



REPUBLIC OF KENYA



KENYA LAW
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**Kibagi v Njogu (Civil Appeal (Application) 95 of 2019)
[2025] KECA 1232 (KLR) (4 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1232 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) 95 OF 2019
JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA
JULY 4, 2025**

BETWEEN

LYDIA MUTHONI KIBAGI APPLICANT

AND

DANIEL NDERI NJOGU RESPONDENT

(Being an appeal from the Judgment and Order of the Environment and Land Court at Kerugoya (D.Cheronu, J.) delivered on the 14th March, 2019 in ELC Case No.487 of 2013)

RULING

1. Lydia Muthoni Kibagi the applicant has brought her application dated 12th March, 2025 under sections 1A and 3A and Order 45 of the Civil Procedure Rules (CPR) (Cap 21 Laws of Kenya) and Article 159 of the Constitution. It seeks the following prayers:
 - a. Moot
 - b. That pending the hearing and determination of this application the Court be pleased to issue orders staying the execution of the judgment delivered on 8th March, 2024.
 - c. That the Court be pleased to review its judgment of 8th March, 2024 and therefore set aside the said judgment and order that the appeal herein be heard afresh before a different panel of judges.
 - d. That in the Alternative the Court be pleased to find that there is an error on the judgment and record and thereafter dismiss the appeal herein.
 - e. That costs to the applicant.
2. The application is premised on five grounds on the face of the application and in the supporting affidavit sworn by the applicant of even date. The grounds are:



- a. There is sufficient reason to warrant a review and setting aside the judgment for reasons that Hon. Lady Justice W. Karanja handled the case which gave rise to the appeal herein while it was in High Court at Embu, being High Court Civil Case No. 34 of 2009.
 - b. Hon. Lady Justice W. Karanja should not have sat on the appeal herein.
 - c. There is a perception of likelihood of biasness.
 - d. There is an error on judgment which is not supported by evidence before the trial Court.
 - e. That a fresh hearing of the appeal before a different panel is necessary in order for justice to be seen to be done.
3. The application was heard on the 28th January, 2025 through this Court's virtual platform. Present at the hearing was learned counsel, Mr. Njeru for the applicant and learned counsel Mr. Masore Nyangau for the respondent. Both counsel had filed their submissions, Mr Njeru's were dated 2nd April, 2024 and those for Mr. Nyangau were dated 6th April, 2024. Both counsel relied entirely on their submissions which they briefly highlighted and which we have considered. The respondent also relied on the replying affidavit sworn by Daniel Nderi Njogu the respondent herein, dated 22nd March, 2024.
 4. The respondent has raised a jurisdictional issue in the replying affidavit and in his submissions. We think that we should consider it first.
 5. Mr. Nyangau submitted that the Court had not been moved as the jurisdiction of the Court was not invoked either through the Court of Appeal Rules or the *Appellate Jurisdiction Act*. He urged that the law invoked was the *Civil Procedure Act* and *Rules* which specifically prescribe that the Rules shall apply to the High Court and subordinate courts acting in exercise of civil jurisdiction. Counsel urged that the invocation of Article 159 of the *Constitution* did not cure the defect, citing *Scope Telmatics International Sales Ltd vs. Stoic Company & Another* [2017] eKLR for the proposition that Article 159 of the *Constitution* ought not to be seen as a panacea to cure all manner of indiscretions relating to procedure.
 6. Mr. Nyangau drew our attention to the fact that the applicant entitled this application 'Being an appeal from the judgment and order of the Environment and Land Court at Kerugoya Hon.D. Cheronu, delivered at Kerugoya on the 14th March 2019 in ELC 487 of 2013.' He urged that the appeal against the ELC was heard and determined by this Court and judgment delivered on 8th March, 2024, and that there is nothing pending to be heard before this Court.
 7. Mr. Njeru did not respond to the issues raised by the applicant in his replying affidavit and the submissions, despite being served with both documents in good time. The applicant's submission is a one and half pager that addresses only two points as the reasons for seeking review of the judgment of this Court; that the application is merited as W. Karanja, JA who sat on appeal heard the matter in the superior court and so for purposes of access to justice, ought not to have sat on appeal, and that there were errors in the judgment placing reliance on the supporting affidavit where errors were detailed. It was submitted that the applicant realized that Karanja, JA sat on appeal when the judgment by this Court was delivered.
 8. Mr. Njeru orally admitted that the relevant law and rules were not invoked but urged that failure to invoke the same did not render the application defective. He urged that there is always an assumption that the Court knows the law. He submitted that the issue raised was a technicality and resorted to Article 159 of the *Constitution* and section 3 and 3A of the *Appellate Jurisdiction Act*. He submitted



that the Court of Appeal has similar powers as the High Court and that in the circumstances quoting Order 45 of the CPR did not render the application defective.

9. There is no dispute that the jurisdiction of this Court was not invoked, which is a critical point because this Court relies on properly cited legal provisions to understand the basis of an application and to determine whether it has jurisdiction to entertain it. The applicant cited Order 45 of the *CPR* which deals with applications for review of decrees and orders before the High Court. The principles applicable in such applications apply only to the High Court and courts below, not to this Court. An application for review to this Court falls under Rule 1 (2) of the *Court of Appeal Rules* [CAR], which invokes the inherent powers of this Court and the residual jurisdiction to review final judgments of the Court. The residual jurisdiction of this Court is limited in scope, and it is to be applied cautiously and sparingly in cases whose decisions are not appealable to the Supreme Court; and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice. See the Supreme Court decision in *Nyutu Agrovet Limited vs. Airtel Networks Kenya Ltd & Another* [2019] eKLR.
11. The application had other problems as pointed out by the respondent. The title of the application was misleading as it proclaimed that what was before us was an appeal against the judgment of the ELC delivered on 14th March, 2019. From the submissions and affidavits of the parties, that appeal was determined by this Court on 8th March, 2024, meaning this Court had already determined the appeal between the parties.
12. There are more problems with the application. It is trite that in an application for review, the applicant must attach the judgment sought to be reviewed, which will enable the Court to determine whether the application is merited. Even if the jurisdiction of this Court was properly invoked, the application would still have been defective without the decision sought to be reviewed.
13. That was not the end of the defects in this application. Nowhere has the applicant stated the bench that heard and gave the impugned judgment, and as the judgment was itself is not attached to this application, it is clear that the applicant has no clue who determined the case. This is a Court of record and there was need to have the impugned judgment form part of the attachments to the application to enable us make an informed ruling.
11. We find that the application is fatally defective for failing to invoke the jurisdiction of this Court, failing to attach the impugned judgment sought to be reviewed and giving a misleading title to the application. In the circumstances, the application is for striking out with costs to the respondent, which we hereby do.

DATED AND DELIVERED IN NYERI THIS 4TH DAY OF JULY, 2025.

J. LESIIT

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JUDGE OF APPEAL

ALI - ARONI

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

