



REPUBLIC OF KENYA



KENYA LAW
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**Ismail & another v Otwala (Civil Appeal E067 of 2022)
[2023] KEHC 27640 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 27640 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E067 OF 2022**

**F WANGARI, J
JUNE 21, 2023**

BETWEEN

JUMA ISMAIL 1ST APPELLANT

MEJUMA MBODZE MDUNE 2ND APPELLANT

AND

EVANS OTWALA RESPONDENT

RULING

1. This is a Ruling on an Application dated 7/11/2023 and filed by the Appellants/ Applicants seeking the review of the Ruling of this Court dated 27/10/2023. The Application is brought under the provisions inter alia Order 45 (1)(b) of the Civil Procedure Rules and is materially based on the ground that this court did not consider the grounds of appeal which had high chances of success, and that the mistake by an advocate should not be visited upon the client.
2. The Respondent filed their Grounds of Opposition dated 15/12/24. The stated that the Appellant had not met test for review and setting aside the court ruling. Further, it was stated that this application was an appeal disguised as a review application, and trying to re-litigate the application dated 20/1/2023 through backdoor.
3. The application was disposed of by way of written submissions, and both parties complied by filing their rival submissions.

Analysis and determination

4. I have perused the Application and the response thereto. I have also considered the filed submissions. The single issue for determination is whether the Applicant has met the legal threshold for an order of review on account of the error apparent on the face if the record.



5. The Jurisdiction of this Court to grant review is well set out in the law. 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”.

6. 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

7. Order 45 Rule 1 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”

8. In reference to the reasoning of Kuloba J (as he then was) in *Lakesteel Supplies vs. Dr. Badia and Anor* Kisumu HCCC No. 191 of 1994 he stated as follows;

“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.”

9. From the provisions of Order 45 (1) (b) of the Civil Procedure Rules, it must be shown that there was an error or omission on the part of the court that needs correction. If there was a discovery of new and important matter discovered after the order sought to be reviewed. From the application and the supporting affidavit, no error on record that needs to be corrected has been pointed out. In addition to the above, there is also no new evidence discovered after the order in issue was issued.
10. The Applicant in his application states that the Preliminary Objection subject to the ruling dated 27/10/2023 was dismissed out of mere technicality and not on merits. Further, that the court did not consider the grounds of appeal which had high chances of success. The Applicant went ahead to argue the issues raised in the Preliminary Objection is seeking for the orders to have the ruling dismissing the said Preliminary Objection set aside.
11. It is clear that the Applicant is seeking to appeal the orders issued on 27/10/2023 through the back door. The issues being raised in the application were already determined and the court made its decision.
12. In *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR where the Court of Appeal stated as follows;

“In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.”
13. From the above, I find that the application has not met the threshold for review under Order 45 (1) (b) of the Civil Procedure Rules.
14. The application having been dismissed, costs of the Application are awarded to the Respondent.
15. Following the foregone discourse, the upshot is that the following orders do hereby issue;
 - a. That the Notice of Motion dated 7/11/2023 has no merits and is hereby dismissed.
 - b. Costs of the application to the respondent.
 - c. File is hereby closed.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 21ST DAY OF JUNE, 2023.



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F. WANGARI

JUDGE

In the presence of;

N/A by the Applicant

M/S Obwangi Advocate for the Respondent

Barile, Court Assistant

