



**Bakari v Abdalla & another (Family Miscellaneous Application
E005 of 2023) [2023] KEHC 18875 (KLR) (12 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18875 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY MISCELLANEOUS APPLICATION E005 OF 2023**

**G MUTAI, J
JUNE 12, 2023**

BETWEEN

SOPHIE PETER BAKARI APPLICANT

AND

HAFSWA OMAR ABDALLA 1ST RESPONDENT

THE HON CHIEF KADHI, MOMBASA 2ND RESPONDENT

RULING

1. The single question that this Court is called upon to determine in this matter is whether the High Court can, in exercise of its review jurisdiction under Order 45 of the *Civil Procedure Rules* review the “orders and proceedings” of a Court Subordinate to it. The view of this Court, after perusing the application and the response thereto, as well as the rival submissions of the parties, is that it does not. That being the case the finding of this Court is that the Notice of Motion application dated February 3, 2023 is completely without merit and must fail for the reasons I shall give below.
2. Vide the said Notice of Motion the Applicant sought the following orders:-
 1. Spent;
 2. That this honourable Court be pleased to call from the Kadhi’s Court, Mombasa, Kadhi Succession Cause No 202 of 2018; Estate of Hussein Omar Taib (deceased) between the parties herein which was heard and determined by the Hon Chief Kadhi, Hon Ali Mudhar AS Hussein on April 27, 2021 for purposes of ordering a review of his orders while in session with another Chief Kadhi, of the same ranking from another jurisdiction other than Mombasa County;
 3. That this Honourable Court be pleased to order that all the new and important matters and evidence that have since been discovered by the Applicant herein be incorporated in the review



herein so as to prevent the estate of the deceased in this matter being rendered into waste by the Respondent and her agents or other associates; and

4. That the costs of this application be provided for.
3. The Applicant grounds his application on an averment that since the Chief Kadhi delivered his ruling on April 27, 2021 she has discovered “several new and important matters after the exercise of her due diligence which were not within her knowledge at that time hence this application for review is now necessary. She argues that the circumstances of the case now call for this Court to call for the lower Court file “for purposes of ordering the review of the last orders of the immediate former Chief Kadhi that was delivered on April 27, 2021”.
4. The application is supported by the affidavit of the Applicant sworn on February 3, 2023. The Applicant deposes that she wishes to have this Court consider and review the ruling together with another Chief Kadhi. The basis of this, she deposes, is that after the ruling was read she discovered new and important evidence which she was not able to supply to the Court previously as they were not within her knowledge when the proceedings at the lower Court were ongoing. She itemised some matters she said were not considered by the Court. She thus submitted that the application was merited.
5. The foregoing notwithstanding the Applicant did not provide any documentary evidence in support of her application.
6. The application is opposed. The 1st Respondent filed a Replying Affidavit sworn on March 11, 2023 and filed on March 14, 2023. In her said affidavit the Respondent deposed that under order 45 of the [Civil Procedure Rules, 2010](#) a review application must be filed in the Court that issued the orders or passed the ruling. She further deposed that no reason had been given for transfer of the matter to a Kadhi, other than that of Mombasa as there are other Kadhi’s in Mombasa who could hear the case. She stated that apart from what she considered to be hearsay no evidence of new and important facts had been produced. She indicated that the Kadhi’s Court had already rendered its judgment. In evidence of that a copy of the judgment and the decree was produced. She thus deposed that the application was an abuse of the process of Court and prayed that it be dismissed with costs.

Proceedings before Court

7. When the matter came before me on March 14, 2023 I directed that the same be canvassed by way of Written Submissions. The parties complied with my directions in the result that on May 10, 2023 I, upon confirming that both parties had complied with my directions, reserved my ruling for 9th June, 2023.

Submissions of the Applicant

8. The Applicant in her very brief submissions asked the court to take judicial notice of the fact that the Judicial Service Commission had not, as at the date the submissions were filed, appointed a substantive Chief Kadhi. It was urged that as the orders sought to be reviewed were passed by the Chief Kadhi this Court should, when reviewing his orders, sit with another Chief Kadhi. It was submitted that the orders sought were in the interest of justice.

Submissions of the Respondent

9. The Respondent, in equally brief submissions argued that this Court lacked jurisdiction to review the matter before the Court below. I was referred to the provisions of Order 45 of the [Civil Procedure Act](#) whose contents were reproduced. It was thus urged that I dismiss the application.



The Applicable Law

10. As I have indicated the Court that can properly hear a review application is the one that passed the decree and or order. That would appear to be a most elementary point that shouldn't be a subject of contention. Since this application was filed it would be useful to set out the applicable law so that any doubt is erased.
11. Section 80 of the [Civil Procedure Act](#) provides 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”.

(emphasis added)
12. The foregoing provision is given effect by Order 45. The said Order goes on to say that the review application must be made without unreasonable delay.
13. From foregoing it is clear that a review application must be made before the Court that passed the decree or made the impugned order. The Court that passed the decree is the Kadhi Court, not this Court ergo the Court before the which the review application should have been filed is the Kadhi Court.
14. Mativo J (as he then was) considered the law applicable in review applications in [Republic versus Advocate Disciplinary Tribunal Ex-parte Apollo Mboya](#) [2019]eKLR and held as follows:-

“The principles which can be culled out from the above noted authorities are:-

 - 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.”

15. I am not convinced that there has been a discovery of new and important matter or evidence which after the exercise of due diligence was not with the Applicant. She has listed matters that were perfectly capable of discovery by her had she exercised due diligence. The Court in Republic v Advocates Disciplinary Tribunal Ex-parte Apollo Mboya (supra) held as follows: -

“... for material to qualify to be new and important evidence of matter, it must be of such a nature that could not have been discovered had the Applicant exercised due diligence. It must be such evidence or material that was not available to the Applicant or the Court”.

16. The Applicant should have filed the Application in good time. This Application before me was made almost 2 years after Chief Kadhi made his decision No explanation for the delay has been given. The Applicant is therefore guilty of laches.

17. I have already indicated that the feeble attempt at review of the ruling of the Chief Kadhi made by the Applicant lacks merit. I must thus dismiss the same. I make no orders as to costs.

Orders accordingly.

DELIVERED DATED AND SIGNED THIS 12TH DAY OF JUNE 2023 AT MOMBASA VIA MICROSOFT TEAMS

.....

GREGORY MUTAI

JUDGE

In the presence of :-

No appearance for the Applicant



No appearance for the Respondent
Ms. Gillian Mutamba – Court Assistant

