



REPUBLIC OF KENYA



**KENYA LAW**  
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**CKO v JMO (Civil Appeal (Application) 560 of 2019)  
[2025] KECA 207 (KLR) (7 February 2025) (Ruling)**

Neutral citation: [2025] KECA 207 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 560 OF 2019  
DK MUSINGA, F SICHALE & HA OMONDI, JJA  
FEBRUARY 7, 2025**

**BETWEEN**

**CKO ..... APPLICANT**

**AND**

**JMO ..... RESPONDENT**

*(Being an application under section 3 and 3A of the Appellate  
Jurisdiction Act for review of the Judgment and Orders of this Court,  
Musinga (P), Sichale & Omondi, JJ.A.) dated 3rd February, 2023)*

**RULING**

1. The Notice of Motion dated 17<sup>th</sup> April, 2023 seeks the following orders:

- “i. Spent
- ii. Spent
- iii. That this Honourable Court of Appeal be pleased to review and set aside its Judgment dated 3<sup>rd</sup> February, 2023 and any orders that may be extracted therefrom in its entirety, and subsequently to render its decision de novo upon considering the grounds raised herein.
- iv. That the cost of this application be provided for.”

2. The motion was supported by the grounds on the face of the motion as well as the applicant’s affidavit sworn on 17<sup>th</sup> April, 2023. In both the grounds on the face of the motion and the affidavit in support thereof, the applicant faulted the decision of the Court dated 3<sup>rd</sup> February, 2023 that dismissed his cross appeal and varied the mode of distribution of the matrimonial property from a ratio of 70:30 in



- favour of the applicant to a 50:50 ratio. The applicant avowed that the said judgment “...is premised on fundamental mistakes and/or manifest errors on the face of it resulting in the miscarriage of justice ...”
3. The applicant urged us to find that it was erroneous for the Court to have come to the conclusion that from the date of suspension from his employment in 1997 upto 2002 when he was dismissed from employment, (the court erroneously indicated the commencement date of the suspension as 1999), he still had income as during the suspension period, he was still receiving a full salary as an employee of (particulars withheld); that as for the period from 2002 upto 2005, (when he got employed in Botswana), he had income from his pig farming in addition to severance pay of 12 months which he had received upon his termination, a sum of Kshs 1,860,000.00; that he sued (particulars withheld) for wrongful termination and he was awarded Kshs 6,000,000.00 as damages and which sum was used for the benefit of the family; that he engaged in consultancies on his own apart from those that he undertook jointly with the respondent; that he single-handedly bought and developed the Fair Acres property in Karen (the family home); that this Court erred in finding that the Kileshwa property was jointly bought; that he single handedly purchased and developed the Lubao property in Kakamega County and registered it in the name of his son, who is not an issue of the marriage; that it was wrong for the Court to have found that his pension was used for the benefit of the family; that the Court erred in finding that the money for the purchase of the Honda CRV, unlike the money for the purchase of the Polo Classic, came from the joint account. Further, he faulted the Court for finding that the respondent was kicked out of the family house, yet the respondent had signed a lease agreement hiring an apartment long before the date of the alleged kick-out.
  4. In paragraph 12 of his affidavit, the applicant sought to have the impugned judgment “ ... reconsidered entirely in light of the above clarifications and be set aside entirely”.
  5. In a further affidavit dated 21<sup>st</sup> September, 2023, the applicant asserted that this Court has residual jurisdiction to review its decision more so when the same is based on fraud, bias or is likely to cause injustice; that this Court falsely assumed facts in favour of the respondent and ignored material evidence that rebutted the presumptions made, and that there are various factual mistakes that have occasioned injustice. In this further affidavit, the applicant reiterated his averments in the supporting affidavit.
  6. In a replying affidavit dated 30<sup>th</sup> June, 2023, the respondent resisted the motion on the basis that it “...is essentially a thinly disguised attempt to appeal against this Court’s Judgment.” She refuted the averments in the supporting affidavit and maintained that she contributed both directly and indirectly to the acquisition of the assets.
  7. On 19<sup>th</sup> December, 2024, the motion came before us for plenary hearing, albeit on the virtual platform. Dr. Arwa, learned counsel for the applicant orally highlighted the applicant’s submissions dated 23<sup>rd</sup> October, 2023.
  8. Relying on the decision of *Benjob Amalgamated Limited & another v Kenya Commercial Bank Limited* [2014] eKLR, counsel submitted that this Court has jurisdiction to review its decision, which decision was fraught with errors of fact as well as bias, the outcome of which caused a total miscarriage of justice; that the refusal to consider the applicant’s evidence violated his right of access to justice under Article 48 of the *Constitution*, thus denying him his right to property as protected under Article 27 of the *Constitution*.
  9. It was further submitted that it was contemptuous of the Court to ignore material evidence of contribution by the applicant in finding in favour of the respondent in absence of supporting evidence as to contribution. Relying on the decision of *F.S v E.Z* [2016] eKLR, it was submitted that the



applicant having contributed a larger portion was entitled to a larger share in the division of the matrimonial property.

10. On the import of the Notice of Appeal dated 15<sup>th</sup> February, 2023 filed by the applicant against the impugned judgment, it was submitted that a right of appeal is subject to leave being granted by the Court and hence, it cannot be said that the applicant exercised his right of appeal by filing the said Notice of Appeal as no leave had been sought and obtained.
11. In response, learned Senior Counsel Judy Thongori, who sadly has since passed on, orally highlighted the respondent's submissions dated 23<sup>rd</sup> October, 2023. She submitted that this Court has limited jurisdiction to review its decision and in support of this proposition, she relied on various decisions including *Benjob Amalgamated Limited v Kenya Commercial Bank Limited* (*supra*) and *Synergy Industrial Credit Limited v Cape Holdings Ltd* [2019] eKLR. She submitted that this Court's power of review on concluded appeals is exercisable in exceptional circumstances and in the most compelling of cases. She argued that the motion before Court is an appeal disguised as a review, and finally, that the Notice of Appeal dated 15<sup>th</sup> February, 2023 filed by the applicant and the instant Review Application are mutually exclusive.
12. We have considered the motion together with the supporting affidavit, the replying affidavit, the applicant's further affidavit, the submissions filed by each of the respective parties and the oral highlights made before us, as well as case law. In *Benjob Amalgamated Limited v Kenya Commercial Bank Limited* (*supra*), the consideration by the Court was whether it had power to review its decision. The Court stated:

“The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court).” (Emphasis added)

13. The decision of *Benjob Amalgamated Limited v Kenya Commercial Bank Limited* (*supra*) was followed in *Standard Chartered Financial Services Ltd & another v Manchester Outfitters (Suiting Division) Ltd & 2 others* [2016] eKLR wherein the Court reiterated that it had residual jurisdiction to review its decisions in exceptional circumstances. In the *Standard Chartered case* (*supra*), the Court set aside its judgment on the basis that it was made without jurisdiction. Further, that there was likelihood of bias as one of the judges had had contact with one of the litigants.
14. In *Niels Bruel v Moses Wachira & 2 others* [2018] eKLR, the applicant sought to review the judgment of the Court on the basis that the Court had failed to evaluate the evidence in the 1<sup>st</sup> appeal. The applicant argued that because of that failure, his Constitutional rights to a fair hearing had been infringed. The Court rejected the argument and stated:

“Starting with the first prayer to re-open the appeal and review the judgment of this Court, it is axiomatic that this Court has jurisdiction to do so. But that jurisdiction is exceptional and has to be exercised sparingly and with circumspection to thwart disaffected parties who



merely seek a second bite of the cherry or who invite the Court to sit on appeal from its own judgment.” (Emphasis added)

15. Finally, in *Cape Holdings Limited (Under Administration) v Synergy Industrial Credit Limited* [Civil Appeal (Application) 81 of 2016 [2023] KECA 1497 (KLR) (8 December, 2023) (Ruling), this Court stated:

“Further, as this Court explained in the decisions we have cited above, allegations that the Court has misapprehended the law constitutes grounds for appeal, not grounds for invocation of the exceptional residual review jurisdiction of the Court. From those decisions, the exceptional residual jurisdiction of the Court will be triggered in the rare instances where the Court is satisfied that the judgment in question was made without jurisdiction, or is tainted by fraud, corruption, violation of the rules of natural justice or other grounds of similar genus that result in a glaring miscarriage of justice, such as what the Supreme Court described in the Nyutu case as “process failures as opposed to the merits of the arbitral award itself.” Such review must be on a case by case basis. Entertaining applications for review of judgments of this Court on the allegation that the Court has misinterpreted or misapplied the law would be the shortest and surest way to create an illegitimate tier of appeals against the decisions of the Court. There is a good reason why the makers of the *Constitution* of Kenya did not confer on the Supreme Court, the apex Court in the land, ordinary appellate jurisdiction from decisions of the Court of Appeal, to correct perceived errors of the law made by the Court. If the Supreme Court has no jurisdiction to entertain appeals from this Court on the grounds that it misapplied the law, how can the Court of Appeal itself be asked to routinely review its decisions on the same grounds? It is also not lost to us that this application for review of the judgment of the Court was made only after the Court found that the applicant’s intended appeal to the Supreme Court did not raise any matters of general public importance to justify a certificate to the apex Court. The Supreme Court was similarly not convinced it had any basis for entertaining the applicant’s intended appeal to that Court.”

16. Suffice to state that our jurisdiction in an application for review is limited and is to be exercised only in exceptional circumstances. In the decision of *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others*, [2017] eKLR, the Supreme Court identified the exceptional circumstances where the Court, in exercise of its inherent powers, may, upon application by a party, or on its own motion, review, any of its Judgments, Rulings or Orders, so as to meet the ends of justice, and which circumstances shall be limited to situations where:

- “(i) the Judgment, Ruling, or Order, is obtained, by fraud or deceit.
- ii. the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent.
- iii. the Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto.
- iv. the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision.”

17. In our view, the judgment of this Court was not obtained by fraud, neither was it a nullity. It was also not rendered on the basis of repealed law or on account of any deceit. It is our considered position and as stated in *Benjob Amalgamated Limited v Kenya Commercial Bank Limited* (*supra*), that the power



to review should be invoked with circumspection. It is also clear that the applicant's dissatisfaction with the impugned judgment is on the basis of our analysis of the evidence. The applicant is of the view that we failed to appreciate the evidence he tendered to support his contention that he made larger contributions compared to the respondent. The year that the applicant was suspended may have been 1997 (and not 1999 as indicated in the judgment). In our view, nothing turns on this. If anything, it goes to show that the applicant's period of suspension was understated by 2 years. The applicant's invitation for us to reconsider the evidence in light of the "clarifications" is, in our view, an appeal against our decision which appeal is disguised as an application for review.

18. It is common ground that the decision of the High Court that placed distribution of the various properties at 70:30 in favour of the applicant was challenged by both the respondent and the applicant; the latter by the filing of a cross-appeal. Upon hearing the appeal and the cross appeal, we arrived at the conclusion, for the reasons stated in the judgment and which we do not wish to rehash, that the properties therein (save the exceptions therein) be distributed equally between the parties. It would appear that the applicant was dissatisfied with this outcome and he duly filed a Notice of Appeal dated 15<sup>th</sup> February, 2023. At the time of hearing this motion, Dr. Arwa for the applicant submitted that the said Notice of Appeal was of no effect as the applicant, (in the absence of leave) had no right of appeal to the Supreme Court. In our view, that may well be the position, but the fact of the matter is that the applicant filed a Notice of Appeal dated 15<sup>th</sup> February, 2023 indicating his intention of moving the Supreme Court by way of an appeal.
19. It is also true to state that during the hearing of the motion, Dr. Arwa informed us that the applicant was satisfied with the distribution of the properties on the ratio of 70:30 in his favour. It is not lost to us that the applicant had filed a cross-appeal as he was dissatisfied with the decision of the High Court distributing the matrimonial property on a 70:30 ratio in his favour. Given the fact that both the applicant and the respondent were accomplished professionals, and given the fact that they both worked very hard for their family, notwithstanding the fact that the applicant at one point suffered a hiatus in his employment, one wonders how much less the applicant wanted the High Court to apportion to the respondent by cross-appealing against the division on the ratio of 70:30 in his favour? On our part, and for the reasons given in our judgment of 3<sup>rd</sup> February, 2023, we did provide reasons that led to our determination of apportionment in the ratio of 50:50. We do not see any bias as alleged by the applicant. It would appear that the applicant would like to have a second bite of the cherry under the guise that the Court was biased and/or we misapprehended the evidence. For the reasons stated above, and in our judgment, we directed that the apportionment be made on a 50:50 ratio, given the contribution of each of the parties. We also do not see any material misapprehension of the evidence as would have affected the decision that we arrived at.

The applicant should be content with the distribution of 50:50 ratio, given that the respondent, just like him, also contributed towards the acquisition of the matrimonial property.

20. We think we have said enough to demonstrate that we are not persuaded that there are exceptional circumstances to warrant a review of this Court's judgment dated 3<sup>rd</sup> February, 2023. The motion dated 17<sup>th</sup> April, 2023 is hereby dismissed with costs to the respondent.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**D. K. MUSINGA [PRESIDENT]**

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**JUDGE OF APPEAL**



**F. SICHALE**

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**JUDGE OF APPEAL**

**H. OMONDI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**

