



**Barasa & 2 others v Musundi & another (Civil Application  
E121 of 2021) [2024] KECA 50 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KECA 50 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E121 OF 2021  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
JANUARY 25, 2024**

**BETWEEN**

**JOYCE SIKHOYA BARASA ..... 1<sup>ST</sup> APPLICANT  
DOROTHY LUSIKE MUYERA ..... 2<sup>ND</sup> APPLICANT  
ESTHER MATINGI WESONGA ..... 3<sup>RD</sup> APPLICANT**

**AND**

**JOEL LUMBASI MUSUNDI ..... 1<sup>ST</sup> RESPONDENT  
STEPHEN FRANCIS MUSUNDI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application seeking to review and or set aside the Ruling of the Court of Appeal at Kisumu (Kiage J, Mumbi Ngugi J & Tuiyot J) dated on 4th November 2022)*

**RULING**

1. The applicants, Joyce Sikhoya Barasa, Dorothy Lusike Muyera and Esther Matingi Wesonga, have moved this Court by way of a notice of motion dated 17<sup>th</sup> April, 2023, brought under Article 159 (2) of *Constitution*, Sections 3(2), 3A & 3B of the *Appellate Jurisdiction Act*, and Rules 5 & 47 of the *Court of Appeal Rules*, in which they seek the following orders:
  - i. ...
  - ii. That the Honourable court be pleased to review, set aside or vary the ruling delivered on 4<sup>th</sup> November, 2022, deeming the notice of appeal from the judgment of the High Court of Kenya at Kitale (Chemitei, J) in Succession Cause No. 12 of 2019 dated 23<sup>rd</sup> July, 2019 as withdrawn.
  - iii. That this Honourable Court be pleased to reopen the hearing of the respondents' application dated 12<sup>th</sup> August, 2021 to ascertain the completeness and accuracy of the Court of Appeal



Records from the time the notice of appeal was lodged up to the time of delivery of the ruling on 4<sup>th</sup> November, 2022, in order to make a fair determination of the said application.

- iv. That the costs of and incidental to this application abide the result of the appeal.
2. The applicants are aggrieved by a ruling made by this Court on 4<sup>th</sup> November, 2022, deeming the applicants' Notice of Appeal dated 23<sup>rd</sup> July, 2019, as withdrawn for failure to file or serve the record of appeal. The applicants contend that there is an error on the face of the record as they had filed a memorandum of appeal dated 3<sup>rd</sup> August, 2020, and a record of appeal dated 3<sup>rd</sup> August, 2020, in the Court of Appeal Sub-registry at Eldoret on 25<sup>th</sup> August, 2020, and the same were transferred to the Court of Appeal registry at Kisumu for hearing and termination. However, neither the memorandum of appeal nor the record of appeal was placed on the court file nor brought to the attention of the three judges of the Court, during the hearing of the respondents' application dated 12<sup>th</sup> August, 2021, seeking to have the appeal deemed as withdrawn.
3. The applicants, therefore, urge the Court that the orders of 4<sup>th</sup> November 2022 deeming the notice of appeal as withdrawn, were made in error. They plead that whereas the respondents shall not suffer any prejudice, they will suffer prejudice if the decree in High Court Succession Cause No. 12 of 2019 subject of the intended appeal is executed, as they (applicants) will be unfairly and unjustly denied a fair share of the net intestate estate of their father.
4. The applicants have also filed written submissions in which they cite *Kenya Power & Lighting Co Limited vs Benzene Holdings Ltd t/a Wyco Paints* [2016] eKLR for the proposition that the Court has powers under Section 3(2), 3A and 3B of the *Appellate Jurisdiction Act*, to allow the application, and review its ruling in order to correct the apparent error on the face of the record, so as to secure the ends of justice and fair hearing. The applicants urged that the Court has inherent jurisdiction to put "right that which would otherwise be an injustice".
5. The 1<sup>st</sup> respondent, in an affidavit sworn on 8<sup>th</sup> June, 2023, (wrongly entitled "supporting affidavit"), has reiterated: that although the applicants filed their notice of appeal within time, they failed to comply with Rule 77(1) of the *Court of Appeal Rules*, as the notice of appeal was not served upon the respondents as required; that the applicants failed to give any satisfactory explanation to the Court as to why the notice of appeal should not be deemed as struck out; and that they also failed to demonstrate service of the record of appeal upon the respondents. The 1<sup>st</sup> respondent accused the applicants of filing the motion merely to stall the process of execution following the distribution of the estate of their deceased father. In support of this the 1<sup>st</sup> respondent has attached a copy of a caveat which the applicants had put in the Daily Newspapers in regard to the property.
6. The respondents have also responded to the motion through written submissions in which they argue that the issue of review goes beyond Section 3A and 3(2) of the *Appellate Jurisdiction Act*; that the applicants have not met the legal threshold provided for review under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*; and that the application simply seeks to have the Court sit on appeal on its own decision.
7. The respondents relied on *Jador Singh Rai & 3 Others -vs- Tarlochan Singh Rai & 4 Others*, Civil Appeal 2013, eKLR for the proposition that the Court has no jurisdiction to reopen, rehear and recall its earlier decisions and substitute it with another.
8. We have carefully considered the motion before us, the affidavit in support and in reply thereto and the written submissions filed by the respective parties. At the outset we wish to point out that sections 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* that gives powers of review, deal with matters heard by the court under the *Civil Procedure Act* and *Rules*. They are not applicable to matters



heard by this Court whose appellate jurisdiction is governed by the [Appellate Jurisdiction Act](#) and [Court of Appeal Rules](#). Neither the [appellate Jurisdiction Act](#) nor the Court of Appeal Rules, gives powers to this Court to review its judgments/orders. It is for this reason that the applicant has rightly fallen back on the Court's residual jurisdiction under Section 3A and 3(2) of the [Appellate Jurisdiction Act](#)

9. It is apparent from the ruling of this Court, dated 4<sup>th</sup> November, 2022, that the application for striking out the applicants' notice of appeal was heard inter partes, and that the parties had filed contending affidavits and written submissions which were duly considered. The Court made a finding that the applicants filed a notice of appeal dated 23<sup>rd</sup> July, 2019, but as at the time of hearing the respondent's motion, there was no record of appeal that had been filed or served on the applicants.

10. At paragraph 12 of the ruling, the Court noted as follows:

“At the hearing of the application counsel for the applicants was cagey with respect to if and when the respondents had filed their record of appeal. Further, we note that in their affidavit in response to their application, the respondents are silent on whether service of the notice of appeal was effected upon the applicants, and whether a record of appeal has ever been filed. It would appear, then, that the applicants' contention that the respondents have failed to comply with Rule 82 with respect to the filing of the record of appeal is an unanswerable.

11. At paragraph 16 of the ruling the Court stated:

“From the pleadings before us there is no dispute that the respondents have not taken any steps to institute their appeal since they filed the notice of appeal more than three years ago. Rule 82 of the 2010, Rules, required that the record of appeal be filed within 60 days from the date of filing the notice of appeal. The respondents had no response to the contention that they have failed to comply with the rules. As there is no time limit for an application to deem a notice of appeal as withdrawn under Rule 83, the present application is properly anchored under the said Rule.”

12. In regard to the residual jurisdiction of this Court the following statement made by this Court on review of its judgment/order in [Benjob Amalgamated Limited & Another vs Kenya Commercial Bank Limited](#) [2014] eKLR is instructive on the circumstances in which the residual jurisdiction may be exercised:

“It is our finding that this Court not being the final court has residual jurisdiction to review its decisions to which there is no appeal to correct errors of law that have occasioned real injustice or failure or miscarriage of justice thus eroding public confidence in the administration of justice. This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice.”

13. Likewise in [Standard Chartered Financial Services Limited & 2 Others vs Manchester Outfitters \(Suiting Division\) Limited \(Now Known As King Woollen Mills Limited & 2 others\)](#) [2016] eKLR this Court asserted:

“We reiterate that position and stress that this Court is clothed with residual jurisdiction to reopen and rehear a concluded matter where the interest of justice demands but that such jurisdiction will only be exercised in exceptional situations where the need to obviate injustice outweighs the principle of finality in litigation”



14. The threshold for the exercise of the Court’s residual jurisdiction is high, as it requires exceptional circumstances in which the Court is impelled to act to avert an injustice. In addition, such action must be one that is in the public interest and enhances confidence in the justice system. The question before us then is whether the applicants have met this high threshold for invoking the Court’s residual jurisdiction.
15. The afore quoted extracts of the judgment of 4<sup>th</sup> November, 2022, show that the applicants did not bring to the attention of the Court what they now allege, that is, that they had filed the record of appeal at the Eldoret Sub Registry. Nor had the applicants exhibited any evidence of service of the said record of appeal on the respondents. The annexures DLM8 which they have relied on in support of the application for review, only refers to service of the notice of appeal and not the record of appeal. Moreover, the said service is deposed to have been effected on 26<sup>th</sup> July 2019, and could not be service of the record of appeal, which is alleged to have been filed on 25<sup>th</sup> August 2020. We are therefore not persuaded that there was any record of appeal filed in court or served on the respondents as alleged.
16. We find that the applicants have not demonstrated that this is a matter in which the Court should excise its inherent jurisdiction. The applicants are simply seeking to have a second bite of the cherry and there is no provision for that. The Court heard the application for deeming the applicants’ notice of appeal as withdrawn and properly rendered its decision. The applicants have failed to demonstrate any justification for the exercise of the Court’s residual powers in reviewing the decision rendered by the Court.

Accordingly, the applicants’ motion for review fails. It is dismissed with costs.

**DATED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF JANUARY, 2024.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H.A. OMONDI**

.....

**JUDGE OF APPEAL**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

