



**Ondiek & another v National Bank of Kenya Ltd & another (Civil Application
26 of 2016) [2022] KECA 1400 (KLR) (16 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1400 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPLICATION 26 OF 2016
K M'INOTI, S OLE KANTAI & F TUIYOT'T, JJA
DECEMBER 16, 2022**

BETWEEN

THOMAS OWEN ONDIEK 1ST APPLICANT

EDAH AMAKOBE INGUTIA 2ND APPLICANT

AND

NATIONAL BANK OF KENYA LTD 1ST RESPONDENT

CENTRAL BANK OF KENYA LTD 2ND RESPONDENT

*(Application for review of the Judgment of the Court of Appeal dated
29th October 2015 and the Rulings of the Court of Appeal dated
15th October 2017 and 19th March 2021 in CA. No. 23 of 2016)*

RULING

1. Court for the fifth time. They purport in their notice of motion dated October 8, 2021 to seek review of the following decisions:
 - i. Judgment of the High Court of Kenya (Mwilu, J. as she then was) dated May 2, 2011;
 - ii. Judgment of this Court (Maraga JA, as he then was, Musinga and Gatembu, JJA) dated October 29, 2015; and
 - iii. Ruling of this Court (Okwengu, Gatembu and M'Inoti, JJA) dated October 5, 2017.
2. As regards the prayer for review of the judgment of the High Court dated May 2, 2011, it hardly needs any emphasis that this court has no jurisdiction to "review" a judgment of the High Court, particularly after it has heard and determined an appeal from the same judgment. As regards the prayers for review of the judgment and ruling of this court, a short narration of the background to this application will



vividly show that not only is the current application res judicata, but it is also blatant abuse of the process of the court.

3. The 1st respondent, National Bank of Kenya, terminated the 1st applicant's employment after a customer made allegations of money laundering against him and following a search of his office conducted by officers of the 2nd respondent, Central Bank of Kenya. The 1st applicant filed a suit against the respondents in the High Court (HCCC No. 115 of 1999) challenging his termination. The High Court found in his favour and directed the Deputy Registrar to compute his terminal dues. The 1st respondent was aggrieved and lodged an appeal in this Court (CA No. 116 of 2012) and by a judgment dated February 5, 2016, the court allowed the appeal and remitted the matter back to the High Court for hearing because the judgment in favour of the 1st applicant was neither signed nor dated.
4. Back in the High Court, the two applicants filed a second suit, HCCC No. 179 of 1999 against the two respondents claiming damages, for among others, loss of business, illegal search of premises, defamation and payment of the 1st applicant's loan which he was unable to repay. The High Court dismissed that second suit as res judicata and the applicants appealed to this court in CA No. 182 of 2011. By a judgment dated October 29, 2015, the court upheld the decision of the High Court that the applicants' second suit was res judicata.
5. Next, the applicants returned to this Court seeking review of the judgment of October 29, 2015. Their application for review was dismissed as totally lacking in merit by a ruling dated October 5, 2017. Undeterred, they filed another application to correct alleged errors in the ruling dated October 5, 2017. That application suffered the same fate when it was dismissed on May 19, 2021.
6. What the above narrative shows is that before the current application, the applicants had unsuccessfully applied for review of the judgment dated October 29, 2015. They had also unsuccessfully sought correction of alleged errors in the ruling dated October 5, 2017. In the present application, they are once again seeking review of the judgment dated 29th October 2015 and the ruling dated October 5, 2017.
7. The applicants' unduly long and argumentative application, supporting affidavits and submissions are a regurgitation of the history of the litigation and an invitation of the court to sit on appeal against its previous decisions and come to different conclusions. It is alleged that the court misapprehended the facts and reached wrong conclusions, which it should now change.
8. The respondents have taken objection to the application, contending in their submissions dated July 15, 2022 that the same is res judicata. Relying on section 7 of the Civil Procedure Act and the decision of this court in IEBC v. Maina Kiai & 5 others [2017] eKLR the respondents submitted that the present application was res judicata because the issues now raised were directly or substantially in issue in the applicant's former applications for review, the former applications were between the same parties as in the present application, the issues raised were heard and determined in the former applications and by a competent court.
9. We need to add that the jurisdiction of this court to review and re-open its decisions is residual and to be exercised with circumspection, and only in exceptional circumstances. For example, in Benjob Amalgamated & Another v. Kenya Commercial Bank Ltd [2014] eKLR this court stated as follows:

“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).”

10. Having carefully considered the present application, we are satisfied that we cannot entertain the same because it is res judicata and does not disclose even a scintilla of special circumstances that would justify invoking the court’s residual jurisdiction. The application has absolutely no merit and the same is dismissed with costs to the respondents. It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022

K. M’INOTI

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

