



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ober & 2 others v County Government of Homa Bay (Appeal E023 of 2022)
[2023] KEELC 21760 (KLR) (27 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21760 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
APPEAL E023 OF 2022
GMA ONGONDO, J
NOVEMBER 27, 2023**

BETWEEN

**JARED OMONDI OBER 1ST APPELLANT
HOMA BAY COUNTY CITIZENS ASSOCIATION A.K.A BUNGE LA WENYE
NCHI 2ND APPELLANT
WALTER OKELO OPIYO (SPEAKER) 3RD APPELLANT**

AND

THE COUNTY GOVERNMENT OF HOMA BAY RESPONDENT

*(Being an appeal from the ruling of Hon. T. M. Olando, Principal
Magistrate, delivered on 8th June 2022 in Homa Bay Chief
Magistrate's Court Environment and Land Case No. 83 of 2018)*

JUDGMENT

1. The instant appeal radiates from the learned trial magistrate's ruling rendered on 8th June 2022 where he held that the application for review filed by the appellants herein lacked merit and dismissed the same.
2. In arriving at the decision, the trial court observed in part thus;

“.... The grounds for review of a judgment or ruling is that either there is an error apparent on the face of the judgment or that there is a material fact which was not in the knowledge of the applicant at the time of hearing the matter. In this case, I find that there are no new faults or an error on the face of the judgment....”



3. The appeal was commenced by way of a memorandum of appeal dated 30th July 2022 and lodged on 7th July 2022 by the 1st appellant on behalf of all the appellants, founded upon eight (8) grounds which include:
 - a. The learned trial magistrate erred in law of evidence in failing to appreciate that the appellants produced before the court receipts in proof of payment of rent to the respondent confirming there existed a controlled tenancy contract between the appellants and the respondent.
 - b. That the learned trial magistrate erred in law of evidence in failing to note that in the absence of the evidence by the respondent, the appellants' case stands uncontroverted.
 - c. The learned trial magistrate erred in law of practice and procedure in failing to note that the appellant's tenancy was governed by Business Premises Tribunal Act which required the respondent to issue unto the appellants a notice of intention to terminate the tenancy to accord the appellants ample time to seek for court's redress instead of hiring goons to evict them therefrom.
 - d. The learned trial magistrate erred in law of practice in failing to note that the eviction process carried out by the respondent was illegal and the appellants' properties got destroyed in the process which the respondent is vicariously liable to compensate.
 - e. The learned trial magistrate erred in the law of practice in failing to note that as a result of the illegal eviction of the appellant and destruction of their properties, their rights were violated as enshrined in the Constitution of Kenya, 2010.
4. Therefore, the appellant prays that this court quashes the decision of the trial magistrate, allow the appeal and enter judgment in favour of the appellants and award them costs.
5. On 14th June 2023, the court directed that the appeal be heard by way of written submissions.
6. So, by the submissions dated 27th June 2023, the appellants gave a background of the matter and submitted that despite the trial court granting them an order of interim injunction on 20th September 2018 restraining the respondents from interfering with the appellants trading structures, the respondent's agents demolished the said trading structures. Thus, the appellants prayed that this court grants them the following orders:
 - a. A declaration that the respondent's action of destroying the appellants' property was illegal, null and void.
 - b. A declaration that the period provided in the [Rent Tribunal Act](#) did not elapse and therefore, any purported eviction was illegal, null and void.
 - c. An order compelling the respondent to unconditionally compensate the appellants and the affected Sofia traders at large in their original structures without loss of income privileges and businesses because the court order was violated intentionally which the law does not accept.
 - d. An order directed at the respondents to pay the Sofia traders all losses and benefits they would have gotten as from time of eviction to date.
 - e. Costs of the suit to be provided.
7. The respondent's counsel, Orego and Odhiambo Advocates, filed submissions dated 4th July 2023 and identified three issues for determination thus: whether the appellant has the capacity to bring this



- appeal; whether the appellant satisfied the grounds for grant of an order of review and who should bear the costs of this appeal?
8. On the first issue, learned counsel submitted that the appellants lack capacity to institute and prosecute this appeal since they were not parties to the suit at the trial court and they have not produced notices issued to the parties they purport to represent or written authorization to lodge this appeal. On the second issue, counsel stated that the trial court rightly applied the law in dismissing the application for review. Counsel noted that in the memorandum of appeal filed herein, the appellants have purported to appeal against the judgment of the trial court delivered on 16th March 2022 and not against the ruling dated 8th June 2022 dismissing their application for review. That in the event that is the case, then the same is defective as the record of appeal filed herein is incomplete in contravention of the provisions of Order 42 Rule 13 (4) (f) of the *Civil Procedure Rules*, 2010. Thus, counsel urged the court to dismiss the present appeal. To fortify the submissions, reliance was placed on various authorities including the case of *Yiapas Ole Seese and 4 others v Sakita Ole Narok and 2 others* (2008) eKLR.
 9. In this regard, the issues for determination herein are as contained in the grounds of appeal which are condensed to; whether the appellants are deserving of the orders sought in the memorandum of appeal.
 10. It is trite law that an appellate court has the mandate to reconsider the evidence on record with caution and reach its own independent conclusions and inferences; see *Kiruga v Kiruga and another* (1988) eKLR.
 11. At the trial court, the suit was instituted by John Odoyo Owino and Philip Otieno Owuor against the respondent herein by way of a plaint dated 20th September 2018 and filed on even date seeking the orders infra;
 - a. A declaratory order that the defendant therein is obliged in law to assume responsibility for the tenants as licensees and accord all and each of the said tenants, paying the due rents and complying with the terms of tenancy, peaceful enjoyment of the let premises.
 - b. An order of injunction to restrain the defendant, its employees, servants, agents or any person deriving authority from the defendant or any of its officers from entering into, closing, evicting or in any other way dealing with the let premises occupied by any of the plaintiffs herein and the tenants referred to herein in any manner prejudicial to the right of the tenants.
 - c. Cost of this suit together with interest thereon at the rate of 14% p.a from the date of filing suit until payment in full.
 - d. Such further or other alternative relief as this honourable court deems fit to grant.
 12. The 1st and 2nd plaintiffs testified as PW1 and PW2 respectively. They urged the court to order the defendant to compensate them for losses incurred when their business premises were destroyed by the defendant. They also prayed that the court issues a warrant of arrest for the person who was in-charge of the illegal evictions.
 13. The defendant did not call any witnesses in defence of the claim.
 14. In his judgment dated 16th March 2022, the learned trial magistrate noted that that the plaintiffs admitted that they no longer occupied the business premises hence, the prayer for injunction could not hold. The court also found that that the plaintiffs did not prove their case on a balance of probabilities and dismissed the suit with costs to the defendant.



15. Thereafter, the plaintiffs filed an application for review dated 28th March 2022 on 30th March 2022 and the same was set down for inter partes hearing on 11th May 2022. Upon hearing the said application, the court dismissed the same on 8th June 2022 for lack of merit hence necessitating the present appeal.
16. It must be noted that the memorandum of appeal dated 30th July 2022 and lodged herein on 7th July 2022 by the appellants raises grounds ostensibly challenging the trial court's judgment delivered on 16th March 2022. A review of this decision had already been disallowed by the trial court.
17. Under Section 80 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, where a party opts to apply for review, such a party cannot after the review is rejected, exercise the option to appeal against the same order he sought review of. The section provides thus:
 80. 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 hereby 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.
18. Order 45 of the *Civil Procedure Rules*, 2010 provides the procedure and the conditions that an applicant must satisfy in an application for review. Equally, it makes it clear that a party cannot seek review of an order and appeal from the same order. In addition, Order 45 rule 1(a) and (b) (*supra*) reiterates the proviso of Section 80(a) and (b) which, in my view, makes it clear that the options of a review and an appeal are not simultaneously available to an aggrieved party. Once a party has opted for a review the option of an appeal cannot at the same time be available to the party.
19. In the present case, the applicant exhausted the process of review. He cannot be permitted to now try his luck with an appeal. Besides, the record of appeal filed herein is incomplete in contravention of the provisions of Order 42 Rule 13 (4) (f) (*supra*) and as noted in the submissions of the respondent's counsel.
20. Plainly, Order 45 Rule 1 (*supra*) provides that:
 - (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.
21. It is my considered view that the application for review lodged by the plaintiffs at the trial court and dated 28th March 2023 did not disclose any new and important matter or evidence which, after the exercise of due diligence, was not within the plaintiffs' knowledge or could not be produced by them at the time when the decree was passed or the order made. Further, the plaintiffs did not show that there was some mistake or error apparent on the face of the record to warrant a review.



22. I therefore, endorse the learned trial magistrate's finding that the application was devoid of merit. Clearly, the same did not meet the threshold as set out in Order 45 Rule 1 (*supra*).
23. Moreover, I note the discrepancy in the identity of the parties who filed the suit at the trial court and the appellants herein. The suit at the trial court was filed by one John Odoyo Owino and Philip Otieno Owuo who are not appellants herein. The said discrepancy has not been explained. Indeed, the appellants lack capacity to prosecute the instant appeal as they are strangers to the present proceedings.
24. In the premises, the trial magistrate's ruling delivered on 8th June 2022 is sound at law. I hereby endorse the same.
25. Accordingly, this appeal is devoid of merit and is hereby dismissed with no order as to costs.
26. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 27TH DAY OF NOVEMBER, 2023.

G.M.A ONG'ONDO

JUDGE

Present

1. 1st and 3rd appellants- present in person
2. Ms. Ngigi holding brief for Mr. Orego, learned counsel for the respondent
3. Mutiva, Court Assistant

