



**Thuo & another v Njuguna & another (Environment and Land Appeal
E076 of 2021) [2022] KEELC 14426 (KLR) (26 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14426 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E076 OF 2021
BM EBOSO, J
OCTOBER 26, 2022**

BETWEEN

MARGARET WANJIRU THUO 1ST APPELLANT

JOSEPH KARUMBA 2ND APPELLANT

AND

PAUL EDWARD NJUGUNA 1ST RESPONDENT

ROSE NYAMBURA NJUGUNA 2ND RESPONDENT

(Being an Appeal arising from the Ruling of Hon. J M Nang'ea, Chief Magistrate, delivered at Thika Chief Magistrate Court on 31/8/2021 in Thika CMC MCLE Case No. 2 of 2019)

JUDGMENT

Background

1. This appeal arose from a post-judgment ruling rendered on August 31, 2021 by Hon J M Nang'ea, Chief Magistrate, in Thika Chief Magistrate Court Environment and Land Case No 2 of 2019. Before I delve into the key issue in this appeal, I will outline a brief background leading to the impugned ruling and to the present appeal.
2. Through a plaint filed before the Thika Chief Magistrate Court on March 9, 2016, Paul Edward Njuguna [the 1st respondent in this appeal] and Rose Nyambura Njuguna [the 2nd respondent in this appeal] sued Margaret Wanjiru Thuo [the 1st appellant in this appeal] and Joseph Karumba [the 2nd appellant in this appeal]. Their case in the trial court was that, they were administrators of the estate of the late Hannah Wairimu Njuguna [the deceased] who died on 18/6/2012. At the time of her death, the deceased owned land parcel numbers Ruiru/Mugutha Block 1/3817 and Ruiru Mugutha Block 1/3818. At the time of identifying the estate of the deceased, it came to their attention that the 1st appellant had trespassed on land parcel number Ruiru/Mugutha Block 1/3817 while the 2nd



- appellant had trespassed on land parcel number Ruiru/Mugutha Block 1/3818. The two appellants were in the process of erecting structures on the two parcels of land.
3. The respondents sought the following reliefs from the trial court: (i) a declaration that the appellants were trespassers on the two parcels of land; (ii) an order evicting the appellants from the two parcels of land; (iii) a permanent injunction restraining the appellants against interfering with the two parcels of land; (iv) a mandatory injunction compelling the appellants to remove all structures from the two parcels of land; and (v) costs of the suit.
 4. The appellants filed a joint statement of defence in which they denied being trespassers on the two parcels of land. They contended that the 1st appellant had purchased parcel number Ruiru/Mugutha Block 1/3817 from the deceased, while the 2nd appellant had purchased parcel number Ruiru/Mugutha Block 1/3818 from one Miriam Ngendo Kamau. It was their case that Miriam Ngendo Kamau had purchased parcel number Ruiru/Mugutha Block 1/3818 from the deceased. They contended that they were purchasers for value who were in possession of the two parcels of land. They urged the trial court to dismiss the suit.
 5. Upon conclusion of trial, the trial court rendered a Judgment on May 25, 2021. The trial magistrate identified the following as the two issues that, in his view, fell for determination: (i) Whether the deceased was the lawful owner of the two parcels of land prior to her death; and (ii) What orders commended themselves for issuance, based on the evidence and circumstances of the case.
 6. The trial court found that the deceased was the lawful owner of the two parcels of land at the time of her death and that the appellants were trespassers and meddlers on the two parcels of land. Consequently, the trial court granted the respondents the following reliefs: (a) a declaration that the appellants were trespassers on the parcels of land; (b) an eviction order against the appellants; (c) a permanent injunction against the appellants; and (d) an award of costs of the suit to the respondents.
 7. Twenty days after the trial court rendered the above Judgment, the appellants filed a notice of motion dated June 14, 2021 in the trial court, seeking the following verbatim orders:
 - a. That this application be certified urgent and be heard *ex parte* in the first instance.
 - b. That this honourable court be pleased to order a stay of execution of the order for eviction of the defendant/applicants pending hearing of this application *inter partes*.
 - c. That his honourable court be pleased to review its order for eviction of the defendants/applicants.
 - d. That costs of this application be provided for.
 8. The trial court heard the application and rendered the impugned ruling on August 31, 2021. The Learned Trial Magistrate rendered himself on the application as follows:
 - “ 12. It would appear that only the defendants filed submissions. The defendants seem to seek review of the impugned judgment on the ground of discovery of new evidence (see Order 45 rule 1 of the Civil Procedure Rules 2010). They exhibit documents purporting to show that they bought the disputed land. The documents include clearance letters from a land buying company called Nyakinyua Investment Limited.
 13. The court is also referred to alleged pending Succession and civil proceedings relating to the same land. The issue to determine is whether the defendants have made out a case for review of the court’s Judgment on the ground stated.



14. The defendants have not satisfactorily explained why the said new evidence was not produced at the time of the hearing of the suit. They didn't therefore exercise due diligence. In any event, as title to the disputed land is in the name of the deceased, the said Nyakinyua Investments Limited could not confer title to the defendants. Only the registered owner can validly transfer their interest in land.
15. Regarding the said Civil Suit No 524 of 2015 (Thika), the plaintiffs aver that the land subject of that suit is Ruiru/Ruiru East Block 2/3132 which is different from the suit parcels herein. The defendants have not exhibited the plaint in that file to rebut this claim by the plaintiffs.
16. Furthermore, none of the annexures to the defendants' affidavits indicates that they are involved in the said succession proceedings. In any event, if indeed the Succession Cause has a nexus to these proceedings, it is not explained why the defendants didn't seek stay of the proceedings as it was purportedly ordered in relation to the said civil suit No 524 of 2015."

9. Consequently, the trial court dismissed the application for lack of merit.

Appeal

10. Aggrieved by the ruling of the trial court, the appellants brought this appeal, advancing the following verbatim grounds:
 1. That the learned magistrate erred in dismissing the appellants' application dated June 14, 2021 without sufficient grounds.
 2. That the learned magistrate erred in making that [sic] the appellants had not shown that they exercised due diligence.
 3. That the learned magistrate erred in failing to make a finding that the appellants were represented by an advocate in the case and therefore relied on him in regard to which evidence to tender before court.
 4. That the learned magistrate erred in failing to make a finding that the mistakes of the advocate should not be visited upon the clients.
 5. That the learned magistrate erred in failing to make a finding that there is [sic] pending a succession matter in which the appellants have been enjoined in the high court and therefore the eviction ought to await the outcome of the succession case.
 6. That the learned magistrate erred in failing to make a finding in the event that the appellants are successful in the succession matter then their success would be rendered nugatory if they are evicted.

Submissions

11. The appeal was canvassed through brief written submissions dated May 10, 2022, filed by M/s Kimani Charagu & Co Advocates. Counsel for the appellants faulted the trial court for granting the respondents prayers (a), (b) and (c) of the plaint despite having made a finding that there was a pending succession dispute in the High Court and despite advising the appellants to lodge their claims in the succession court. Counsel contended that the Judgment of the trial court had brought forth the



question as to what would happen if the appellants were to be evicted and ultimately the succession court finds that they were genuine purchasers entitled to the suit properties.

12. On the impugned ruling, counsel for the appellants submitted that the trial court failed to appreciate the averment made in the affidavit in support of the application, particularly at paragraph 3 of the further affidavit. Counsel contended that the trial court failed to appreciate that the appellants were represented by counsel and the mistake of counsel should not be visited on the appellants.
13. Counsel submitted that the trial court contradicted itself, contending that in the Judgment sought to be reviewed, the trial court had acknowledged that there was a succession matter pending and it had advised the appellants to ventilate their claim in the succession cause, yet in the impugned ruling it made an “about turn”. Counsel further contended that the trial court failed to appreciate that besides an error on the face of the record or discovery of new evidence, a court can review its findings on any sufficient ground. Counsel cited Order 45 rule 7 [sic] of the *Civil Procedure Rules* to support the above view.
14. Counsel for the appellants further contended that the trial court ignored the evidence tendered showing that the 1st appellant had a transfer signed by the deceased and had even obtained a consent from the Land Control Board for the transfer of parcel number Ruiru/Mugutha Block/3817 prior to the demise of the registered proprietor and was unable to register the transfer due to the cautions lodged by the respondents. Counsel urged this court to allow the appeal.
15. The respondents opposed the appeal through written submissions dated June 13, 2022, filed by M/s Wakio Mugo & Co Advocates. Counsel for the respondents cited Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules and submitted that the appellants’ application for review of the Judgment of the trial court did not satisfy the requirements of the said provisions. Counsel added that the appellants’ allegation that their advocate did not lead certain evidence was not sufficient ground for review of a court’s own Judgment. Counsel further contended that the evidence which the appellants alleged their advocate failed to lead was not new evidence or new material hence it did not meet the criteria for review of a court’s own judgment. Counsel added that the documents which the appellants were relying on required interrogation through cross-examination hence they were not the kind of evidence or material that would form the basis of a review order as sought by the appellants.
16. Counsel for the respondents further submitted that the appellants failed to point out any error on the face of the record to warrant a review. Counsel added that existence of a succession cause was not a proper ground for review, contending that whereas it was the mandate of the trial court to determine disputes relating to ownership of land, the succession court did not concern itself with that kind of dispute. Counsel argued that a determination by the trial court was necessary in enabling the succession court to determine whether or not to distribute the suit property as part of the estate of the deceased. Counsel urged the court to dismiss the appeal.

Analysis and Determination

17. I have considered the record of appeal and the original record of the trial court; the grounds that were set out in the memorandum of appeal and those that were canvassed in the appellant’s written submissions. I have also considered the relevant legal frameworks and jurisprudence on the key issue in this appeal. The key issue that falls for determination in this appeal is whether the trial court erred in declining to grant the plea for review of its Judgment in relation to the disposal order relating to eviction of the appellant. Identification of this issue is informed by the fact that the plea for review of the trial court’s Judgment solely focused on the trial court’s disposal order directing eviction of the appellants from the suit properties. The plea for review did not focus on the findings of the trial court



on the key question of ownership of the suit properties. I will pronounce myself on the above issue in the context of the submissions that were tendered in support of the appeal and against the appeal.

18. Before I delve into the key issue in this appeal, I will outline the principles upon which this court exercises jurisdiction as an appellate court. I will also outline the legal framework which guides our civil trial courts when called upon to review their judgments, rulings or orders. Further, I will outline the jurisprudential principles which guide our civil trial courts when exercising jurisdiction to review their own judgments.
19. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of [*Susan Munyi v Kesbar Shiani*](#) (2013)eKLR as follows:-

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”

20. The above principle was similarly outlined in [*Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates*](#) [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse 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.”

21. The jurisdiction of a trial court to review its own judgment is granted under Section 80 of the [*Civil Procedure Act*](#). The jurisdiction is regulated by the framework in Order 45 rule 1(1) of the Civil Procedure Rules which provides as follows:

“

“(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.”

22. When a plea for review is sought on the basis of discovery of new matter or evidence which the applicant alleges was not within his knowledge, the proviso to Order 45 rule 3 of the [*Civil Procedure Rules*](#) requires the applicant to strictly prove the allegation of discovery of new matter or evidence and the allegation that the new matter or evidence was not within his knowledge or could not be adduced by him during trial. Order 45 rule 3 of Civil Procedure Rules provides thus:

“



“(1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.

(2) Where the court is of opinion that the application for review should be granted, it shall grant the same:

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.”

23. The principles upon which our courts exercise jurisdiction to review their judgments are similarly well settled. The Supreme Court of Kenya outlined the principles in *Hussein Khalid and 16 others v Attorney General & 2 others* [2020] eKLR in the following words:

“The salient points were that the power of review is exercised sparingly because a trial has several implications once a judgment is delivered; litigation must come to an end; there is need for finality in court decisions; the court is functus officio after delivery of decision sought to be reviewed; and that review should not substantially alter the decision sought to be reviewed. The review window is to be exercised sparingly and only deserving cases have to be allowed.”

24. Emphasizing the above principle, the Supreme Court of Kenya quoted the following words of the Supreme Court of Nigeria in the case of *Citec International Estate Ltd & Others v Francis & others* [2014] LPELR – 22314 (SC):

“An application for review is not meant to afford the losing party an opportunity to relitigate or re-open a matter merely because such party is unhappy with the outcome.....”

25. On my part, I would add that, unlike the avenue of an appeal where the appellate court has a wide latitude, the jurisdiction of a trial court exercising review power under Order 45 rule 1 of the *Civil Procedure Rules* is restricted by the parameters set out under the above rule. It therefore calls for deep reflection before a litigant elects to pursue the review mechanism as opposed to an appeal against the judgment of a trial court. Having outlined the relevant principles, I now turn to the key issue in this appeal.

26. As observed, the key issue in this appeal is whether the trial court erred in declining to grant the plea for review of its Judgment in relation to the disposal order relating to eviction of the appellants. I have carefully evaluated the application that culminated in the impugned ruling. I have also evaluated the supporting affidavit and the further affidavit that were filed in support of the application. Firstly, the application did not seek a review of the finding of the court on the key issue in that suit. The key issue in the suit was the question of ownership of the suit properties as at the time the deceased died. Secondly, the application did not seek a review of the other disposal orders made in the Judgment of the trial court. All that the appellants sought in the said application was a review of the order directing eviction of the appellants.

27. The Judgment of the trial court was a determination of the question of ownership of the suit properties. The court made a finding that the suit properties belonged to the deceased at the time of her death. Having elected not to challenge that finding through the appellate mechanism or through the review mechanism, it is not clear how the appellants expected the trial court to review the disposal order directing their eviction from the suit properties. That was certainly a wrong approach. That is not all.



28. The appellants invited the court to exercise review jurisdiction under Order 45 rule 1 of the Civil Procedure Rules. Did they satisfy the criteria for review of a judgment under Order 45 rules 1 and 3 of the Civil Procedure Rules? I have examined the two affidavits that were filed in support of the application alongside the submissions that were tendered before the trial court. It is clear that the appellants did not discharge their obligation under Order 45 rules 1 and 3 of the Civil Procedure Rules. The appellants' application for review of the eviction order was premised on six grounds. The first ground was that there was evidence which was not produced during the hearing of the suit. The appellants' obligation in relation to this ground was to demonstrate that they had come across new evidence which was not within their knowledge and which could not be produced by them despite exercise of due diligence. No evidence was placed before the trial court to satisfy the above requirement. All that the appellants did was to blame their advocate for not advising them properly. Incompetence of counsel or ill-advice by counsel is not a proper ground for review of a court's own Judgment.
29. The second ground upon which the appellants sought a review of the eviction order was that the appellants were parties in Succession Cause No 2629 of 2014 pending in the High Court. This fact was not new evidence or matter. It was within the knowledge of the appellants when they participated in the trial leading to the judgment. In any event, the trial court was properly seized of the dispute relating to ownership of the suit properties. Indeed, there was evidence that the succession court had stayed its proceedings to await the trial court's determination of the dispute relating to ownership of the suit properties. Existence of the succession cause was therefore not a proper ground for review of the eviction order.
30. The third ground upon which the appellants sought a review of the eviction order was that there existed CMCC No 524 of 2015 in which the suit property was the subject matter. The trial court considered this ground and found that the appellants had failed to exhibit the plaint relating to the said suit. The trial court further noted that the appellants had failed to controvert the respondents' assertion that the subject matter in the said suit was Ruiru/Ruiru East Block 2/3132, which was not the same as the suit properties in the suit before the trial court. This court's view on this ground is that it was the burden of the appellants to satisfy the requirements of Order 45 rules 1 and 3 of the Civil Procedure Rules. They did not discharge that burden.
31. The fourth ground set out in the application was that the 1st appellant was a widow who had built a dwelling house on one of the suit lands. While it would be humane and proper to show sympathy to litigants, the trial court was expected to be guided by the law as set out in Order 45 rules 1 and 3 of the Civil Procedure Rules and the applicable jurisprudential principles. It was not expected to be guided by extraneous considerations.
32. The fifth ground upon which the application was premised was that the appellants stood to suffer irreparable loss if they were to be evicted. Without the appellants satisfying the requirements of Order 45 rules 1 and 3 of the Civil Procedure Rules, this alone would not be a proper basis upon which a trial court would review its own judgment.
33. Lastly, the appellants contended before the trial court that, were they to be successful in CMCC No 524 and in the Succession Cause, their successes would be rendered nugatory. I have already considered and pronounced myself on the two issues in one of the preceding paragraphs and I do not find merit in them in so far as the impugned decision of the trial magistrate is concerned. The appellants moved the court to exercise review jurisdiction over its own judgment under Order 45 rule 1 of the Civil Procedure Rules. They were obligated to satisfy the requirements of the law.



34. For the above reasons, my finding on the single issue in this appeal is that the trial court did not err in declining to grant the plea for review of its judgment in relation to the disposal order relating to eviction of the appellants from the suit properties.

35. The result is that I find no merit in this appeal. The appeal is dismissed. The appellants shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 26TH DAY OF OCTOBER 2022

B M EBOSO

JUDGE

In the Presence of: -

Ms Mugo for the Respondents

Court Assistant: Ms Osodo

