Gobe v Bora (Environment and Land Appeal E005 of 2023)
[2025] KEELC 4300 (KLR) (4 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4300 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND APPEAL E005 OF 2023

JO MBOYA, J

JUNE 4, 2025

BETWEEN

ALI GOBE ..... APPELLANT

AND

MOHAMMED GOLICHA BORA ..... RESPONDENT

RULING

1. The Applicant [who is the Respondent in the substantive appeal] filed the application dated the 16th April 2025 and wherein same has sought the following reliefs [verbatim]:

    i. That this Honourable Court be pleased to certify this Application as urgent and the service thereof be dispensed with in the first instance.

    ii. That this Honourable Court be pleased to amend, review, or otherwise set aside the Judgment delivered by this Honourable Justice Oguttu Mboya on 7th April 2025.

    iii. That the Respondent/ Applicant's submission filed on 9th October 2024 be admitted and deemed as duly filed.

    iv. That upon the setting aside of the said Judgment this Honourable Court be pleased to consider the Respondent/ Applicant's written submissions dated 9th October 2024, which were erroneously omitted or misplaced in the court record and or thereafter render a fresh judgment upon due consideration thereof.

    v. That the costs of this application be provided for.

2. The instant application is premised on various grounds which have been highlighted/ enumerated in the body thereof. In addition, the application is supported by the affidavit of the Respondent sworn on even date and to which the Respondent has annexed two [2] documents including a copy of the judgment of the court and a copy of the written submissions sic filed on behalf of the Applicant.

3. The Respondent [the appellant in the appeal] filed a replying affidavit sworn on the 19th May 2025 and wherein same has contended that the application for review does not meet and or satisfy the threshold to warrant review of the judgment of the court. In any event, it has been averred that the applicant has not demonstrated that his written submissions were duly filed on the E-platform of the judiciary of at all.

4. The subject application came up for hearing on the 4th June 2025 whereupon the advocates for the parties agreed to canvass and dispose off the application vide oral submission[s]. Suffice to underscore that the application thereafter proceeded for hearing and the submissions made by the advocate for the respective parties are on record.

5. The learned counsel for the applicant adopted and reiterated the grounds contained on the face of the application and thereafter reiterated the averments in the body of the supporting affidavit. Furthermore, learned counsel for the applicant proceeded to and highlighted three [3] salient issues for consideration by the court. The issues raised by the applicant are namely, that the applicant duly filed written submissions but same were not taken into account by the court; the applicant highlighted pertinent issues demonstrating that the suit property was community land and not otherwise.; and that the Appellant's claim to the suit property is borne out of an illegality.

6. Regarding the first issue, learned counsel for the Applicant has submitted that the Applicant duly filed written submissions as pertains to the subject appeal. Moreover, it has been submitted that the said written submissions were filed on the court's e-platform and therefore same formed part of the record of the court.

7. Additionally, it has been submitted that learned counsel for the applicant also attended court during the last scheduled mentioned date and same duly confirmed that the Applicant herein had filed his written submissions.

8. Be that as it may, learned counsel for the applicant has submitted, that the written submissions by the applicant were never placed before the court at the time of crafting the judgment and hence the court did not take cognisance of the said submissions.

9. Furthermore, learned counsel for the applicant has submitted that the applicant had raised diverse legal argument[s] at the foot of submission[s] including the point that the applicant did not demonstrate that the Giftor [sic] had any substantial interest in the suit property and thus the giftor could not sic pass any interest of over the suit property.

10. Further and in any event, it was submitted that even though the appellant relied on the witness statement of the alleged wife of the deceased, no evidence was tendered by the appellant to demonstrate that the purported wife was indeed a wife of the deceased. In this regard, learned counsel posited that had the court taken into account the said submissions, the court could have come to a different conclusion.

11. Secondly, learned counsel for the applicant has also submitted that there was no proof of succession having been taken in respect of the estate of the deceased ant thus there was no constituted administrator capable of challenging the appellant's claim.

12. Thirdly, learned counsel for the applicant has also submitted that the manner in which the suit property was acquired was not properly explained and or accounted for by the appellant. In this regard, it was submitted that the suit property is community land and thus the provisions of the *law of succession act* did not apply to the suit property. To this end learned counsel for the applicant ahs reference the provision of section[s] 5, 6, and 32 of the *Law of Succession Act*, Chapter 160, Laws of Kenya.

13. Finally, learned counsel submitted that the appellant herein did not place credible evidence before the court to demonstrate [if at all] that the gift was granted to him. To this end, it was submitted that the appellant did not prove ownership of the suit property.

14. Further and at any rate, it was submitted that in so far as the appellant did not properly demonstrate the manner of acquisition of the suit property, his acquisition of the suit property is vitiated by illegality. To this end, it was submitted that a court of law can not rubberstamp an illegality.

15. Flowing from the forgoing submissions, learned counsel for the applicant has implored the court to find and hold that the application is meritorious. In this regard, the court has been invited to allow the application and review the impugned judgment.

16. The Respondent [appellant in the main suit] adopted and relied on the replying affidavit sworn on the 19th May 2025 and thereafter highlighted two [2] key issues. The issues highlighted by the Respondent are namely; the applicant has not demonstrated that the written submissions were duly uploaded and filed on the court's E platform; and that the applicant has not established any basis to warrant review of the judgment.

17. As pertains the first issue, learned counsel for the Respondent has submitted that it was incumbent upon the applicant to upload the written submissions onto the court's E platform and thereafter ensure that the said submissions were available to the court. Nevertheless, it has been contended that the applicant has not tendered or placed before the court any evidence to that effect. In particular, it has been posited that the applicant has not availed to the court any extract from the Case Tracking System [CTS] or receipt to demonstrate the filing of the submissions.

18. Regrading the second issue, learned counsel for the Respondent has submitted that it behoved the applicant to place before the court a credible basis to warrant review. However, it has been submitted that the applicant failed to meet and or establish the threshold for review or at all.

19. Arising from the foregoing, it has been submitted that the application beforehand is devoid of merit[s] and same ought to be dismissed. To this end, the court was invited to dismiss the application.

20. Having appraised the application for review and having taken into account the response thereto; and upon consideration of the written oral submissions made on behalf of the respective parties, I come to the conclusion that the determination of the subject implication turns on two [2] key issues namely; whether the applicant has established and or satisfied the threshold of review or otherwise; whether a failure to take into account submissions negates a judgment of the court or otherwise.

21. Regarding the first issue, namely; whether the applicant has established and or satisfied the threshold of review or otherwise, it is imperative to state and outline that any claimant/ a person seeking to procure an order of review is called upon to meet and satisfy the statutory conditions espoused under the provisions of order 45 (1) of the Civil Procedure Rules 2010.

22. Furthermore, it is worthy to underscore that before an applicant seeks to prove the grounds for review or either of the ground for review, the applicant is obligated to implead the grounds for review or such particular ground which is being invoked to accrue or underpin the application for review.

23. Additionally, once the applicant has impleaded and or invoked the designated ground for review, then the applicant must place before the court credible evidence or basis to demonstrate the necessity for review. Instructively, it is not enough for an applicant to throw omnibus accusation[s] and averment[s]; and leave it for the court to discern whether the threshold has been met.

24. Put differently, the onus [burden] of demonstrating that a basis for review has been met and satisfied lies on the shoulders of the applicant. Suffice to underscore that the burden/ onus must be discharged on a balance of probability.

25. Has the applicant met and or satisfied the threshold to warrant review? To start with, the only ground upon which the review is sought is to the effect that the applicant's written submissions were neither considered nor taken into account at the time of crafting of the judgment. In the regard, it has been posited that had the court considered the said written submissions, the court may [I repeat, may] have come to a different conclusion.

26. Nevertheless, I beg to underscore that a review can only be accrued on the basis of an error or mistake apparent on the face of the record. The error or mistake on the face of record must relate to an error or mistake or law and not one of fact. Furthermore, the error or mistake must be one that is discernable at a glance without elaborate arguments and or submissions. [See the holding of the court of appeal in the case of National Bank Of Kenya Limited v Ndungu Njau [1997] KECA 71 (KLR)]

27. Did the applicant demonstrate the existence of any such error or mistake on the face of record? To my mind, there was no error and or mistake apparent on the face of record. In any event, it is not lost on the Court that the Applicant didn't demonstrate that the Written submission[s] were duly filed and placed before the Court in the established manner.

28. Moreover , learned counsel for the applicant submitted that the Respondent herein did not prove and demonstrate that the giftor had any interest over and in respect of the suit property to underpin the gift. Furthermore, learned counsel also submitted that the appellant did not demonstrate the manner in which the same acquired the suit property. Finally, it was posited that the suit property was community land and thus same fell outside the purview of the *law of succession act*.

29. Be that as it may, it is important to recall and reiterate that while engaging with the various issues now raised with the applicant, the court found and held that there was a proven gift inter vivos; that the suit property was public land and not community land; and that the appellant had demonstrated entitlement to the suit property.

30. The court may [I say may] have been wrong in coming to the various conclusions which are highlighted and contained in the body of the judgment. However, the conclusions highlighted and contained in the body of the judgment constitute intentional; deliberate and well- reasoned findings. To this end, any error [if any] would be an error in disposition of the issues and thus such an error, constitute[s] an erroneous view; and the same can only be remedied vide an appeal and not otherwise.

31. Furthermore, the manner in which the appeal was disposed off and the findings deployed at the foot of the judgment takes the matter beforehand outside the purview of review. For good measure, there is a distinction between an erroneous view; or mere error on one hand; and error on the face of record. The latter lends itself to review, while the former can only be remedied vide appeal. [see the holding of the court of appeal in Nyamogo & Nyamogo –Vs Kogo [2001] E.A 170.

32. What about discovery of new and important evidence which could not have been placed before the court despite exercise of due diligence? It is imperative to recall that the crux of the application before hand relate[s] to the failure to take cognisance of and consider the written submissions by the applicant. Instructively, there is no question of new and important evidence. Moreover, there is no gainsaying that written submissions do not fall within the ambit of Evidence or at all.

33. To my mind, it was the duty and or obligation of the applicant to satisfy the court that same had met and established the ingredients underpinning an application for review. However, I am afraid that the

applicant herein has failed to meet and or satisfy the statutory threshold of granting review. [See the holding in the case of Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2019] KECA 594 (KLR); see also the holding in Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] KEHC 6379 (KLR)]

34. Flowing from the forgoing, my answer to issue number one [1] is that the applicant herein has failed to meet and or satisfy the threshold for purposes of granting an application for review.

35. Regarding the second issue, it is important to point out that the first appellate court is tasked with the duty and or obligation of undertaking an exhaustive review, appraisal and analysis of the totality of the evidence that was tendered before the trial court. Furthermore, there is no gainsaying that the first appellate court is thereafter obliged to evaluate that evidence and to arrive at an independent conclusion taking into account the evidence and the law. [See Peters versus Sunday Post Limited 1958 EA 424; Selle Versus Associated motor boat and others 1968 EA 123 and Gitobu Imanyara versus the Attorney General 2016 Eklr).

36. Suffice it to underscore that this court undertook extensive review and evaluation of the entirety of the evidence that was tendered before the trial court and thereafter deployed the law in coming to the conclusions underpinning the judgment.

37. Whereas this court is not laying a claim to infallibility,[certainly, no Court can make such a claim], it is imperative to observe that the findings at the foot of the Judgment can only be impugned on appeal.

38. Moreover, it common ground that the failure to take into account the written submissions by a party [provided the submissions were duly filed] does not found a basis to vitiated and or invalidate a judgment. For good measure, cases are determined on the basis of evidence and the law. In any event, there are a plethora of cases that are determined without submissions.

39. Before concluding on this issue, it is imperative to cite and reference the holding of the Court of Appeal in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] KECA 642 (KLR) where the court stated and observed as hereunder:-

> Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.

40. With or without the submissions filed by the applicant, [whose filing was not proven], I reiterate that the first appellate court was duty bound to re-evaluate the entire record and to draw independent conclusion[s] both of fact and of law. This is certainly what this court did upon reflecting on the provision[s] of section 78 of the *Civil Procedure Act* Chapter 21 Laws of Kenya.

41. Flowing from the forgoing, my answer to issue number two [2] is that the court came to the informed decision and findings on the basis of the record and the applicable law and hence, the fact that the applicant's submissions were [sic] not considered or taken into account does not , in my humble view, invalidate the Judgment.

Final Disposition:

42. For the reasons which have been highlighted [captured] in the body of the ruling, I come to the conclusion that the Application dated 16th April 2025; is devoid and bereft of merit.

43. Consequently, and in the premises, the following are the final orders of the court;

    i. The Application dated 16th April 2025 be and is hereby dismissed.

    ii. Cost of the Application be and are hereby awarded to the Respondent [appellant in the main suit]

    iii. The Cost in terms of clause[ii] shall be agreed upon and in default same to be taxed in the conventional way.

44. Its so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 4TH DAY OF JUNE 2025

OGUTTU MBOYA, FCIArb; CPM [MTI].

JUDGE

In the presence of:

Ms Mukami- Court Assistant.

Mr. Owade for the Applicant

Ms Alexandra Akinyi holding brief for Mr Yusuf for the Respondent.