



SKR v BC (Civil Appeal E011 of 2023) [2025] KEHC 13740 (KLR) (26 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13740 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E011 OF 2023
M THANDE, J
SEPTEMBER 26, 2025**

BETWEEN

SKR APPELLANT

AND

BC RESPONDENT

RULING

1. Before this Court for determination is a Notice of Motion dated 22.11.24 seeking:
 1. Spent.
 2. That the firm of Kagori & Kagori Advocates be granted leave to come on record for the Appellant/Applicant.
 3. That the Honourable Court be pleased to hear the Application herewith and set aside orders made on the 18th day of March, 2024 and reinstate the appeal for hearing on its merits.
 4. That the Applicant be at liberty to apply for further orders and/or directions as the Honourable Court may deem fit to grant.
 5. That the costs of this Application be provided for.
2. The grounds upon which the Application is premised are that the Appellant’s application dated 9.4.23 seeking reinstatement of his appeal, was dismissed on 6.11.24 as his then advocates failed to comply with the provisions of Order 9 Rule 9 of the Civil Procedure Rules; that the application was determined on merit and that he was condemned unheard and has to remain in a non-functional marriage as the Respondent is bent on securing his property in the event of his demise. The Appellant asserted that he has an arguable appeal with good prospects of success. He urged that the mistakes of counsel should not be visited upon him and that the appeal be reinstated so that he can prosecute the same.



3. The Respondent filed grounds of opposition dated 17.3.25. The grounds are that the Court is functus officio; the Application is misconceived, bad in law an abuse of the court process and ought to be dismissed.
4. The background of this matter briefly, is that the Appellant through Minyazi & Associates Advocates, filed his appeal on 13.2.23, against the judgment of Hon. D. Sitati in Kilifi SRM Divorce Cause No. E006 of 2022. The appeal was admitted on 28.3.23 and directions given for the filing and service of the record. Further directions were to be given on 14.6.23 but the date was moved to 19.7.23 as the Judge was away. On that date however, the Applicant was absent and the record had not been filed. The Court dismissed the appeal for want of prosecution.
5. The Appellant, then acting in person filed an application dated 9.10.23, seeking the setting aside of the orders of 19.7.23 and reinstatement of the appeal. On 24.10.23, the Court noted that the issue of preparation of the record was not addressed and directed that the application be served for mention on 20.11.23. None of the parties attended Court on that date and a further mention was fixed for 18.3.24. However, on that date, the Respondent attended Court but the Appellant did not. The matter was dismissed with costs. Undeterred, the Appellant filed an application dated 9.4.24, seeking the setting aside the orders of 18.3.24 and reinstatement of his appeal. By a ruling dated 6.11.24, the Court found that the Applicants advocate had not complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules and dismissed the application. It is this state of affairs that has prompted the present Application.
6. The Appellant seeks the setting aside of the orders of 18.3.24 and reinstatement of its appeal for hearing on merit.
7. As indicated herein, the appeal was dismissed on 19.7.23 for failure of the Appellant to attend court and to file the record of appeal as directed on 28.3.23. Similarly, the Applicant failed to attend Court on 18.3.24 for his application dated 9.10.23 and the same was dismissed. His Application dated 9.4.24 was dismissed for noncompliance with the provisions of the law.
8. It is noted that the prayers sought in the present Application are identical to those sought in the application dated 9.4.24, namely setting aside the orders of 18.3.24 and reinstatement of the appeal. The Applicant is in essence asking the Court to hear and determine afresh, an application that has been determined with finality by this Court. Notably, the Applicant is not seeking review of the orders under the provisions of Section 80 of the *Civil Procedure Act* or Rule 45 of the Civil Procedure Rules. This Court having made a determination on the prayers sought in the application dated 9.4.24, it became functus officio and cannot re-open deliberation on the said prayers, notwithstanding they have been brought in a new application.
9. It is trite law that once a court has made a final determination on an issue, any challenge to the decision can only be taken to a higher court. This was the holding in *Shollei v Judicial Service Commission & another* (Application 10 (E016) of 2022) [2023] KESC 8 (KLR) (Civ) (17 February 2023) (Ruling) where the Supreme Court stated:

Noting that in the case of *Raila Odinga vs IEBC & 3 others* [2013] eKLR this court referred to the case of *Jersey Evening Post Limited v A Thani* [2002] JLR 542 at pg 550 where it was stated that:

A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the



court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.” [emphasis ours]

10. This Court being functus officio, cannot consider the present Application. The Applicant’s challenge to the decision of this Court must be taken to a higher court, namely the Court of Appeal.

11. Further, this Court derives its jurisdiction principally from Article 165(3) of *the Constitution* which confers upon it, unlimited original jurisdiction in criminal and civil matters. The provision clearly delineates and demarcates what the Court can and cannot do. The jurisdiction of this Court includes supervisory powers. By dint of Article 165(6) however, this Court cannot supervise superior courts. It provides:

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

12. In *Kenya Hotel Properties Limited v Attorney General & 5 others* (Petition 16 of 2020) [2022] KESC 62 (KLR) (Civ) (7 October 2022) (Judgment), the Supreme Court stated:

As was thus rightly noted by the High Court and the Court of Appeal, the rule of thumb is that superior courts cannot grant orders to reopen or review decisions of their peers of equal and competent jurisdiction much less those court higher than themselves.

13. Duly guided, this Court finds that it lacks the jurisdiction to reopen or review the decision made by its peer of equal and competent jurisdiction.

14. The upshot is that the Application dated 22.11.24 lacks merit and the same is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF SEPTEMBER 2025

M. THANDE

JUDGE

