



Muhoro v Chuchu (Appeal 17 of 2019) [2022] KEELC 4739 (KLR) (25 August 2022) (Judgment)

Neutral citation: [2022] KEELC 4739 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
APPEAL 17 OF 2019
MAO ODENY, J
AUGUST 25, 2022

BETWEEN

JECINTER WANGUI MUHORO APPELLANT

AND

SAIDI CHUCHU RESPONDENT

*(Being an appeal from the entire Ruling/Order of Principal Magistrate
(Hon. Alloyce P. Ndege) delivered on 3rd December 2019 at Hola,
Magistrates Court, Environment and Land Court case No. 5 of 2018)*

JUDGMENT

1. This appeal arises from the lower court's ruling dated December 3, 2019 delivered at Hola PM's Court in Environment and Land Case No 5 of 2018. The appellant herein being aggrieved by the said ruling lodged this appeal vide a memorandum of appeal dated December 16, 2019 listing 6 grounds that: -
 1. That the magistrate erred in law and in fact in failing to have due regard and to take into account various issues raised in the appellant's application but took up extraneous issues that were not raised by the other party.
 2. That the learned magistrate misdirected himself by finding that the appellant had disentitled itself of its right to invoke the provisions of order 45 (review/setting aside) of the Civil Procedure Rules.
 3. That the learned magistrate misdirected himself in law and fact by finding that by allowing the application will lead to undesirable consequences and therefore not in the interest of overriding objectives and fair trial as provided for in the Constitution.
 4. That the learned magistrate erred in law and in fact by failing to consider any of the authorities cited in support of the application, the submission of the learned counsel for the appellant, applying wrong principles of law and thus arriving at the wrong decision.



5. That the learned magistrate erred in law and in fact by finding the appellant's application was unmeritorious and dismissing the same with costs.
 6. That in all the circumstances of the case, the learned magistrate failed to do justice before him.
- Counsel agreed to canvas the appeal vide written submissions of which only the appellant filed. The respondent did not file any response to the appeal.

Appellant's Submissions

2. Counsel submitted that the appellant herein had filed a suit at Hoi Law Courts, and gave the necessary documentary evidence required in support of the claim to his advocate who was on record but the case proceeded to full hearing but the advocate inadvertently failed to produce the documents in evidence.
3. Counsel submitted on the grounds of appeal and stated that learned magistrate erred in his finding that a re-trial may lead to delay and costs and may prejudice the other party but such prejudice was not demonstrated.
4. Counsel further submitted that the decision as to whether or not to reopen the case was discretionary which the court has to exercise judiciously in the interest of justice and relied on the case of *Raindrops Ltd v County Government of Kilifi* [2020] eKLR.

Analysis And Determination

5. This appeal is based on the ground that the learned magistrate erred in refusing to allow an application for review to reopen the appellant's case due to the fact that her counsel failed to produce documents which she had given him.
6. The issue for determination is whether the appeal as presented should be allowed and in effect the court must be satisfied that the Learned erred in arriving at the decision that the appellant is appealing against. Whether the magistrate was right in dismissing the application for review to reopen the case to allow the appellant to adduce more evidence and produce documents in support of her case.
7. In the case of *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR the Court of Appeal stated as follows regarding the duty of first appellate court: -

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, *inter alia*, that: -

“On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

8. The court is under a duty to consider the evidence, evaluate it and draw its own conclusions but it must bear in mind that it did not benefit from hearing the witnesses. The application before the lower court was for review and the grounds for review were that the appellants counsel did not produce the



documentary evidence which the appellant had availed to him. Counsel also blamed this on the fact that the appellant was a lay person hence did not know her counsel had not produced the documents.

9. Order 45 rule 1 of the Civil Procedure Rules provides that:-

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.”

10. Further under section 80 of the Civil Procedure Act provides as follows: -

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.”

11. This court has powers to reconsider and evaluate the evidence and make its own conclusion. The appellant had to convince the court that she had discovered new and important matter or evidence which after the exercise of due diligence was not within her knowledge or could not be produced by her at the time when the order was made. This would essence mean that the new evidence would refer only to a discovery made since the order sought to be reviewed was passed.

12. In this case the appellant is lamenting about documents which were within her knowledge and that of her counsel but were not produced. Would this be considered as discovery of new knowledge or negligence of counsel to conduct the case diligently on behalf of a client. My answer to this would be that this does not amount to new knowledge as if parties were to be allowed to litigate in instalments, there would be no finality of cases.

13. An appellate court cannot interfere with the exercise of judicial discretion by the lower court where such discretion was exercised judiciously as was stated by Sir Charles Newbold, P in Mbogo & Another v Shab [1968] EA 93 at page 96: -

...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice....”



14. I have considered the grounds of appeal and the submissions by counsel and find that the appeal lacks merit and is therefore dismissed with each party bearing their own costs as the respondent did not respond to the appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 25TH DAY OF AUGUST, 2022.

MA ODENY

JUDGE

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated March 28, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving order 21 [1] of the Civil Procedure Rules.

