



Coffee Board of Kenya v Kiambu County Council & another (Civil Appeal (Application) 232 of 2015) [2022] KECA 1398 (KLR) (16 December 2022) (Ruling)

Neutral citation: [2022] KECA 1398 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 232 OF 2015
HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA
DECEMBER 16, 2022**

BETWEEN

COFFEE BOARD OF KENYA APPELLANT

AND

KIAMBU COUNTY COUNCIL 1ST RESPONDENT

**MARGARET NYOKABI MBUGUA THE ADMINISTRATOR OF THE ESTATE
OF THE LATE SAMUEL MBUGUA KIBATHI THE CHAIRMAN, KIAMBU
COFFEE CESS 2ND RESPONDENT**

(Being an application for Review of the Orders of the Court of Appeal of Kenya at Nairobi (Martha Koome, JA.) made on 18th July 2019 in Civil Appeal No. 232 of 2014)

RULING

1. The applicant, Margaret Nyokabi Mbugua, is the legal representative of the estate of Samuel Mbugua Kibathi (deceased), who was the 2nd respondent in the appeal herein. For ease of reference in connection with the application before us, we shall refer to Coffee Board of Kenya and Kiambu County Council as the 1st and 2nd respondents respectively.
2. On July 29, 2010, the 2nd respondent, the County Council of Kiambu, obtained judgment against the 1st respondent, the Coffee Board of Kenya and the deceased, jointly and severally, in the High Court of Kenya at Nairobi Civil Suit No 186 of 2000 for a declaration that the 2nd respondent, and not the deceased, was the only lawful authority entitled to receive cess from the 1st respondent; an order that an account of all the moneys collected by the 1st respondent between 1997 and January 2000 be taken; that the 1st respondent be ordered to release all the money found due and owing to the 2nd respondent; that the sums due on taking of the accounts be paid to the 2nd respondent with interest at court rates from the date of filing suit until payment in full; that the sums held in the escrow account be deemed



- to have been held on behalf of the 2nd respondent and released forthwith with the interest accrued; and that the 2nd respondent do have the costs of the suit.
3. Aggrieved by the judgment and decree of the High Court (M G Mugo, J), the 1st respondent moved on appeal to this court. Likewise, the deceased filed a notice of appeal dated September 15, 2010, but took no further steps to lodge a cross-appeal.
 4. Following the deceased's death on October 19, 2011, the 1st respondent applied and obtained orders to substitute the applicant for the deceased on July 18, 2019.
 5. Dissatisfied by the order for substitution, the applicant moved this court on November 11, 2021 praying: that the ruling and orders of this court made on July 18, 2019 impleading the applicant to this appeal be reviewed, vacated and/or set aside; that the name of Margaret Nyokabi Mbugua, an administratrix of the estate of Samuel Mbugua Kibathi (deceased), be struck out from these proceedings; and that the costs of this application be borne by the respondents in any event.
 6. The applicant's motion is supported by her annexed affidavit sworn on November 11, 2021, and is made on 15 grounds set out on the face of the motion, which we need not replicate here. Suffice it to observe that her main ground is that her deceased husband had been sued in the official capacity as the Chairman of Kiambu Coffee Cess (KICOCE limited) and not in his personal and/or individual capacity; and that, therefore, his estate was a stranger to the proceedings before the High Court, and to the present appeal.
 7. The 1st respondent opposed the motion *vide* the replying affidavit of Enosh Akuma, the Director to the 1st respondent's successor – the Coffee Directorate of the Agriculture and Food Authority) sworn on October 27, 2022. According to Mr Akuma, the deceased had been sued in his personal capacity and not on behalf of KECOCE, a limited liability company capable of being sued on its own behalf; that the application for substitution was unopposed; that the motion seeks to circumvent the law, and is an abuse of the court process; that the said application is time-barred and offends the provisions of rules 55 and 84 (now rules 57 and 86) of the *Court of Appeal Rules*; and that the applicant is properly joined in this appeal. He urged us to dismiss it with costs.
 8. On its part, the 2nd respondent filed "grounds of opposition" dated October 25, 2022 on which we need not deliberate. Suffice it to observe that no replying affidavit was filed on its behalf to back up the grounds on which it opposes the applicant's motion.
 9. Learned counsel for the applicant, Njuguna, Kahari and Kiai, filed written submissions dated January 25, 2022. Citing the Supreme Court decision in *Manchester Outfitters (suing division) Ltd and another v Standard Chartered Financial Services Ltd and 2 others* [2019] eKLR, counsel submitted that this court has jurisdiction to review its own decision in circumstances that warrant the exercise of that jurisdiction.
 10. On the authority of *Overdrive Consultants (K) Ltd v Mazhar Sumra* [2020] eKLR, citing Salomon v Salomon [1897] AC p22, counsel submitted that the suit against the deceased in his individual capacity in place of the company of which he was director, and the present appeal in which the applicant has been substituted for as legal representative of his estate could not stand.
 11. In reply, learned counsel for the 1st respondent filed their written submissions dated October 27, 2022 citing 3 authorities: *Mario Rossi v Salama Beach Hotel Limited* [2018] eKLR for the proposition that timelines fixed by statute or subsidiary legislation made thereunder are of essence; *Ali Mohammed Mwanzia v National Bank of Kenya Limited* [2019] eKLR for the proposition that review of this court's decisions can only be undertaken in certain specific circumstances under rule 35 (commonly



known as the slip rule), now rule 37 of the 2022 Rules; and *Mohamed Shally Sese (Shab Sese) v Fulson Company Ltd and another* [2018] eKLR on what the court considers before interfering with the decision of a single judge.

12. Likewise, learned counsel for the 2nd respondent, Karuru Mwaura and Company, filed their written submissions dated October 27, 2022 of which we have also taken note.
13. Having carefully considered the applicant's motion, the affidavit in support thereof and in reply, and the written and oral submissions of learned counsel for the applicant, the 1st and 2nd respondents, we form the view that the applicant's motion turns on our findings on three main issues, namely: whether the applicant has made a case to warrant striking out of her name from the record of appeal as prayed; whether her application comes too late in the day; and what orders ought we to make in determination of the motion, including orders as to costs.
14. The applicant's contention is that her deceased husband had been sued as a co-defendant in HCCC No 186 of 2000 in which he was referred to as "the chairman of Kiambu coffee cess". Judgment was obtained against him and the 2nd respondent jointly and severally. According to the applicant, the deceased's estate was a stranger to the proceedings in the High Court and in this appeal. She decries the order substituting her for the deceased, and seeks to have her name struck out from the record. To this end, she invites the court to review, vary or set aside the order made on July 18, 2019.
15. This court's jurisdiction to review its own orders was affirmed in *Manchester Outfitters (Suting Division) Ltd and another v Standard Chartered Financial Services Ltd and 2 others* (supra) where the Supreme Court had this to say:

"(54) What emerges from this disposition is that the Court of Appeal, being the final court of the land before the enactment of the 2010 Constitution, did not have the residual jurisdiction to review or sit on appeal on its own matters. However, as it has emerged, the court has since 2010, in some cases, expressed the wherewithal to exercise its inherent jurisdiction in circumstances that it deemed warranted the exercise of that jurisdiction. The latter is our position although we are cognizant of the fact that there are no constitutional or statutory provisions that allow this court to sit on appeal or review of its own decisions as the final arbiter. We may however, as in the circumstances highlighted in both Rai 2 and Outa cases, review previous decisions and/or depart from previous judgments if the principles as set out in the two cases are satisfied. Judicial precedent necessitates that we sustain that position."

16. In *Benjob Amalgamated Limited & another v Kenya Commercial Bank Limited* [2014] eKLR, the Court of Appeal held:
 25. What emerges from these provisions of the law is that this court has only appellate jurisdiction which arises and crystallizes once an appeal is filed or a notice of appeal is lodged manifesting intention to appeal. The court has in addition inherent power re-echoed in rule 1(2) of the rules of this court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Can this inherent power be invoked outside the purview of an appeal? Does this court have jurisdiction to review its decisions? Exactly what is the amplitude of this court's judicial power? If it has power to review its decisions, have the applicants made out a case for review of the judgment?
 57. 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).”

17. While this court has inherent jurisdiction under rule 1(2) of its Rules to review its own decisions, the applicant has not demonstrated any fraud, bias or other injustice occasioned by the order to substitute her for the deceased in the appeal. Neither has she demonstrated that the impugned order amounted to an abuse of the court process.
18. It is also noteworthy that the judgment in the trial court having been passed during the deceased’s lifetime, and the appeal having been preferred before his demise, the proceedings in the appeal call for representation of the deceased’s estate, but only if the appellant wishes to participate in the appeal. To our mind, it is in those proceedings that the applicant can properly challenge the judgment and decree passed against the deceased, and which attaches to his estate. To grant her application and strike out her name from the record of appeal this early in the day would be tantamount to summarily allowing the appeal in favour of the deceased’s estate on the basis of the motion before us. It is not for us to discharge the deceased’s estate from the judgment and decree to which the appeal relates, but the business of the bench that will hereafter sit to hear and determine the appeal. In view of the foregoing, we reach the inescapable conclusion that the applicant has not made out a case for striking out of her name from the record of appeal.
19. As to whether the applicant’s motion comes too late in the day, we form the view that no useful purpose would be served by our finding on this issue either way. In conclusion, the applicant’s notice of motion dated November 11, 2021 fails and is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

H. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA – CI Arb, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

