is not provided for under the law as a reason for review and/or setting aside a ruling of the Court and is a lame excuse;
 - iii. The application is a waste of judicial time;
 - iv. The application is bad in law and an abuse of the Court process;
 - v. The Honourable Court pronounced itself on the appeal filed by the appellant/applicant and therefore the Court had become functus officio;
 - vi. The rules as to taxation of Advocate-Client Bill of Costs is very clear and if a party is dissatisfied with the ruling of the Judge he/she has to file an appeal in the Court of Appeal against the ruling;
 - vii. The applicant/appellant has not brought forth any new matter or material to the Court for the orders to be granted; and
 - viii. The application lacks merit and in the interest of justice the same be dismissed with costs.
4. The instant application was canvassed by way of written submissions. The applicant's submissions were filed by the law firm of Wesonga Wamalwa & Kariuki Associates on 24th January 2024, whereas the respondent's submissions were filed on 12th April 2024 by the law firm of Kabaka Ombui & Co. Advocates.
 5. Mr. Wesonga, learned Counsel for the applicant submitted that the applicant proceeded under the assumption that the Court had the principal file, but the ruling revealed that the Deputy Registrar had not provided it. He contended that this was an administrative failure which should not negatively impact the applicant. To buttress these submissions, Counsel relied on the case of Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR.
 6. Mr. Oyugi, learned Counsel for the respondent submitted that the applicant failed to present any material for the Court to consider, leaving no option but for the Court to dismiss and/or strike out her application. He stated that parties must provide documentary evidence for the Court, since Courts are not required to source for evidence. Mr. Oyugi argued that the Court having delivered its ruling on 25th April 2023, is now functus officio.

Analysis And Determination.

7. I have considered the application filed herein, the affidavit in support thereof, the grounds of opposition filed by the respondent and the written submissions filed by Counsel for the parties. The issue that arises for determination is whether this Court should review its ruling of 25th April, 2023.
8. Review applications are provided for under the provisions of Section 80 of the [Civil Procedure Act](#) which 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.
9. The above provisions are elaborated under Order 45 of the Civil Procedure Rules, 2010 as follows -
Application for Review of decree or order.
 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.
10. The Court in the case of *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others* [2021] eKLR, when dismissing an application similar to this one held that-

“...section 80 prescribes the power of review while Order 45 stipulates the rules. However, the rules limit the grounds for evaluating requests for review. Simply put, there are definite limits to the exercise of power of review. The rules prescribe the jurisdiction and scope of review. They limit review to the following grounds:

 - a. Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
 - b. On account of some mistake or error apparent on the face of the record, or
 - c. For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.”
11. In this case, the applicant is seeking a review of this Court’s ruling delivered on 25th April 2023 on the basis that her application was dismissed for not providing relevant documentary evidence, whereas the necessary documents were already presented during the taxation proceedings in Misc. No. 754 of 2019, but the Deputy Registrar failed to forward the file to the Judge before the ruling of 25th April 2023 was delivered.
12. From the above, it is manifest that the grounds on which the applicant seeks to set aside the ruling delivered on 25th April 2023 are not the ones contemplated under the provisions of Order 45 of the Civil Procedure Rules, 2010. The Supreme Court of India discussed the scope of review in the case of



Ajit Kumar Rath vs State of Orisa & others, 9 Supreme Court Cases 596 at Page 608, where the said Court stated as follows-

A review cannot be claimed or asked 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 tabling it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule.

13. This Court at paragraph 18 of its ruling delivered on 25th April 2023 held that

“.....it is not the business of the Court to go looking for pleadings, evidence and/or any other documentation in support of an applicant’s case. The applicant had a duty to avail to this Court all the necessary pleadings and/or documents in support of her case, so as to assist the Court in arriving at a just decision.”

14. This Court then proceeded to strike out the applicant’s Chamber Summons application dated 31st March 2022 for being defective. In the premise, the applicant’s argument that failure to forward the file for Misc. No. 754 of 2019 to the Judge was an administrative failure which should not negatively impact her, holds no water, since the applicant bore the burden of availing to Court all the necessary pleadings and/or documents in support of her case, so as to assist the Court in arriving at a just decision. Instead of filing another application with proper supporting documentation after the first one was struck out, the applicant opted to file the instant application for review of the Court’s ruling of 25th April 2023. Needless to say, there was no error apparent on the face of the said ruling to be reviewed by this Court.

15. In the result, the application dated 19th September, 2023 is not merited. It is dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF OCTOBER, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Kariuki for the respondent

No appearance for the respondent

Ms B. Wokabi – Court Assistant.

