



**Kibias & another v Muyesu (Civil Application E108 of 2021)  
[2023] KECA 354 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KECA 354 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION E108 OF 2021  
F SICHALE, FA OCHIENG & LA ACHODE, JJA  
MARCH 31, 2023**

**BETWEEN**

**THOMAS KIMUTAI BOIT ..... 1<sup>ST</sup> APPLICANT**

**JOSIAH KIMEBUR KIBIAS ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOSEPH NDAYALA MUYESU ..... RESPONDENT**

*(An Application for Review/correction of Orders given by the Court  
of Appeal (Koome (as she then was), Mohammed & Kantai, JJ A)  
dated July 9, 2021 IN ELDORET CIVIL APPEAL NO 112 OF 2018)*

**RULING**

1. Thomas Kimutai Boit and Josiah Kimebur Kibias (the applicants herein), have vide a motion dated July 15, 2021, brought pursuant to the provisions Sections 3 (2), 3A of the [Appellate Jurisdiction Act](#), Rules 1 (2), 35 42 of the [Court of Appeal Rules](#), Article 159 (2) of the [Constitution](#) of Kenya and all other enabling provisions of the Law sought the following orders:
  1. Spent.
  2. That this Honourable Court be pleased to review paragraphs 22,23,24, 25, 26 and 27 of its judgment delivered by the Court of Appeal on July 9, 2021 in Eldoret Civil Appeal No. 112 of 2018.
  3. That consequent upon the said review, this Honourable Court do set aside the decree that the written agreement between the parties was found not credible by both the trial court and the Superior Court and that there was a valid oral agreement between the parties as contained and reflected in paragraphs 22 and 27 of the judgment delivered by the Court of Appeal on July 9, 2021 in Eldoret Civil Appeal No 112 of 2018.



4. That further consequent upon the said review, this Honourable Court do allow the appeal of the applicant herein dated 3<sup>rd</sup> September 2018 and do dismiss the respondent's plaint dated October 18, 2007.
  5. That alternatively, this Honourable Court do correct the order made on July 9, 2021 in Eldoret Civil Appeal No 112 of 2018 by setting aside the decree that the written agreement between the parties was found not credible by both the trial court and the Superior Court and that there was a valid oral agreement between the parties as contained and reflected in paragraphs 22 and 27 of the judgment delivered by the Court of Appeal on July 9, 2021 in Eldoret Civil Appeal No 112 of 2018.
  6. That this Honourable Court does give such consequential, further or other order (s) as it may deem just.
  7. That the costs of this application be provided for.”
2. The motion is supported by the grounds on the face of the motion and an affidavit sworn by the 2<sup>nd</sup> applicant Josiah Kimebur Kibias who deposed, *inter alia*, that the respondent had filed a claim against the applicants in Eldoret CMCC No 885 of 2007, which claim was dismissed vide a judgment delivered on June 17, 2014. That, being aggrieved with the decision of the trial court, the respondent preferred an appeal to the High Court and vide a judgment delivered on July 11, 2018, the High Court allowed the appeal in its entirety.
  3. He further deposed that being aggrieved with the judgment of the High Court, the applicants preferred an appeal to the Court of Appeal which appeal was dismissed on July 9, 2012 with costs; that in dismissing the appeal, the Court of Appeal found that the written agreement between the parties was found not credible by both the trial court and the Superior Court and that in making these findings, the Court of Appeal overlooked the findings of the trial court that there was a written agreement between the parties dated January 22, 1996, whose contents were not challenged in the trial court nor in the Superior Court.
  4. The motion was opposed vide a replying affidavit sworn by the respondent on November 8, 2022 who deposed, *inter alia*, that once the court passes a judgment, it becomes *functus officio* and it could not revisit the judgment on merit, and that the applicants' motion was premised on Rule 35 of the Court of Appeal Rules, which gives this Court limited jurisdiction to only correct any clerical or arithmetic errors in a judgment. Further, that both the Superior Court and the Appellate Court analyzed the evidence and the Court could not reopen and rehear the appeal from the back door.
  5. It was submitted for the applicants that the Court of Appeal in its judgment failed to consider that the written agreement between the parties was neither challenged in the trial court nor was it the subject of the appeal before the Superior Court. Additionally, it was contended that this Court has residual jurisdiction to review and/or correct findings. For this proposition reliance was placed on the case of *Standard Chartered Financial Services Limited & 2 Others v Manchester Outfitters (Suiting Division) Limited (Now Known as King Woolen Mills Limited & 2 others* [2016] eKLR.
  6. On the other hand it was submitted for the respondent that it was evident that the applicants were dissatisfied with the judgment on merit which could only be addressed through an appeal and that it was a settled principle of law that a Court after passing judgment becomes *functus officio* and cannot revisit the judgment on merit save as provided by law and that the applicants had not demonstrated how the Honourable Court erred in its findings and that if there was any miscarriage of justice, it is the respondent who had suffered having waited for 23 years to be given what was rightfully his.



7. We have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival submissions by the parties, the cited authorities and the law.
8. A cursory perusal of the applicants motion clearly shows that the same is an appeal disguised as an application for review for the following reasons; firstly, the applicants are asking this Court to inter alia “set aside the decree that the written agreement between the parties was found not credible by both the trial court and the Superior Court and that there was a valid oral agreement between the parties as contained and reflected in paragraphs 22 and 27 of the judgment delivered by the Court of Appeal on July 9, 2021.”
9. Secondly and more tellingly so, the applicants in prayer 4 of the motion are asking us to “allow the appeal of the applicant herein dated September 3, 2018 and dismiss the respondent’s plaint dated October 18, 2007.” (Emphasis supplied).
10. In the case of *Benjob Amalgamated Ltd vs Kenya Commercial Bank Limited* [2014] eKLR, this Court stated that the jurisdiction of the Court to review its own decisions should be invoked with circumspection.
11. The Court went on to state:

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 ours).

12. This Court at this juncture and in an application of this nature cannot go into the realm of whether the agreement between the parties was credible or not, or whether there was a valid oral agreement between the parties. The contention by the applicants that the Court of Appeal overlooked the findings of the trial court that there was an agreement between the parties cannot be the subject of our determination in an application of this nature. Equally, the issue of whether constructive trust was applicable or not cannot be the subject of our determination in an application for review.
13. From the circumstances of this case we have absolutely no doubts in our minds that this is not a proper case for the exercise of this Court’s limited jurisdiction to review its decision and the applicants motion is clearly an appeal disguised as a review.
14. In *Menginya Salim Murgani vs Kenya Revenue Authority* [2014] eKLR: The Supreme Court stated as follows:

It is a general principle of law that a Court after passing Judgment, becomes functus officio and cannot revisit the Judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law.”
15. The upshot of the foregoing is that there is no merit in the applicants’ motion dated July 15, 2021. It is hereby dismissed in its entirety with costs to the respondent.

It is so ordered.



DATED AND DELIVERED AT ELDORET THIS 31ST DAY OF MARCH, 2023.

F SICHALE

.....

JUDGE OF APPEAL

F OCHIENG

.....

JUDGE OF APPEAL

L ACHODE

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JUDGE OF APPEAL

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

*Signed*

**DEPUTY REGISTRAR**

