



REPUBLIC OF KENYA



**KENYA LAW**  
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**MAAA (Suing in his Capacity as the Administrator of the Estate of AMAA - Deceased) v FSS  
(Civil Appeal (Application) 25 of 2022) [2023] KECA 933 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 933 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) 25 OF 2022  
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA  
JULY 28, 2023**

**BETWEEN**

**MAAA (SUING IN HIS CAPACITY AS THE ADMINISTRATOR OF THE  
ESTATE OF AMAA - DECEASED) ..... APPLICANT**

**AND**

**FSS ..... RESPONDENT**

*(An application for the review and setting aside part of the judgment of the Court of Appeal at Mombasa (Gatembu, Mbogholi Msagha & Nyamweya, JJ.A) delivered on 18th February 2022 that directed the Kadhi's Court to undertake an inquiry as to the financial ability of the estate of the deceased so as to assess and arrive at a fair award for alimony and compensation in COA Civil Appeal No. E043 of 2021)*

**RULING**

1. In his application dated 27<sup>th</sup> April 2022, made under Article 159(2)(d) of *the Constitution* of Kenya and sections 3(2), 3A & B of the *Appellate Jurisdiction Act* and rules 1(2) and 42 of the *Court of Appeal Rules*, the applicant, MAAA as administrator of the Estate of his father AMAA, deceased, seeks an order for review and setting aside prayer (c) of the judgment of this Court delivered on 18<sup>th</sup> February 2022 in which this Court directed the Kadhi's Court to make an inquiry as to the financial ability of the Estate of the deceased so as to arrive at a fair award for alimony and compensation in favour of the respondent.
2. The background is fully set out in the judgment of this Court the subject of the present application. In brief, FSS, the respondent, sued her husband, AMAA, since deceased, (hereafter the deceased) in Mombasa Kadhis Court Civil Case 173 of 2011 seeking, maintenance and release of her personal items among other reliefs.



3. Although the learned Senior Resident Kadhi (trial court) found that the divorce pronounced by the respondent's husband was not valid under Islamic law, the trial court nonetheless dissolved the marriage and awarded the respondent Eda maintenance for 3 months of food at Kshs 90,000.00; Medical care of Kshs 45,000.00; Housing of Kshs 60,000.00; Clothing of Kshs 30,000.00; past maintenance at the rate of Kshs 50,000.00 per month for 64 months in the amount of Kshs 3,200,000.00; alimony/Mut'a of Kshs 2,500,000.00 for the period she spent with the deceased as his wife; and Kshs. 2,500,000.00 as compensation for her personal belongings. The trial court ordered that the total amount of Kshs. 6,925,000.00 was to be paid within 7 days.
4. The deceased was aggrieved by the judgment of the trial court. On appeal the High Court upheld the judgment of the trial court in a judgment delivered on 21<sup>st</sup> May 2021.
5. The appellant, who as already stated is the son and administrator of the estate of the deceased, was again dissatisfied and approached this court on second appeal. In its judgment delivered on 18<sup>th</sup> February 2022, this Court upheld the awards made by the trial court except the awards of Kshs 3,200,000.00 and alimony/Mut'a of Kshs 2,500,000.00 which were set aside. The matter remitted back to the trial court to "undertake an inquiry as to the financial ability of the estate of the deceased so as to assess and arrive at a fair award for alimony and compensation".  
Still dissatisfied, the applicant now seeks a review of the order remitting the matter back to the trial court.
6. During the virtual hearing of the application before this Court on 22<sup>nd</sup> March 2023, Miss Juma, learned counsel held brief for Mr. Mwanzia for the applicant and orally highlighted the applicant's written submissions. The respondent appeared in person. She relied on her replying affidavit in opposition to the application in addition to her oral address to the Court.
7. The applicant's case, based on the grounds on the face of the application, the supporting affidavit and the written and oral submissions is that the judgment of this Court is erroneous to the extent that the respondent was granted awards that were not pleaded; and that the respondent amended her plaint and abandoned the claim for compensation, and that under Islamic law, alimony is based on the financial ability of the husband and not that of the estate of the deceased.
8. Counsel urged that there are conflicting past decisions of the Court namely, *Housing Finance Company of Kenya v J. N. Wafubwa* [2014] eKLR; *Caltex Oil (Kenya) Limited v Rono Limited* [2016] eKLR and *Gideon Nassim Kiti v Faiza Oscar Meuli & another*, Malindi Civil Appeal No. 35 of 2013 (unreported) and the impugned decision of this Court contradicts those decisions. It was urged that the result of the impugned decision of this Court is confusion in jurisprudence.
9. It was submitted, on the strength of the decision in *Standard Chartered Financial Services Limited & 2 others vs. Manchester Outfitters (Suiting Division) Limited (now Known as King Wollen Mills Limited) & 2 others* [2016] eKLR that where, as here, the interests of justice demand it, the Court is clothed with jurisdiction to re-open and rehear a concluded matter.
10. On her part, the respondent stated that the judgment is not erroneous, that the awards made accord with Islamic law as regulated by the Holy Quran and rulings; that in making the awards, the courts properly exercised judicial discretion and jurisdiction; that the present application is only one of myriad applications and appeals by the applicant in a bid to delay finalization of the matter; that this is not a proper matter for review as there is no discovery of new facts or evidence which was not in the knowledge of the applicant and neither is there an error on the face of the record to warrant review.



11. Furthermore, the respondent stated, the present application is overtaken by events because the Kadhi's Court has already carried out the assessment in compliance with judgment of this Court and a decision in that regard was scheduled to be delivered on 30<sup>th</sup> March 2023.
12. We have considered the application and the arguments. In the cited case of *Standard Chartered Financial Services Limited & 2 others vs. Manchester Outfitters (Suiting Division) Limited (now Known as King Wollen Mills Limited) & 2 others*, (above) this Court expressed itself regarding the jurisdiction of the Court to review its own decisions as follows:

“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.”
13. Earlier, in *Benjoh Amalgamated Ltd. & Another v Kenya Commercial Bank Ltd.* [2014] eKLR the Court had stated:

“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.” [Emphasis added]
14. The Supreme Court of Kenya in *Menginya Salim Murgani v Kenya Revenue Authority* [2014] eKLR in re-affirming the decision of this Court in *Benjoh Amalgamated Ltd. & Another v Kenya Commercial Bank Ltd* (above) stated:

“In Benjoh amalgamated Ltd. & Another v Kenya Commercial Bank Ltd. [2014] eKLR, the Court of Appeal comprehensively analysed the Court's jurisdiction to review its decisions before and after the date of promulgation of the 2010 Constitution. The Appellate Court held that prior to the promulgation of the new Constitution, it had no jurisdiction to review its decisions, except in the application of the slip rule under Rule 35 of the Court of Appeal Rules. As to the position after the promulgation of the 2010 Constitution, the Court held that as it was not the final Court in the land, it had a residual jurisdiction, where there was no appeal to the Supreme Court, to correct errors of law that had occasioned real injustice, or failure, or miscarriage of justice. Such a position notwithstanding, the Court held that it would not entertain applications for the review of decisions made before the 2010 Constitution came into being.”
15. And in *Kamau James Gitutho & 3 Others v Multiple ICD (K) Limited & Another* [2019] eKLR the Court stated that the existence of this Court's jurisdiction to review its decisions does not at all negate the principle of finality and the object of review is not for the Court to sit on appeal over its own decisions.
16. In present case, the main grievance is that the awards made in favour of respondent by the trial court as confirmed by the High Court and by this Court were not pleaded and that there is confusion in jurisprudence. In our view, what the applicant is seeking to do in raising those complaints is to ask this Court sit on appeal over its own judgment. The applicant has not demonstrated how the decision complained of has occasioned injustice or a miscarriage of justice and that such injustice or miscarriage



of justice has eroded public confidence in the administration of justice to qualify for the exercise of the Court's discretion in his favour.

17. Moreover, the assertion by the respondent that the judgment of this Court has already been executed and a fresh assessment of the means carried out by the trial court has not been challenged. This Court is therefore being asked to act in vain.
18. The application fails and is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT MOMBASA THIS 28<sup>TH</sup> DAY OF JULY 2023**

**S. GATEMBU KAIRU, FCIArb**

**JUDGE OF APPEAL**

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**P. NYAMWEYA**

**JUDGE OF APPEAL**

.....

**G.V. ODUNGA**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

