Moruri (Suing for and on behalf of the Estate of Truphena Abisa Moruri) v Nyangena Hospital & another (Civil Appeal 13 of 2020) [2025] KEHC 12473 (KLR) (9 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12473 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL 13 OF 2020

DKN MAGARE, J

SEPTEMBER 9, 2025

BETWEEN

DENNIS OSOE MORURI (SUING FOR AND ON BEHALF OF THE ESTATE OF TRUPHENA ABISA MORURI) .... APPELLANT

AND

NYANGENA HOSPITAL .... 1ST RESPONDENT

DAVID MOMANYI .... 2ND RESPONDENT

RULING

1. The applicant herein filed an application and for the advocates to come-on record. In the review they seek to review the orders made by P Gichohi J, on 31.01.2023. These were orders of stay pending appeal. It was their case that the respondent has taken their sweet time to file an appeal. They also stated that the Applicant seeks and desires to have new advocates.
2. In respect to review, the power is enshrined in Section 80 of the *civil procedure act* that states that:

   " Any person who considers himself aggrieved—

   (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

   (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit".

3. This is further enunciated in Order 45 of the Civil Procedure Rules provides for Review and it states as follows:

> "(1) Any person considering himself aggrieved—
>
> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
>
> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"

4. In Lakesteel Supplies vs. Dr. Badia and Anor Kisumu HCCC No. 191 of 1994, Kuloba J (as he then was), stated as follows regarding review:

> The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made.

5. The net effect is that the review must relate to the impugned ruling. Nothing has been raised in respect of the ruling made by the learned judge. Instead, the issues raised relate to non-filing of the appeal in the Court of Appeal. Does this court have jurisdiction to make these orders?

6. A court expand its jurisdiction through judicial craft or innovation or through fiat. There must be jurisdiction to dela with an issue. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the supreme court stated as doth: -

> “This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

7. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. Where there is no jurisdiction, the court must down its tools. This was well couched in the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR, Nyarangi JA, as he then was stated as doth;

> “With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: “By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.

8. The court issued stay pending appeal. Whether there is now an appeal, is a matter of the court appealed to. Whether there is a certificate of delay or not is a matter beyond the purview of this court. In other words, the court is functus officio in respect of the order for stay and proceedings in court above. The applicant knows which rules to invoke to approach the court o appeal. Requesting the high court to find there is no appeal in the court of appeal is an overreach. The Court of Appeal in Mahinda vs. Kenya Power & Lighting Co. Ltd [2005] 2 KLR 418 expressed itself as follows:

> “The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made.”

9. The court can only review its decisions based on the grounds on review but not to invite the court to depart from its ruling and have a second bite of the cherry. In the case of Dock Workers Union & 2 others v Attorney General & another Kenya Ports Authority & 4 others (Interested Party) [2019] eKLR it was therefore held that: -

> "In this regard, for a Court to review its own orders, it must be demonstrated that there is discovery of new and important matter or evidence. It must also be shown that the new evidence was not within the knowledge of the party seeking review or could not be produced at the time the orders were made. Such party must also satisfy the Court that this was the case even after exercise of due diligence. A Court will also review its orders if it is demonstrated that there is some mistake or error apparent on the face of the record, or for any other sufficient reason. The error must be evident on the face of the record and should not require much labour in explanation. An application for review must also be made without unreasonable delay."

10. The power for review is not an invitation to second guess the court but to correct a mistake apparent on the face of the record of discovery of new evidence. It cannot be a way of avoiding the Court of Appeal. The Code of Civil Procedure, Volume III Pages 3652-3653 by Sir Dinshaw Fardunji Mulla states:

> "The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure...The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper."

11. The court therefore finds that the application to revise its orders is otiose and is dismissed with costs of Ksh 5,000/= to the Respondent.

12. The Application to come on record is ancillary to the said application it is not opposed and there is no impediment for not being allowed. The applicant shall file notice of change within 14 days and serve the former advocate and the respondent. thereafter file an affidavit of service, failing which leave lapses.

Determination

13. In the upshot, I make the following Orders:

    a. Prayer 2 of the application dated is partly allowed in that the firm of Kingoina- Obuya to come on record for the Applicant instead of Nyamweya Mamboleo advocates.

    b. Prayers 3 and 4 are dismissed with costs of Ksh. 5,000/= payable within 30 days, in default execution do issue.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT KISII ON THIS 9TH DAY OF SEPTEMBER, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of

N/a for the Applicant

N/a for the Respondent