



REPUBLIC OF KENYA



KENYA LAW
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**Nkabo v M’Nyiruu & another (Civil Application 27 of 2019)
[2024] KECA 1294 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1294 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 27 OF 2019
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
SEPTEMBER 20, 2024**

BETWEEN

DINAH KAWIRA NKABO APPLICANT

AND

SAMSON MUTUA M’NYIRUU 1ST RESPONDENT

MIKE MUTHAMA MBAYA 2ND RESPONDENT

(Being an application for review of the orders issued on 23rd September 2022)

RULING

1. On 10th March 2020 this Court made the following order:-

“By consent:-

1. The 1st respondent Dinah Kawira Nkabo shall retransfer title in the property known as Ntima/Igoki/2778 into the name of Mike Muthamia Mbaya within thirty (30) days of today.
2. There shall upon the said transfer be maintained status quo whereby the respondent shall not interfere with the title of the property in the name of Mike Muthamia Mbaya or otherwise interfere with the said title or property pending the hearing and determination of Nyeri Civil Appeal No. 325 of 2019.
3. The 1st respondent shall pay the costs of the two applications in any event.”

2. Following the application dated 17th October 2020 by Mike Muthamia Mbaya, the present 1st respondent, the Court found Dina Kawira Nkabo, the present applicant, to be in contempt of the orders dated 10th March 2020 and ordered her committal to civil jail for four (4) months. It was ordered



that the Officer Commanding Chogoria Police Station or any other police station, arrests and escorts the applicant to the Chief Magistrate's Court at Meru for the issuance of her committal documents for her to serve the jail term.

3. Even as the applicant states in her notice of motion dated 22nd November 2022 that she has since made effort to purge her contempt by executing the transfer documents to retransfer parcel Ntima/Igoki/2778 in favour of the 1st respondent, she has failed to present herself before the Chief Magistrate's Court at Meru to be committed to jail. Her application seeks the review of this Court's orders that found her guilty for contempt and ordered her to serve four (4) months in jail. One of the grounds was that she had purged the contempt. The other was that she had been misadvised by her then advocates regarding the legal complications of not obeying the consent order.
4. Vide the replying affidavit dated 8th September 2023, the 1st respondent opposed the application by stating that this Court lacks residual jurisdiction to review its ruling and orders thereof which discretion ought only to be exercised in exceptional circumstances such as to correct errors of law that would occasion an injustice; that review was not to be used as an avenue to rewrite the Court's decision.
5. The applicant's application was brought under section 3 of the *Appellate Jurisdiction Act* (Cap. 5), Rule 29 of the Court of Appeal Rules, section 3(2) of the *Court of Appeal (Organization and Administration) Act*, 2015 and Articles 159(2)(d) and 164(3) of *the Constitution*.
6. At the plenary hearing of the application, learned counsel Mr. Harrison Kinyanjui for the applicant and learned counsel Mr. Gitonga for the respondents addressed us on the motion. We have to point out that, even assuming that we have the jurisdiction to hear and determine the application, the circumstances do not merit our allowing the same. This is because the contempt has not been purged as long as the applicant is dodging, as it were, her appearing before the Chief Magistrate's Court to be sent to jail in accordance with this Court's orders of 23rd September 2022.
7. It is, however, trite that the principle of finality has left this Court with residual jurisdiction to be exercised only in exceptional circumstances to re-open a matter that has been concluded by the Court. (See Kamau James Gitutho & 3 Others -vs- Multiple ICD (K) Ltd & Another [2019] eKLR). A matter can only be reopened to correct errors of law that have occasioned real injustice or miscarriage of justice thus eroding public confidence in the administration of justice.
8. We reiterate that, at the heart of this dispute was the consent entered into by the parties on 10th March 2020, and which the applicant deliberately failed to obey and comply with. The failure necessitated the contempt proceedings that resulted into her being ordered to serve four (4) months in jail. She has since, again in disobedience, refused to surrender to the Chief Magistrate's Court in Meru for her committal documents to be processed. Public confidence in the administration of justice would be better served by the applicant going to serve the term that was pronounced by this Court.
9. This means that, the applicant has not demonstrated that the threshold to warrant the exercise of this Court's residual jurisdiction to review the ruling dated 23rd September 2022 has been attained. We dismiss the application with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED



.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

