



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mashele v Wanzetse & another (Environment & Land Case 53 of 2016)  
[2023] KEELC 21642 (KLR) (20 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21642 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 53 OF 2016  
BN OLAO, J  
NOVEMBER 20, 2023**

**BETWEEN**

**MANASSEH EMISEMBE MASHELE ..... APPLICANT**

**AND**

**DAVID WANZETSE ..... 1<sup>ST</sup> RESPONDENT**

**KALORI WANZETSE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The dispute between Manasseh Emisembe Mashele (the Plaintiff) and David Wanzetse and Kalori Wanzetse (the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively) regarding the ownership of the land parcel No Bukhayo/Nasewa/1491 (the suit land) was heard by Omollo J. In a judgment delivered on 8<sup>th</sup> June 2022, the judge made the following final orders in disposition of the case:
  1. A declaration be and is hereby issued declaring that the Plaintiff's acquisition and continued use of land parcel Bukhayo/Nasewa/1491 is unlawful, null and void.
  2. A declaration be and is hereby issued declaring that the Plaintiff's process of acquisition of land parcel Bukhayo/Nasewa/1491 is illegal and their use if any amounts to trespass.
  3. An order is hereby issued for cancellation of title deed Bukhayo/Nasewa/1491 which arose from the purported sub-division of land parcel No Bukhayo/Nasewa/616.
  4. Each party to bear their respective costs of the suit.
2. The Plaintiff was aggrieved by that judgment and promptly filed a Notice of Appeal at this Court's registry on 17<sup>th</sup> June 2022.
3. The Plaintiff has now approached this Court vide his Notice of Motion dated 2<sup>nd</sup> January 2023 and filed under certificate of urgency seeking the following orders:



1. Spent
  2. That this Honourable Court be pleased to grant leave to the firm of Abdulrahman Saad & Associates Advocates to come on record on behalf of the Plaintiff.
  3. That this Honourable Court be pleased to review, set aside and/or vary the judgment dated 8<sup>th</sup> June 2022.
  4. That this Honourable Court be pleased to order that the Plaintiff's process of acquisition of the land title No Bukhayo/Nasewa/1491 was lawful.
  5. That this Honourable Court be pleased to reinstate the Plaintiff's land title No Bukhayo/Nasewa/1491.
  6. That costs of the application be provided for.
4. The application is founded upon the provisions of Order 45 Rule 1 of the Civil Procedure Rules as well as Sections 1A, 1B, 3B and 85 of the *Civil Procedure Act*. It is based on the grounds set out therein and supported by the Plaintiff's affidavit of even date.
  5. It is the Plaintiff's case that judgment was entered against him on 8<sup>th</sup> June 2022 on the allegation that he did not acquire title to the suit land lawfully yet he had entered into a sale agreement with the vendor lawfully at a consideration of Kshs.400,000 of which he paid a deposit of Kshs.200,000 and thereafter processed all the relevant documents before being issued with a title deed on 10<sup>th</sup> march 2014. That his title was erroneously nullified by the Court yet it had been issued lawfully. That if this Court does not intervene, he will suffer serious and immense losses.
  6. Annexed to the application are the following documents:
    1. A document from Kakamega hospital showing that he is "technically blind and needs rehabilitative care."
    2. Copy of the judgment delivered on 8<sup>th</sup> June 2022.
    3. Copy of the sale agreement dated 10<sup>th</sup> February 2014 between the Plaintiff and Syphrosa Nyongesa Okwero.
    4. Copies of receipts.
    5. Stamp – Duty pay in slips.
    6. Receipts from Land Registry.
    7. Copy of title deed to land parcel No Bukhayo/Nasewa/1491.
  7. The application is opposed and the 1<sup>st</sup> Defendant has filed a replying affidavit dated 8<sup>th</sup> August 2023 in which he has deposed, inter alia, that the 2<sup>nd</sup> Defendant who was his father died on 13<sup>th</sup> August 2022. That the application is bad in law, an abuse of the process of this Court, scandalous, vexatious and misplaced. That no new issues have been raised to warrant a review and if the Plaintiff is not satisfied with the judgment, he should file an appeal. The Plaintiff, having filed a Notice of Appeal, should move to the Court of Appeal.
  8. That the land parcel No Bukhayo/Nasewa/616 belonged to his grandfather Kalori Anzetse Oduor and when the 2<sup>nd</sup> Defendant applied for Letters of Administration, it was found that the said land had been sub-divided to create land parcels No Bukhayo/Nasewa/1490–1493 which titles had been obtained



unlawfully. Therefore the suit land does not exist and it will be futile for this Court to restore it. This application is a waste of the Court's time.

9. Annexed to the replying affidavit is the burial permit in the name of the deceased 2<sup>nd</sup> Defendant.
10. The application has been canvassed by way of written submissions. These have been filed both by Mr Saad instructed by the firm of Abulrahman Saad & Associates Advocates for the Plaintiff and by Ms Nabulindo instructed by the firm of D. K. Nabulindo & Company Advocates for the 1<sup>st</sup> Defendant.
11. Prayer No 2 was granted when the application came up *ex-parte* on 19<sup>th</sup> January 2023.
12. I shall only consider prayer No 3 because if I dismiss it, the prayers No 4 and NO 5 will collapse.
13. In prayer No 3, the Plaintiff seeks that this Court sets aside, review or vary the judgment delivered on 8<sup>th</sup> June 2022. I shall first consider if this Court can set aside or vary the said judgment.
14. The judgment dated 8<sup>th</sup> June 2022 was not an *ex-parte* or default judgment where the Court retains a wide discretion to set it aside on terms that it may deem fit. It was a final judgment arrived at after all the parties herein had been heard in support of their respective cases. Such a judgment can only be set aside on review or on appeal. It is not amenable to the provisions of Order 10, 12 or 36 of the [Civil Procedure Rules](#). There are no provisions in the [Civil Procedure Rules](#) for the setting aside of a final judgment. That was the view which the Court of Appeal took in the case of [Kenya Power & Lighting Company Ltd -v- Benzene Holdings Ltd <sup>1</sup>/a Wycoco Paints](#) C.A. Civil Appeal No 132 of 2014 [2016 eKLR] where the judges expressed themselves as follows:

“ Apart from the provisions of Order 10 Rule 11, Order 12 Rule 7 and Order 36 Rule 10 of the Civil Procedure Rules dealing with the setting aside of default judgments, the Civil Procedure Rules do not have a provision for the setting aside of the final judgment. A party aggrieved by a final judgment can either move the Court under Order 45 for a review of the resultant decree or by lodging an appeal in terms of Order 42.” Emphasis mine.

Therefore, the remedy for setting aside or varying the judgment dated 8<sup>th</sup> June 2022 is not available to the Plaintiff.

15. With regard to the remedy of review, it is provided for under Section 80 of the [Civil Procedure Act](#) which sets out the law and Order 45 Rule 1(1) of the [Civil Procedure Rules](#) which sets out the procedure Section 80 reads:

“ 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 that Court may make such order thereon as it thinks fit.”

On the other hand, Order 45 Rule 1(1) of the [Civil Procedure Rules](#) provides that:

“ 1

- (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 member 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.”  
Emphasis mine.

It is clear from the above that a party can only seek a review of judgment against which no appeal has been preferred. But a party cannot pursue both an appeal and application for review at the same time.

The Plaintiff herein lodged a Notice of Appeal in this Court’s registry on 17<sup>th</sup> June 2022. It is not clear whether he has subsequently filed any appeal. What is clear, however, is that once the Notice of Appeal was lodged, the route to seek a remedy of review of judgment closed. In *Karani & 47 Others v Kijana & 2 Others* 1987 KLR 557, the Court held that:

“... Once an appeal is taken, review is ousted and the matter to be remitted by review must merge in the appeal.”

In *Otieno Ragot Advocates v National Bank of Kenya Ltd* C.a. Civil Appeal No 60 and 62 of 2017 [2020 eKLR], the Court, while dealing with a situation such as the one obtaining in the this case and where the applicant had filed an application for review and after lodging a Notice of Appeal, stated as follows:

“Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time when the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed it would then pursue the appeal. It was gambling with the law and judicial processes. It is precisely to avoid this kind of scenario that the option either to appeal of review was put in place. There can be no place for review once an intention to appeal has been intimated by filing a notice of appeal. (see *Kamalaksbi Amma v Karthayan* [2001] AIHC 2264)”

It is clear therefore from both the law and precedents that once the Plaintiff opted to appeal the judgment delivered on 8<sup>th</sup> June 2022 by filing a Notice of Appeal, he could not again approach this Court seeking a review of the same judgment. The application for review must be struck out for being incompetent.



16. Even if this Court was to consider the application for review on its merits, both parties herein are simply re-opening the case that was determined by Omollo J by attempting to address this Court afresh on the same issues upon which a decision has been made. The Plaintiff has addressed this Court at length on how he purchased the suit land and obtained title thereto. He then depones in paragraph 9 of his supporting affidavit:

9:

“That there appears to have been an error apparent on the face of the record my title which was only issued by the right authority following of all requisite procedure was erroneously nullified by this Honourable Court.”

His counsel then submits as follows:

“My Lord, from the foregoing case, we wish to inform this Honourable Court that the judgment dated 8<sup>th</sup> June 2022 was entered against the applicant herein on the allegation that he did not use lawful process to acquire the land title number Bukhayo/Nasewa/1491 (the property) from Syphrosa Nyongesa Okero (the vendor) though the same is far from the truth.”

The Plaintiff is questioning the trial judge’s appreciation of the law and evidence. That cannot be a ground for review. It can only be a ground for appeal. In *Abasi Belinda v Fredrick Kangwamu & Another* 1963 E.A. 557, Bennett J held as follows:

“A point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of the law is not a ground for review though it may be a ground for appeal.”

That decision was affirmed by the Court of appeal in the case of *Pancras T. Swai -v- Kenya Breweries Ltd* C.A. Civil Appeal No 275 of 2010 [2014 eKLR] when it added that:

“It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on ground that the decisions were erroneous in law, either because a judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which Court decisions that ought to be examined on appeal would be exposed to attacks in the Courts in which they were made under the guise of review when such Courts are functus officio and have no appellate jurisdiction.”

Therefore, even if the application for review was to be considered on its merits, it was still bound to fail.

17. On the issue of costs, the parties did not appear before me as this suit was heard by Omollo J who had the benefit of seeing them. The Plaintiff has however filed a document from Kakamega Provincial General Hospital which describes him as “suffering from Macula scar both eyes. He is therefore technically blind and needs rehabilitative care.” Costs are at the discretion of the Court and follow the event. A successful party may nonetheless be denied costs for good reason. I cannot think of a better reason to save the Plaintiff the burden of meeting the Defendant’s costs than his current medical condition which calls for sympathy. Indeed Omollo J also made no order as to costs.



18. The up-shot of all the above is that the Notice of Motion dated 2<sup>nd</sup> January 2023 is dismissed. Each party shall meet their own costs.

**BOAZ N. OLAO**

**JUDGE**

**20TH NOVEMBER 2023**

**RULING DATED, SIGNED AND DELIVERED ON THIS 20TH DAY OF NOVEMBER 2023 BY WAY OF ELECTRONIC MAIL.**

**BOAZ N. OLAO**

**JUDGE**

**20TH NOVEMBER 2023**

