



**Nkonge & 3 others v Mugambi (Environment & Land Case 29 of 2019)  
[2022] KEELC 12743 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12743 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 29 OF 2019**

**JO OLOLA, J  
SEPTEMBER 28, 2022**

**BETWEEN**

**TIMOTHY NKONGE ..... 1<sup>ST</sup> APPELLANT  
MOSES KAIMENYI ..... 2<sup>ND</sup> APPELLANT  
LAWRENCE KOOME ..... 3<sup>RD</sup> APPELLANT  
ROSE NCUGUNE ..... 4<sup>TH</sup> APPELLANT**

**AND**

**JOHN MUGAMBI ..... RESPONDENT**

**RULING**

1. By the notice of motion dated October 15, 2020, the four (4) appellants urge the court to be pleased to review order no 2 of the ruling delivered herein on November 7, 2019 by discharging the appellants from the requirement of depositing a security of Kshs 1,500,000/- in court.
2. The application is supported by an affidavit sworn on behalf of the appellants by the 4<sup>th</sup> appellant – Rose Ncugune alias Rose Karambu John and is premised on the grounds inter alia:
  - (i) That the appellants have tried all ways within their capability to raise the required amount of security of Kshs 1,500,000/- but they have been unable to do so;
  - (ii) That the 4<sup>th</sup> appellant is the mother of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants and is 82 years old. all the appellants reside on the suit land where they have lived for more than 43 years. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants are casual labourers and have no proper source of income;



- (iii) That currently all the appellants and their families rely on farming on the suit land where they get their food and use the proceeds thereof for their upkeep;
  - (iv) That due to their financial incapability, the appellants have been unable to comply with the order on security for costs;
  - (v) That the respondent will not suffer any prejudice as the suit property is still intact and the appellants have maintained its *status quo*; and
  - (vi) That the appellants are ready to abide by any condition which the honourable court may impose.
3. The application is opposed by the respondent John Mugambi. In his replying affidavit sworn on November 19, 2020 as filed herein on November 24, 2020, the respondent asserts that the application is incompetent and amounts to an abuse of the court process.
4. The respondent avers that there has been an unexplained and inordinate delay in bringing the present application as the 4<sup>th</sup> appellant has not attached any documents to support and demonstrate the claim that she was unwell. The respondent further avers that the alleged sickness could not prevent the other appellants from lodging the application.
5. The respondent further avers that the appellants have disobeyed a court order and they have therefore no basis for seeking to be discharged from depositing the security of Kshs 1,500,000/- as ordered by the court on November 7, 2019. It is further the respondent's case that the appellants have not established any legitimate ground for review of the court's orders and their application ought to be dismissed with costs.
6. I have carefully perused and considered the application as well as the response thereto. I have similarly perused and considered the rival submissions placed before me by the learned advocates acting for the parties herein.
7. By the present application before me the appellants have sought a review of the orders of this court (Hon. Lady Justice MC Oundo)
- issued on November 7, 2019 requiring them to deposit security in the sum of Kshs 1,500,000/- in court as a condition for the stay of execution orders granted on the same day. It is the appellants' submission that due to their financial incapability, they are unable to raise the said amount and hence their prayer for review.
8. The application is expressed to be brought inter alia under section 80 of the [Civil Procedure Act](#). The said section gives the court the power to review and provides as follows:
- “ 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 allowed by this Act,
- my apply for a review of the Judgment to the court which passed the decree or make the order, and the court may make such order thereon as it thinks fit.



9. As to the scope of the power of review, order 45 rule 1 of the *Civil Procedure Rules* provides thus:
- “(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 a 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 the Judgment to the court which passed the decree or made the order without unreasonable delay.”
10. In the matter before me, the appellants had approached this court vide a notice of motion dated October 23, 2019 in which they sought leave to be allowed to file an Appeal out of time against the judgment made in Nanyuki Chief Magistrates’ Court in Civil Suit No 75 of 2013 as delivered on July 9, 2019. In addition, the appellants sought an order of stay of execution of the judgment and decree issued by the lower court.
11. Upon considering the application, the Honourable Lady Justice MC Oundo then seized of the matter rendered a ruling herein on November 7, 2019 granting the appellants leave to file an appeal within 30 days. In addition, the learned judge made the following orders:
- (i) Stay of execution of the judgment/decree herein is granted pending hearing and determination of the applicants’ intended appeal; and
- (ii) The applicants shall deposit security of Kshs 1,500,000/- (One Million Five Hundred Thousand) in court within 21 (twenty one) days from the date of delivery of this ruling. In default, the stay orders shall automatically lapse.
12. Some one year down the line, the appellants filed the present application seeking to review prayer No 2 of the said orders on account that they are indigent and are unable to raise the sum of Kshs 1,500,000/- as ordered by the court as security.
13. As it were, an application for review has to be raised without unreasonable delay. While the 4<sup>th</sup> appellant has deposed in her affidavit in support of the application that she was unable to file the application earlier due to an illness, no evidence of any such illness has been attached to the application. Neither was there an explanation why the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants who are adult sons of the 4<sup>th</sup> appellant were not able to file the application when they were aware that the stay of execution would lapse within 21 days of the court’s ruling.
14. It was also clear to me that the issues of inability to pay and the alleged illness of the 4<sup>th</sup> appellant do not fall within the scope of the powers of review as donated to the court under section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules*.
15. As was stated in *Absalom Dova v Tarbo Transporters* (2013) eKLR:
- “The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that



the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation ...”

16. In the matter herein, the Learned Judge had certainly given a consideration to the circumstances prevailing herein and it was her determination that the sum of Kshs 1,500,000/= would be the amount that would constitute sufficient security for the due performance of the decree which might ultimately be binding on the Applicants.
17. Considering such an issue in *Mwaruga Karuga t/a Limit Enterprises v Kenya Bus Services Limited & 4 others* (2015) eKLR, the court stated thus:-

“... the Security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore envisage just any security. The words “ultimately be binding” are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost, that is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6(2) of the Civil Procedure Rules includes costs and inters on the Judgment sum unless the latter two were not granted – which is seldom. The security to be given is measured on that yardstick.”
18. This court concurs with that learned exposition as in the absence of such security, recovery of costs becomes a challenge especially to the winning party where the losing party turns out to be a woman or man of straw. Thus the Learned Judge having pronounced herself on the issue of security for costs, I did not think it was open for the appellants to seek orders of review thereon.
19. A review is by no means an appeal in disguise whereby an erroneous or unpleasant decision is brought to be reheard and corrected. A review lies only for a patent error on the face of the record. Looking at the record herein I was unable to find any such patent error and the appellants having failed to comply with the orders issued by the court are clearly trying to appeal the decision through the back door.
20. This court as it were cannot sit on an appeal of its own decision and it follows that the application before me has no merit. It is dismissed with costs to the respondent.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

In the presence of:

No appearance for the Appellant

No appearance for the Respondent

Court assistant - Kendi

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**J. O. Olola**

**JUDGE**

