



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: W. KARANJA, AZANGALALA & GATEMBU, JJ.A)**

**CIVIL APPLICATION NO. 66 OF 2015**

**BETWEEN**

**E K M .....1<sup>ST</sup> APPLICANT**

**C M O ..... 2<sup>ND</sup> APPLICANT**

**AND**

**J M M ..... RESPONDENT**

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**RULING OF THE COURT**

1. The applicants have moved the Court under Sections 3(2), 3A, 3B of the Appellate Jurisdiction Act, Rules 42 and 57(2) of the Rules of the Court seeking “*review and/or set aside (sic) its ruling delivered on 21<sup>st</sup> April 2016*” and for an order that “*Civil Appeal No. 14 of 2016 in the Court of Appeal at Kisumu be heard and determined on merit.*”

**Background**

2. In a judgment delivered on 27<sup>th</sup> February 2015, the High Court at Kisii decreed that the marriage solemnized on 9<sup>th</sup> September 2004 between the respondent and the 1<sup>st</sup> applicant be dissolved. The court further ordered the 1<sup>st</sup> applicant to refund to the respondent a sum of Kshs. 205,000.00 together with interest being half of school fees and upkeep that the respondent paid for the 1<sup>st</sup> applicant while she was in college and “*half dowry paid for her*”. Aggrieved by that judgment, the applicants lodged a notice of appeal dated 10<sup>th</sup> March 2015.

3. By an application dated 3<sup>rd</sup> December 2015, the respondent moved the Court to strike out the applicants’ notice of appeal dated 10<sup>th</sup> March 2015. That application was based on the grounds that the respondent had failed to comply with the orders of this Court issued on 28<sup>th</sup> April 2015 staying execution of the judgment of the High Court. The orders of stay of execution had been granted on terms that the 1<sup>st</sup> applicant would deposit Kshs. 102,500.00 in an interest earning account in the joint names of the advocates for parties. It was also a condition of the stay that the applicants would expedite the process of filing and hearing the intended appeal.

4. After considering that application, the Court was persuaded that the applicants had failed to make due

effort to file and prosecute their appeal. In its ruling delivered on 21<sup>st</sup> April 2016, the Court stated:

*“Although the respondents’ counsel blamed the Court for delay in supplying them with proceedings, counsel did not demonstrate that he had exercised due diligence in pursuing the same. The letters that were allegedly written to the High Court requesting for the proceedings were not copied to the applicant’s advocate. There is also no proof that the letters were actually delivered to the High Court registry. Further, there is no evidence that the proceedings were paid for. Mr. Achoki told the Court that he has since received the proceedings but did not state why he had so far not filed the appeal.*

*One of the terms agreed upon by the parties for grant of orders of stay of execution was that the respondents would file an appeal “as soon as possible and fast track its hearing” but that condition has been breached.”*

5. Being of that view, the Court ordered that, *“in terms of Rule 83, the notice of appeal filed on 10<sup>th</sup> March 2015 is deemed to have been withdrawn...”* That is the order that the applicants now seek to have reviewed or set aside.

### The legal test for review

6. In Standard Chartered Financial Services Limited & 2 others vs. Manchester Outfitters (Suing Division) Ltd (Now known as King Woollen Mills Ltd & 2 others [2016] eKLR, the Court has held that it has jurisdiction to review its own decisions. After analyzing past decisions of the Court [1] on the subject, the Court stated:

*“We have deliberately quoted extensively from the Rai case, the Nguruman case, and the Benjoh case in order to bring out the position that this Court has taken in the past and the reason for any deviations. From the analysis it is evident that although the facts in the Rai case were similar to the Benjoh case, to the extent that in both instances there was a motion seeking to reopen a concluded judgment of the Court, the new constitutional dispensation justified a departure from the Rai case as it called for an interpretation of the Court’s jurisdiction in a manner that brings it into conformity with the principles of the 2010 Constitution, and gives allowance for the development of the law. The exercise of the Court’s residual jurisdiction under section 3A of the Judicature Act was therefore justified. This is to say that this Court has already pronounced itself in the Benjoh case in a way that evinces a clear intention of departing from the precedent set out in the Rai case. We reiterate that position and stress that 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. Indeed, the Benjoh case addressed this point thus:-*

*“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]*

7. The question therefore is whether in the present case, there is an “exceptional situation” justifying the exercise of that residual jurisdiction?

### Submissions by counsel

8. Learned counsel for the applicants Mr. W. M. Ochoki referred us to the grounds in support of the application on the face of the application and to the supporting affidavit sworn by Charles Mosei Onchiri, the 2<sup>nd</sup> applicant. He submitted that the Court should review its ruling delivered on 21<sup>st</sup> April 2016 because in making that ruling, the Court overlooked that there was correspondence demonstrating that the

applicants had paid for the typed proceedings and judgment of the lower court and that an appeal had already been filed. He urged that had it been brought to the attention of the Court, at the time, that an appeal had been filed, then the Court would have arrived at a different decision. He stated that justice demands that the ruling of the Court be reviewed or set aside so that the applicants' appeal may be heard on its merits.

9. Opposing the application, Mr. S. M. Sagwe learned counsel for the respondent referred us to the respondent's notice of preliminary objection and to the respondent's replying affidavit, in opposition, and submitted that the application is devoid of merit; that in view of the failure by the applicants to comply with the terms of the order of this Court granting stay of execution, the Court was justified in deeming the notice of appeal as withdrawn; that the matter is *res judicata*; and that the court does not have jurisdiction to review its own decision.

**Determination**

10. We have considered the application, the affidavits and the submissions by learned counsel. The reason the applicants seek review is, in the words of the 2<sup>nd</sup> applicant, as deposed in his affidavit, because, "*the court overlooked a matter which had the matter been brought to its attention, it (the court) could have made a different finding.*" He goes on to say that "*the matter had been inadvertently omitted by the applicant.*"

11. The 'matter' the applicants' say the Court overlooked is that there is correspondence showing that the applicants had paid for the typed proceedings and judgment of the lower court and that the appeal had been filed.

12. Beyond the general statement that the omission to bring those matters to the attention of the court was "*inadvertent*", no explanation is otherwise offered. The applicants' simple answer to the respondent's application to strike out their notice of appeal would have been to demonstrate that an appeal had in fact been filed. The long and short of it is this: In his application to strike out the notice of appeal, the respondent accused the applicants of failure to file a record of appeal. In answer to that accusation, the applicants said they had not filed the appeal because they were yet to be supplied with proceedings and the judgment of the lower court. That was then.

13. For purposes of the present application, they now say they were mistaken; that the proceedings and the judgment had in fact been obtained and the appeal had in fact been filed but they "*inadvertently omitted*" to bring this to the attention of the Court when dealing with the application to strike out the notice of appeal. How is it possible, we marvel, that the applicants overlooked that they had already filed an appeal. Is it something they would not have known? We do not think so. How is it that faced with an application to strike out a notice of appeal on the ground that the appeal has not been filed, the respondent would fail to answer that the appeal is filed? The applicants have not provided any satisfactory answers to these vexing questions. They have not demonstrated or satisfied us that this is a proper case for this Court to exercise its residual jurisdiction to review. The application is devoid of merit. It is dismissed with costs to the respondent.

Orders accordingly.

**Dated and delivered at Kisumu this 9<sup>th</sup> day of March, 2017.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

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**DEPUTY REGISTRAR**

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[\[1\] Jasbir Singh Rai and 2 Others v Tarlochan Singh Rai and 4 Others \[2007\] eKLR \(the Rai case\); Nguruman Ltd v Shompole Group Ranch & Another \[2014\] eKLR \(Nguruman case\); Benjoh Amalgamated Limited & Muiri Coffee Estate Limited v Kenya Commercial Bank Limited, \[2014\] eKLR \(Benjoh case\)](#)