



**Atingo v Mbalanya (Environment and Land Appeal E004 of 2022)  
[2023] KEELC 19923 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19923 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT AND LAND APPEAL E004 OF 2022**

**E ASATI, J**

**SEPTEMBER 21, 2023**

**BETWEEN**

**READON ELISHA ATINGO ..... APPELLANT**

**AND**

**OLIVER SHADRACK MBALANYA ..... RESPONDENT**

*(Being an appeal from the judgement of the Honourable RM NDOMBI  
SRM in VIHIGA CMCC E66 OF 2018 delivered on the 3RD MARCH, 2022)*

**RULING**

1. This ruling is in respect of the notice of motion application dated May 15, 2023 brought by the respondent pursuant to the provisions of section 1A, 1B, 3 and 3A of the *Civil Procedure Act* and order 12 rule 2(c), order 51 rule 1 and 15 of the *Civil Procedure Rules*, article 159 and articles 50 of the *Constitution* of Kenya, 2010.

Prayers 1 to 4 of the application are already spent. The outstanding prayers are prayer 5, 6 and 7. Prayer 5 is a prayer that the court may set aside or vary the judgement and all consequential orders herein.

Prayer 6 is a prayer that the court may find that there was forgery by the respondent based on the proceedings from the Provincial Dispute Appeals Tribunal that were produced by him. And prayer 7 is a prayer that costs of the application be provided for.

2. The application was based on the grounds set out on the face of the notice of motion and the averment in the supporting affidavit sworn by Oliver Shadrack Mbalanya. The applicant's case as contained in the supporting affidavit is that it is clear from the evidence on record that the appellant's father never purchased the portion of land. That the right of the appellant to acquire the said portion of land by adverse possession relinquished by virtue of the several court cases and his occupation has not been quiet and uninterrupted as required by law. That the court should have first ascertained whether there



was some forgery as to the proceedings produced by the appellant that were undated and were different from the dated ones that were produced in court.

The applicant contended that there was an error on the face of the record as to whether the respondent acquired the said parcel of land by adverse possession. That the application has been made in good faith and in the interest of justice, expeditiously and without undue delay.

3. The appellant opposed the application *vide* his replying affidavit sworn on June 12, 2023 and the annexures thereto. He deposed that the application is incompetent, incurably defective, frivolous, vexatious, lacks merit and amounts to an abuse of the court process.

That the application is *sub-judice* in view of the fact that the applicant chose to appeal against the judgement and that the applicant is not allowed to pursue both review and appeal at the same time.

That there is no evidence of forgery and that the court did not rely on any proceedings of the tribunal in arriving at its decision. That the issue of forgery is *res judicata*. That the applicant is trying to use tricks to delay the matter. That the issue of adverse possession was decided by the court and by inviting the court to relook into it again, the applicant is effectively inviting the court to sit on appeal over its own decision. That the application is unknown in law and should be dismissed with costs.

4. The application was argued orally on July 11, 2023.
5. Learned counsel for the applicant adopted the contents of the application, the supporting affidavit and further affidavit and prayed that the application be allowed as presented. Counsel urged the court to consider documents annexed to the affidavit and marked OSM 1(a) and OSM 1(b) as the two documents were totally different.
6. Learned counsel for the appellant adopted the contents of the replying affidavit and submitted that the application is seeking for review but the applicant avoided to invoke order 45 of the [Civil Procedure Rules](#).

That the applicant is referring to a document marked OSM 1(b) which is not signed by any person. That the court did not rely on proceedings of the tribunal when it made its judgement. That the applicant having filed a notice of appeal cannot at the same time seek review.

7. I have considered the application, the supporting affidavit and annexures and the further affidavit filed by the applicant and the and the replying affidavit and annexures filed by the appellant/respondent. I have considered the submissions by learned counsel.
8. The substantive prayer in the application is prayer 5 which is a prayer that;

“ the honourable court be pleased to set aside and or vary the judgement obtained against the applicant and all consequential orders obtained thereto based on the fact”.

Among the provisions of law under when the application is brought is order 12 2(c). Though order 12 2(c) provides for what the court is to do when only the plaintiff attends court and the court is not satisfied that there was adequate service of hearing notice upon the defendant, order 12 generally deals with hearing and consequences of non-attendance. It is rule 7 that provides for setting aside of judgements and orders made under O.12. Grounds for setting aside entail explanation for non-attendance, demonstration that the applicant has a good defence that raises triable issues and that no prejudice will be suffered by the respondent if the judgement is set aside. This is not the case in the present matter. The judgement in the present matter is a judgement on an appeal wherein both parties were represented and submitted on the appeal. Order 12 is therefore not applicable.



9. One of the grounds presented for the application is that there is an error on the face of the record as to whether the appellant acquired the said parcel by way of adverse possession or whether it was by purchase. The applicant expounded on this in the supporting affidavit that from the record it is clear that the respondent's father never purchased the portion of land, that the right of the respondent to adverse possession had been relinquished and that the court should have first found out whether there was forgery.
10. Error apparent on the face of the record is one of the grounds for review of judgements, orders and decrees under O. 45 *Civil Procedure Rules*. The error alluded to by the applicant points to the merits of the judgement namely; whether there was sufficient evidence of adverse possession, whether the right to adverse possession had been relinquished and whether the court failed to make a finding that there was forgery. Error apparent on the face of the record does not concern itself with the merits of the judgement being sought to be reviewed.
11. I find that the grounds that are advanced in support of the application are rather ground of appeal. I am in agreement with counsel for the applicant that the application invites the court to sit on appeal over its own decision.
12. A court of law that has rendered its judgement in a matter becomes *funtus officio* in so far as the merits and demerits of the case or the propriety or impropriety of the evidence adduced before it is concerned. A litigant who wishes to revisit, re-interrogate or question such matters can only do so in the next court up; in an appeal. The court however has power to review the judgement and engage in other actions as permitted by law, including actions related to execution of the judgement.
13. The application herein, though couched as an application to set aside and vary the judgement, invites the court to relook at its findings on the issues of adverse possession and to consider the propriety of the evidence adduced. These are matters that can only be canvassed in the appeal to the Court of Appeal. The applicant already lodged a notice of appeal and under the provisions of order 45 *Civil Procedure Rules* he cannot pursue both review of and appeal against the same judgement simultaneously.
14. I find that the application is misconceived, the same lacks merit and is hereby dismissed. Costs to the appellant(respondent in the application).

Orders accordingly.

**RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

**In the presence of:**

Maureen- Court Assistant.

for the Appellant.

for the Respondent/Applicant.

