

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL APPEAL NO. E140 OF 2023**

**IBRAHIM ADDAN ISSACK .....**  
**APPELLANT**

**VERSUS**

**MARGINTONS**  
**LIMITED .....RESPONDENT**

***(Being an appeal from the Ruling of Honourable E.K  
Suter (PM) in Mavoko Magistrate’s Civil Case No. 332 of  
2020 delivered on 15<sup>th</sup> June 2023)***

**JUDGMENT**

1. The appellant being aggrieved by the Ruling of the trial court delivered on 15<sup>th</sup> June 2023 in Mavoko Magistrate’s Court Civil Case No. 332 of 2020 preferred this appeal. The ruling arose from an application dated 31<sup>st</sup> March 2023 filed by the appellant seeking a review of the ruling delivered on 29<sup>th</sup> March 2023. Dissatisfied by the dismissal of that application, the appellant filed a Memorandum of Appeal dated 19<sup>th</sup> June 2023 on the following summarized grounds; that the Learned Magistrate erred in law and in fact in holding that the application dated 31<sup>st</sup> March 2023 did not meet the threshold for review; in finding that the Appellant was bound by a consent judgment to which he was not aware of and was not a party to; by failing to consider and apply

the principles governing the setting aside of consent judgment; by failing to consider the merits of the appellant's applications and erred in holding that consent judgment was valid and binding without adequately analysing the evidence and submissions presented, thereby arriving at an erroneous decision.

2. The Appellant seeks the following orders; that the appeal be allowed; the judgment/decreed delivered on 15<sup>th</sup> June 2023 in Mavoko Magistrate Court Civil Suit No. 332 of 2020 be set aside; the appellant be granted costs of this appeal and that this court be pleased to make any further orders and directions that it may deem fit and just in the circumstance of the case.
3. Pursuant to the directions of this court the application was canvassed by way of submission.

### **Appellant's submissions**

4. The Appellant commenced her submissions by outlining the facts of the case. He challenges the ruling delivered on 15<sup>th</sup> June 2023 by the trial court, which dismissed his application for review dated 31<sup>st</sup> March 2023. That application had sought to review and set aside an earlier ruling of 29<sup>th</sup> March 2023, in which the court declined to set aside a consent judgment dated 12<sup>th</sup> September 2022. The Appellant maintains that he was neither a party to nor aware of that consent judgment, and being aggrieved by the refusal to review the decision, he filed the present appeal.

5. The Appellant identifies four issues for determination: whether the trial court erred in dismissing the application for review; whether the consent judgment should be set aside; whether the appeal is merited and the appropriate reliefs; and who should bear the costs of the appeal.
6. On the first issue, the Appellant submits that the trial court erred in law and fact by failing to exercise its discretion judiciously. He argues that his application for review was properly grounded on the discovery of new and important evidence which, despite due diligence was not within his knowledge at the time of the initial ruling. He relies on Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, emphasizing that while Section 80 grants the court power to review its orders, Order 45 outlines the conditions for such review, including discovery of new evidence, error apparent on the face of the record, or any other sufficient reason. The Appellant contends that the trial court failed to appreciate that review can also be granted for “any other sufficient reason,” and that this ground is not restricted or analogous to the other specified grounds. He relies on the authority in **Shanzu Investments Limited v Commissioner for Lands (Civil Appeal No 100 of 1993)** to support the position that the phrase “any other sufficient reason” should be given a broad and unfettered interpretation. Accordingly, he submits that the trial magistrate erred in finding that the application did not meet the threshold for review.

7. On the second issue, the Appellant submits that the consent judgment dated 12<sup>th</sup> September 2022 ought to be set aside because it was entered into without his consultation, knowledge, or consent, and without the concurrence of his advocate. He argues that the trial court failed to properly consider and apply the established legal principles governing the setting aside of consent judgments and also failed to exercise its inherent powers under Sections 1A, 1B, and 3A of the Civil Procedure Act in the interest of justice.
8. The Appellant reiterates that it is settled law that a consent judgment can only be set aside on grounds that would justify the setting aside of a contract, such as fraud, collusion, or an agreement contrary to public policy. In this regard, he relies on **Board of Trustees National Social Security Fund v Michael Mwalo [2015] eKLR**, where the court affirmed that a consent judgment may be impeached on such grounds. He submits that based on the evidence and circumstances of this case, the consent judgment meets the threshold for being set aside.
9. On the third issue, the Appellant submits that he has demonstrated that the conditions for review were met and that the consent judgment ought to be set aside. Consequently, he argues that the appeal is merited and should be allowed. He urges the court to set aside both the ruling dismissing the application for review and the consent judgment itself. In support of this position, he

relies on **Kimita v Wakibiru [1985] eKLR**, where the court allowed an appeal, set aside an order dismissing an application for review, and granted appropriate relief after finding that the threshold for review had been satisfied.

10. On the issue of costs, the Appellant submits that he should be awarded the costs of the appeal in line with the principle that costs follow the event, particularly since the appeal ought to be allowed. However, he further contends that, given that the trial suit was allegedly filed without the Respondent's instructions, the costs should, in any event, be borne by the firm of Mwangale & Company Advocates.

### **Respondent's submissions**

11. The Respondent opposes the Appellant's appeal arising from the ruling delivered on 15th June 2023, which dismissed the Appellant's application for review dated 31st March 2023. The Respondent notes that the Appellant had initially filed an application dated 27<sup>th</sup> October 2022 seeking to set aside a consent judgment. That application was dismissed by the trial court, prompting the Appellant to file the subsequent application for review, which was also dismissed. Aggrieved by the dismissal of the review application, the Appellant then filed the present appeal through a Memorandum of Appeal dated 19<sup>th</sup> June 2023.

12. The Respondent frames two issues for determination: whether the trial court erred in dismissing the application for review, and whether the appeal is merited.
13. On the first issue, the Respondent submits that the trial court did not err in dismissing the application for review. They rely on **Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules**, emphasizing that although the law permits review, it is only available under specific conditions. The Respondent argues that the Appellant's application was primarily grounded on the alleged discovery of new and important evidence. However, they contend that mere discovery of such evidence is insufficient; the applicant must also demonstrate that the evidence was not within their knowledge and could not have been produced earlier despite the exercise of due diligence. In support of this position, the Respondent cites **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR**, and further argues that the Appellant failed to meet this threshold demonstrated in this case as he did not demonstrate that the purported new evidence was unavailable to him despite due diligence. Instead, the trial court correctly found that the failure to produce the evidence earlier was attributable to the Appellant's own lack of diligence and carelessness.
14. The Respondent further relies on **Alpha Fine Foods Limited v Horeca Kenya Limited & 4 Others [2021]**

**eKLR**, submitting that for evidence to qualify as “new,” it must have been discovered after the order sought to be reviewed. In this case, the Appellant admitted to having obtained the affidavit forming the alleged new evidence on 27<sup>th</sup> February 2023, prior to the delivery of the ruling of 29<sup>th</sup> March 2023. Therefore, it is inconceivable for the Appellant to claim that the evidence was not within his knowledge at the time of the ruling. The Respondent argues that the Appellant failed to demonstrate that he was prevented by circumstances beyond his control from presenting the evidence earlier.

15. They also rely on **Cyrus Shakhhalaga Khwa Jirongo v Soy Developers Limited & 9 Others SC Petition (Application) No. 838 of 2019** which emphasized that an applicant must show that the new evidence could not have been obtained with reasonable diligence or produced at the time of trial. Applying these principles, the Respondent submits that the Appellant did not satisfy the legal threshold for review and therefore the trial court was correct in dismissing the application. Consequently, the Appellant cannot use the present appeal to cure his own failure before the lower court.
16. On the second issue, the Respondent submits that the appeal is misconceived and lacks merit. They argue that although the Appellant purports to appeal against the ruling of 15<sup>th</sup> June 2023 which dealt with the application for review, the grounds in the Memorandum of Appeal actually target the earlier ruling of 29<sup>th</sup> March

2023 concerning the refusal to set aside the consent judgment. As such, the appeal is fundamentally inconsistent and not aligned with the decision being challenged.

17. The Respondent emphasizes that a Memorandum of Appeal is a fresh pleading that defines the scope of the appellate court's jurisdiction and parties are strictly bound by their pleadings. They rely on **Akhura v Simon Kibet Rugut (Civil Appeal E054 of 2024) [2025] KEHC 3133 (KLR)** where the court dismissed an appeal on the basis that the issues raised were inconsistent with the grounds of appeal. Similarly, in the present case, the Appellant has departed from his pleadings by raising issues that do not relate to the ruling under appeal, rendering the appeal defective and misconceived.

18. Further, the Respondent argues that the Appellant is improperly attempting to challenge the refusal to set aside the consent judgment by disguising the appeal as one arising from the dismissal of the review application. They contend that this amounts to an abuse of the court process, as the Appellant is effectively reopening issues that were the subject of the earlier application. In support of this argument, the Respondent cites **HA v LB [2022] eKLR**. The Respondent submits that by first seeking to set aside the consent judgment, then applying for review and now filing the present appeal, the Appellant is engaging in precisely the kind of multiplicity of proceedings that the law seeks to prevent.

19. The Respondent reiterates that the core issue in the present appeal is the dismissal of the application for review yet the Appellant's arguments improperly focus on the merits of setting aside the consent judgment. They argue that having elected to pursue review, the Appellant cannot now seek to appeal the same issues under the guise of challenging the review decision. Accordingly, the Respondent submits that the Appellant's conduct amounts to an abuse of the court process and that the appeal is misconceived, lacks merit and should not be entertained.
20. In conclusion, the Respondent prays that the appeal be dismissed in its entirety and that costs be awarded to the Respondent.

### **Analysis and Determination**

21. This being a first appeal, the duty of the court is settled see the case of **Selle and another Vs Associated Motor Board Company and Others [1968] EA 123**. This court is under a duty to re-evaluate and reassess the evidence and arrive at its own independent conclusions.
22. I have carefully considered this Appeal in its entirety. The central issue that emerges for determination is **whether the learned trial magistrate erred in law and in fact in dismissing the Appellant's application for review dated 31<sup>st</sup> March 2023**.

23. This issue is dispositive of the entire appeal. Although the Appellant has raised several grounds touching on the validity of the consent judgment dated 12<sup>th</sup> September 2022, it is evident that the appeal before this Court arises strictly from the ruling delivered on 15<sup>th</sup> June 2023, which determined the application for review. Consequently, this court will confine itself to interrogating whether the threshold for review was met and whether the learned magistrate properly exercised her discretion.
24. The law governing review is well settled under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, 2010. These provisions circumscribe the jurisdiction of a court to review its own orders upon: 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 at the time the order was made; mistake or error apparent on the face of the record; or any other sufficient reason. Additionally, the application must be made without unreasonable delay.
25. The trial court correctly set out the applicable legal framework and further relied on judicial authority, including **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR** which emphasizes that mere discovery of new evidence is insufficient unless accompanied by proof that such evidence was not within the applicant's knowledge and could not have been produced despite due diligence.

26. From the record, the Appellant's application for review was premised primarily on the alleged discovery of new and important evidence, namely an affidavit said to have been obtained from a former advocate. The Appellant contended that the said affidavit was not available at the time the ruling of 29<sup>th</sup> March 2023 was delivered and that it would have materially affected the outcome of the decision. However, the trial court made a clear factual finding that the Appellant had received the said affidavit on 27<sup>th</sup> February 2023 prior to the delivery of the ruling sought to be reviewed. Further, the court noted that the Appellant had indicated having written a letter as early as 2<sup>nd</sup> February 2023 regarding the same issue. Despite this, neither the Appellant nor his advocate brought this matter to the attention of the court before the ruling was delivered, nor did they seek an extension of time or leave to introduce the evidence.

27. The learned magistrate consequently found that there was a lack of diligence on the part of the Appellant and his counsel and that the application for review was an afterthought brought after the delivery of the ruling. The court further observed that litigation cannot be conducted in a piecemeal manner and that parties are bound to present their case fully at the appropriate time.

28. This court finds no reason to fault those findings. The requirement of due diligence under Order 45 Rule 1 is not a mere technicality but a substantive threshold. As was held in **Alpha Fine Foods Limited v Horeca Kenya**

**Limited & 4 Others [2021] eKLR**, an applicant must demonstrate not only that the evidence is new but also that it could not have been obtained with reasonable diligence prior to the impugned decision.

29. In the present case, the Appellant did not satisfy this requirement. The evidence he sought to rely on was admittedly within his possession prior to the delivery of the ruling. The failure to place it before the court cannot therefore be attributed to circumstances beyond his control but rather to his own inaction. Review cannot be used as a mechanism to cure such omissions.

30. The Appellant also invoked the ground of “any other sufficient reason” and relied on **Shanzu Investments Limited v Commissioner for Lands**. While it is true that this ground is broad and not restricted to the other specified grounds, it must still be exercised judiciously and within the framework of justice. The trial court considered this argument and found that the reasons advanced did not amount to sufficient cause, particularly in light of the demonstrated lack of diligence. I agree with that finding. To hold otherwise would open the door to abuse of the review jurisdiction by parties seeking to re-litigate matters that ought to have been addressed earlier.

31. I also find merit in the Respondent’s submission that the Appellant has improperly sought to re-open the merits of the application to set aside the consent judgment through the present appeal. The Memorandum of Appeal

raises issues relating to the validity of the consent judgment yet the ruling under appeal was confined to the question of review. This creates a misalignment between the decision appealed against and the grounds advanced. I am persuaded by the reasoning in **HA v LB [2022] eKLR**, where the court cautioned against litigants pursuing review and appeal in a manner that creates multiple fronts of litigation or amounts to an abuse of the court process. The sequence of applications by the Appellant first seeking to set aside the consent judgment, then seeking review and now appealing demonstrates an attempt to re-open issues that have already been conclusively determined.

32. In the circumstances, I find that the learned trial magistrate properly directed herself on the law, correctly evaluated the material on record and exercised her discretion judiciously in dismissing the application for review. There is no basis for this court to interfere with that exercise of discretion.

33. This appeal therefore lacks merit and is dismissed with costs. The ruling of the trial court delivered on 15<sup>th</sup> June 2023 is hereby upheld.

34. Orders accordingly.

Dated, signed and delivered at Machakos this 9<sup>th</sup> day of April, 2026.

**RHODA RUTTO**  
**JUDGE**

**In the presence of;**

.....Appellant

.....Respondent

Selina Court Assistant