Muthuri & another t/a Karibu Drapers v Kimathi & 3 others (Environment and Land Appeal E084 of 2022) [2025] KEELC 5088 (KLR) (9 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5088 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E084 OF 2022

BM EBOSO, J

JULY 9, 2025

BETWEEN

ARTHUR MATHEW RAPHAEL MUTHURI & JULIA GAITI MUTHURI T/A KARIBU DRAPERS ..... APPELLANT

AND

SAMSON KIMATHI ..... 1ST RESPONDENT

JOSHUA MUTWIRI ..... 2ND RESPONDENT

BERNARD KINYUA ..... 3RD RESPONDENT

GEOFREY KINOTI ..... 4TH RESPONDENT

(Being an Appeal against the Judgment of the Senior Principal Magistrate Court at Githongo (Hon. S.Ndegwa – SPM) rendered on 9/12/2022 in Githongo SPMC Civil Case No. 20 of 2019)

JUDGMENT

1. This Court [Yano J] heard this appeal and determined it through a Judgment rendered on 7/3/2024. The court dismissed the appeal for lack of merit. The 1st appellant died thereafter. About eight months after delivery of Judgment in the appeal, Julia Gaiti Muthuri, one of the two appellants in the appeal, brought a notice of motion dated 13/11/2024 under Article 159(2) of the *Constitution* of Kenya, 2010; Sections 1(a), 1(b), (3a), (3b), and 80 of the *Civil Procedure Act*; Order 56 Rules 1 and 2; Order 42 Rule 27 (1) of the *Civil Procedure Rules*, 2010; and Section 47A of the *Evidence Act* Cap 80. She sought the following verbatim orders in the motion:

    1. Spent

    2. That this Honourable Court be pleased to vary/set aside and review the judgment issued by this court on 7th March 2024 and admit additional evidence being the Judgment in Criminal Case No. 439 of 2017 issued on 7th March 2024 which, after the exercise of due diligence, was

not within the applicant's knowledge or could not be produced by them at the time when the judgment was passed.

3. That this Honourable Court be pleased to call for new and additional evidence.

4. That this Honourable Court do make such further or better orders as will meet the ends of justice

5. Costs of this application be met by the respondent

2. The said notice of motion is the subject of this ruling. The application was premised on the grounds set out in the motion and in the applicant's supporting affidavit sworn on 13/11/2024. It was canvassed through written submissions dated 29/1/2025, filed by M/s Kiautha Arithi & Co. Advocates.

3. The case of the applicant is that, new evidence which was not available during trial is now available and she should therefore be allowed to tender it. It is also her case that the judgment of the court should be reviewed on account of the new evidence. She contends that on the same day that judgment was rendered in this appeal, the Chief Magistrate Court at Meru rendered a Judgment in Meru CMC Criminal Case No. 439 of 2017 in which it convicted the four respondents of the offences of: (i) Incitement to violence contrary to Section 96 of the *Penal Code*; and (ii) Malicious damage to property contrary to Section 339 (1) of the *Penal Code*. She adds that the judgment in the criminal case was not available during trial in Githongo SPM Civil Case No. 20 of 2019 and therefore the said judgment could not be tendered as evidence during the said trial. She similarly contends that the said judgment was not available during hearing and disposal of this appeal, hence it could not be tendered as additional evidence in the appeal. She argues that under Section 47A of the *Evidence Act*, the findings of the Criminal Court in Meru CMC Criminal case No. 439 of 2017 is conclusive evidence of the respondents' guilt and would persuade this court to find in her favour.

4. The respondents opposed the application through their joint replying affidavit dated 2/12/2024 and written submissions dated 3/3/2025, filed by M/s Meenye & Kirima Advocates. They term the application as frivolous, vexatious, and a waste of the court's time. They state that on 22/3/2024, they lodged Meru High Court Criminal Appeal No. E033 of 2024 challenging the judgment which the applicant is relying on, adding that their appeal is pending disposal by the High Court. They further state that they are innocent and law abiding members of the society. They contend that they made an application to stay hearing of Githongo SRM Civil Case No. 20 of 2019 pending disposal of Meru CMC Criminal Case No. 439 of 2017 but the two appellants opposed the plea for stay and their objection was upheld by Muriithi J in Meru High Court Misc Civil Application No. E018 of 2021. They urge the court to reject the application.

5. The Court has considered the application, the response to the application and the parties' respective submissions. The Court has also considered the relevant legal frameworks and the prevailing jurisprudence on the key issues in the application. The two key issues that fall for determination in this ruling are: (i) Whether the criteria for review of a court's own judgment under Order 45 rule 1 of the *Civil Procedure Rules* has been met; and (ii) Whether the criteria for adducing additional evidence in an appellate court has been met. I will analyse and dispose the two issues sequentially in the above order.

6. This court's jurisdiction to review its own judgments is donated by Section 80 of the *Civil Procedure Act* which provides as follows:

> " Any person who considers himself aggrieved—
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> (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."

7. The above jurisdiction is regulated by the framework in Order 45 rule 1 of the *Civil Procedure Rules* which provides as follows:

> " 1.
>
> (1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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.
>
> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

8. Our superior courts have, in a number of decisions, outlined principles that guide the above jurisdiction. In *Mohamed Fugicha v Methodist Church in Kenya (Through its Registered Trustees) & 3 others* (2020) eKLR, Civil Application no. 4 of 2019, the Supreme Court of Kenya emphasized that the jurisdiction of a court to review its own judgment was never intended to give a party the opportunity to canvass an appeal before the same court. The Supreme Court emphasized that where review is sought, the applicant has to demonstrate, to the satisfaction of the court, the grounds for review.

9. The Supreme Court of Kenya similarly outlined the above principle in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* (2017) eKLR. The Court quoted with approval, the following principle that was outlined in *Sow Chandra Kanta & Another v Sheik Habib* 1975 AIR 1500, 1975 SCC (4) 457:

> " A review of a judgement is a serious step and a reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility"

10. The Supreme Court similarly adopted the following principle that was articulated in *Northern India Caterers (India) v Governor of Delhi* 1980 AIR 674:

> " It is well settled that a party is not entitled to seek a review of a judgement delivered by this court merely for the purpose of rehearing a fresh decision of the case. The normal principle is that a judgment pronounced by this court is final and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so"

11. The Court of Appeal in *Daniel Macharia Karagacha v Monica Watithi Mwangi*, Civil Appeal No. 159 of 2000 rendered itself on the relevant principle as follows:

> " Review is only available where there is an error of law apparent on the face of the record or there is a discovery of new and important matter of evidence which the applicant could not by exercise of due diligence have placed in his pleadings or before the Judge when he heard the earlier application."

12. This Court exercised jurisdiction in this matter as an appellate court. Evidence was taken by the trial court, Githongo Senior Principal Magistrate Court. The appellants were accorded an opportunity to tender evidence to prove their case on a balance of probabilities. On conclusion of trial and on receipt of submissions, the trial court made a finding to the effect that the appellants had failed to prove their case on the balance of probabilities. The applicant was one of the two appellants in this appeal. Their appeal was considered by this court and this court agreed with the trial court that the appellants did not tender sufficient evidence to prove their case.

13. The record of appeal reveals that during trial, Julia Gaitu Muthuri [applicant/2nd appellant] testified as PW1. In addition, the appellants called Samuel M'Itere and Cyprian Kirera Riungu who testified as PW2 and PW3 respectively. The three witnesses testified between 10/2/2020 and 9/10/2022. The appellants closed their case at that point. On their part, the respondents led evidence by four (4) witnesses. On conclusion of trial, the trial court made the following findings:

> " 23. In this case, it is probable and indeed I am persuaded that there were demolitions on the Plot No. 47 Githongo Market and which was owned by Karibu Drapers. I am also persuaded that the damage occasioned by the said demolitions were indeed worthy the amount stated by PW3, to wit, Kshs. 2,356,958.40. However, on a balance of probabilities, I am not persuaded that the defendants [the respondents in this appeal] are the ones who caused the said loss. The plaintiffs as (sic) thus failed to prove their case to the required standards. As such the plaintiff's suit fails."

14. The applicant in the application under consideration exhibited and relied on the Judgment in Meru CMC Criminal Case No. 439 of 2017 but did not exhibit the full proceedings relating to the trial proceedings in the Criminal Court. This Court does not therefore know the dates when the prosecution led evidence in the said criminal case. What, however, emerges from the exhibited judgment is that, the prosecution led evidence by 10 witnesses. The ten (10) witnesses were: (i) Arthur Muthuri - PW1; (ii) Silas Mbabu Muguna - PW2; (iii) Samuel Nteere - PW3; (iv) Elijah Peter Nguruwe - PW4; (V) Chief Inspector of police Charles Ogutu – PW4; (v) an expert witness who produced video clips - PW5; (vi) Corporal Gabriel Kosgei – PW6; (vii) Jefferson Musyoka Paul [County Director of Physical Planning in Meru – PW7; (viii) Police Constable Geoffrey Kiptanui – PW 8; (ix) Eric Munene – PW9 and Police Constable Peter Mbathia Mutinda [digital forensic examiner] – PW10.

15. The applicant has not explained why they did not lead primary evidence proving the liability of the respondents in Githongo SPMC Civil Case No. 20 of 2019. She is simply waving the Judgment of the Criminal Court and asking this court to set aside the Appeal Judgment on the basis of the Judgment of the Criminal Court.

16. Secondly, the Judgment which the applicant is waving is the subject of an appeal. It is not a final pronouncement on the criminal liability of the respondents. Thirdly, the criminal court judgment did not exist at the time the trial court rendered its civil judgment. It did not exist by the time this Court rendered its civil judgment in this appeal; the criminal court judgment was rendered the same day that this Court (Yano J) rendered its Judgment. The court does not know what subsequent efforts were put in place to procure a conviction after the appellants lost their claim in the civil court.

17. It is also not lost to this Court that having failed to lead critical primary evidence during trial in Githongo SPMC Civil Case No. 20 of 2019, the appellants did not deem it necessary to move the appellate court for leave to adduce additional evidence before disposal of the appeal under Section 78 (1) (d) of the *Civil Procedure Act*. If they had any newly discovered evidence, they elected not to place it before the appellate court. They came to this first appellate court after the court had rendered its judgment in the appeal.

18. Equally significant, the respondents have demonstrated that they lodged an appeal against the findings of the criminal court and their appeal is pending disposal by the High Court. They exhibited a petition of appeal dated 19/3/2024, indicating that Meru High Court Criminal Appeal No. E033 of 2024 was filed against the criminal court judgment and was served on the DPP on 22/3/2024.

19. Section 47A of the *Evidence Act* which the applicant relied on provides as follows-:

> "47A. A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."

20. The court's interpretation of the above framework is that, until the pending criminal appeal is disposed, the judgment which the applicant is waving cannot be taken as conclusive evidence of guilt on part of the respondents.

21. The totality of the foregoing is that the applicant has not satisfied the criteria upon which this court would be justified to revisit its judgment and review it. As observed by the Supreme Court, the jurisdiction of a court to revisit and review its judgments is exercised on the basis of circumstances of a substantial and compelling character that make it necessary to do so.

22. Does the application satisfy the criteria for adducing additional evidence in an appellate court? The relevant criteria was outlined by the Supreme Court of Kenya in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR as follows-:

    a. The additional evidence must be directly relevant to the matter before the court and be in the interest of justice.

    b. It must be such that if given, it would influence or impact upon the result of the verdict, although it need not be decisive;

c. It is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence.

d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit.

e. The evidence must be credible in the sense that it is capable of belief;

f. The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;

g. Whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;

h. Where the additional evidence discloses a strong prima facie case of willful deception of the court;

i. The court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The court must find the further evidence needful.

j. A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.

k. The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence on the one hand and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

23. The Supreme Court emphasized thus:

> " We must stress here that this court even with the application of the above stated principles will only allow additional evidence on a case by case basis and even then sparingly with abundant caution."

24. In *Dorothy Nelima Wafula Vs Hellen Nekesa Nelson & Paul Fredrick Nelson* [2017] KECA 654 (KLR) the Court of Appeal outlined the criteria as follows-:

> " Before the court can permit additional evidence to be adduced under Rule 29 (now rule 31), it must be shown, one, that it could not have been obtained by reasonable diligence before and during the hearing; two, that the new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial and finally, that the evidence sought to be adduced is credible, though it need not be incontrovertible. It is agreed that these are only general principles and certainly not the only ones."

25. Chesoni Ag JA in *Mzee Wanje & 93 others v A.K Saikwa* (1982-88) 1KAR 462 stated that:

> "This rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak point in his case and fill up omission in the court of appeal. The rule does not authorize the admission of additional evidence for the purposes of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should

not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence."

26. The plea to adduce additional evidence in this appeal is being made after the appeal has been heard and determined through a judgment rendered on 7/3/2024. Secondly, the evidence which the applicant is waving is a judgment rendered by a criminal court on the same day that Judgment in this appeal was rendered. The said criminal court judgment is the subject of a pending appeal in the High Court. It is not a final pronouncement on the question of the respondents' guilt. Under Section 47A of the *Evidence Act*, the said Judgment cannot be of help to the applicant at this point. Thirdly, the said judgment is in itself not primary evidence. The applicant has not explained what prevented him from tendering primary evidence during trial. It is clear that, as a party who was unsuccessful in a preceding civil dispute, the applicant seeks to tender the subsequent judgment of the criminal court to make a fresh case in a disposed appeal. This is precisely what our courts have cautioned against.

27. For the above reasons, my finding on the second issue is that the applicant has failed to satisfy the criteria for adducing additional evidence in an appellate court.

28. The result is that the application dated 13/10/2024 fails. The same is dismissed for lack of merit. In tandem with the principle in Section 27 of the *Civil Procedure Act*, the applicant shall bear costs of the application.

DATED, SIGNED AND DELIVERED AT MERU THIS 9TH DAY OF JULY, 2025

B M EBOSO [MR]

JUDGE