



**Wambura v Wambura & another (Environment & Land Case
54B of 2018) [2024] KEELC 4991 (KLR) (2 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 4991 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 54B OF 2018**

**BN OLAO, J
JULY 2, 2024**

BETWEEN

ANAKLETUS WAMBURA PLAINTIFF

AND

JOHN WAMBURA 1ST DEFENDANT

GEOFREY WAMBURA 2ND DEFENDANT

RULING

1. The dispute between Anakletus Wambura(the Plaintiff) against John Wamburaand Geofrey Wambura(the Defendants) with respect to the ownership of the land parcel NoSamia/Bulemia/2692 (the suit land) was heard by OmolloJ. And by a judgment, delivered on 20th July 2022, the Judge made the final orders as follows:
 1. The Plaintiff's title to L.R No Bunyala/Bulemia/2692 is hereby cancelled.
 2. The said L.R No Bunyala/Bulemia/2692 shall be surveyed and sub-divided between the Plaintiff and the 1st Defendant putting into consideration their current residences and separate titles issued.
 3. The Plaintiff shall sign the requisite forms and avail the necessary documents to facilitate the sub-division of and transfer of the suit portion to the 1st Defendant's name or his nominee. In default, the Deputy Registrar of the Court to execute the said documents in execution of this decree.
 4. The surveyor's costs to be borne by the Defendants.
 5. This being a case between family members, there shall be no orders as to costs.



The Plaintiff was aggrieved by that judgment and lodged a Notice of Appeal on 29th July 2022 signifying his intention to appeal.

2. By a Notice of Motion dated 23rd August 2022, the Plaintiff approached this Court seeking the main prayer that there be a stay of execution of the said judgment pending the hearing and determination of the appeal NO 199 of 2022 at the Court of Appeal. Having considered that application, I dismissed it vide my ruling delivered on 14th March 2023 with orders that the parties meet their own costs being family members.
3. Subsequently, by a Notice of Motion dated 24th May 2023, the Plaintiff sought an order that the Court be pleased to interpret the judgment herein. That was done by Omollo J vide a ruling delivered on 11th December 2023.
4. I now have for my determination the Plaintiff's Notice of Motion dated 30th January 2024 and filed on 2nd February 2024 in which the Plaintiff seeks the following:
 1. Spent
 2. Spent
 3. That the judgment entered herein dated 20th July 2022 be reviewed and Decree issued on 27th July 2022 and any other decree and consequential orders granted thereunder be set aside.
 4. That the ruling made on 11th December 2023 be and is hereby reviewed and/or set aside and all consequential orders made pursuant thereto be vacated.
 5. That there be a temporary stay of execution of the judgment entered on 20th July 2022 and ruling delivered on 11th December 2023 pending hearing and determination of this review application.
 6. That the costs of this application be provided for.

The application which is the subject of this ruling is premised on the provisions of Sections 3, 3A and 80 of the *Civil Procedure Act* as well as Order 45 Rule 1 and 2 of the *Civil Procedure Rules*. It is based on the grounds set out therein and supported by the Plaintiff's affidavit of even date.

5. The gist of the application is that the Defendants obtained judgment herein through fraudulent means. That the principal grounds why the trial Court denied the Plaintiff the prayers sought in his plaint was because he did not produce the sale agreement for the suit land to contradict the sale agreement dated 21st August 1975 which is a false agreement. That the true position is that the Plaintiff purchased the suit land on 16th July 1977 but he could not trace the original sale agreement. However, following intensive inquiries, investigations and research, the Plaintiff was able to trace a copy of the original sale agreement for the suit land which was made at the Busia Court and attested to by the District Magistrate. That the land parcel number indicated on the original sale agreement was parcel No Bunyala/bulemia/276 which was the initial parent title before it's subdivision to create the suit land. That according to the original sale agreement, the Plaintiff purchased the suit land at a consideration of Kshs.5,200 which was paid in one installment upon execution thereof. That the Defendants well aware of the fact that the Plaintiff could not trace the original sale agreement owing to loss, or misplacement or theft had the audacity to produce a fraudulent copy of the alleged sale agreement dated 21st August 1975 in a desperate move to mislead the Honourable Court to the Plaintiffs' prejudice. The Plaintiff then cites paragraph 24 of the judgment by Omollo J and adds that the Judge failed to provide or set out the criteria as to how she arrived at the decision that the suit land be shared in half (½) between



the Plaintiff and the Defendant. Further, that the ruling delivered on 11th December 2023 did not address the criteria which the Judge used despite the actual acreage occupied by the parties as per the Surveyor's report dated 1st August 2023 together with the drawing and the mutation thereof. This is notwithstanding the fact that on 27th April 2010 the Budalangi Land Dispute Tribunal had made an award in favour of the Plaintiff against the 1st Defendant as set out in paragraphs 31–36 of the award which was endorsed as a judgment of the Court in Busia PMC Land Dispute No 41 of 2010. The said award was however quashed by Kibunja J in Judicial Review Application No 1 of 2011. That the impugned Tribunal award notwithstanding, the Defendants defence and counter-claim only prayed for half (½) share each between the Plaintiff and the Defendants. That the Defendant's submission quoted erroneous and overcast sums which the trial Court drew inferences from yet those sums were not correct. That as per the surveyor's report, the Defendants occupy a far much smaller piece of land as compared to the Plaintiff and the sale agreement produced by the Defendant is dated 21st August 1975 whereas the original sale agreement executed by the Plaintiff before the Busia District Magistrate's Court is dated 16th July 1977. Therefore valid legal questions linger including what was the criteria and justification for the Court in apportioning half (½) share each of the suit land between the Plaintiff and the Defendants. It is clear that the Court in arriving at its decision merely relied on the impugned Tribunal award yet it was supposed to make its own independent finding and decision. That the Court in its judgment contravened the provisions of Order 2 Rule 6 of the *Civil Procedure Rules* by implying a trust when the same was not pleaded. That the entire judgment is contrary to the law and should be impeached. This application should therefore be allowed.

6. The following documents are annexed to the application:
 1. Copy of the order issued in BusiaELC Misc Application No14 of 2017.
 2. Copy of judgment delivered on 20th July 2022.
 3. Copy of decree issued on 20th July 2022.
 4. Copy of sale agreement and receipt of purchase price dated 16th July 1977.
 5. Copy of Mutation Form for land parcel No Bunyala/Bulemia/276.
 6. Copy of title deed for the land parcel No Bunyala/Bulemia/2692.
 7. Copy of ruling delivered on 11th December 2023.
 8. Copy of Surveyor's report dated 1st August 2023.
 9. Copy of Budalangi Land Disputes Tribunalaward in case of John Wambura -v- Anakletus Wamburaover land parcel No Bunyala/Bulemia/276 (Trespass).
 10. Copy of order issued in Busia Principal Magistrates Court Land Dispute No 41 of 2010 *John Wambura v Anakletus Wambura*.
 11. Copy of order issued in Busia High Court Judicial Review Application No1 of 2011.
7. The application is opposed and Geoffrey Wamburathe 2nd Defendant has filed a replying affidavit dated 4th March 2023 though signed by John Wambura the 1st Defendant in which it is deposed, inter alia, that the Plaintiff does not raise anything substantial which was not before the trial Court. That he filed a confirmation of payment of purchase price and not a sale agreement as alleged by the Plaintiff. That the Defendants also filed payment advices to confirm the sums sent to the Plaintiff by the 1st Defendant as well as the proceedings of the Land Dispute Tribunal which were not objected to during the hearing. In any event, the orders in the Judicial Review Application No 1 of 2011 were issued on 25th September



2013 yet the Land Disputes Tribunal had concluded its sittings on 22nd April 2010 and the Plaintiff frustrated the implementation of the said award. Finally, that the judgment sought to be reviewed and/or set aside was delivered on 20th July 2022 and the Plaintiff has not provided any new evidence nor any explanation as to why it has taken him 2 years to file this application.

8. When the application was placed before me on 5th February 2024, I directed that it be canvassed by way of written submissions. The Plaintiff was to file and serve within 7 days from 5th February 2024 and the Defendants were to file and serve within 14 days from the date of service. However, only Mr Juma counsel for the Defendants had filed his submissions by 6th March 2024 when the matter was mentioned before the Deputy Registrar Hon. E. Serem to confirm compliance.
9. I have considered the application, the supporting affidavit and annexures thereto as well as the submissions by Mr J. V. Jumacounsel for the Defendants. The firm of Balongo & Company Advocates for the Plaintiff did not file any submissions.
10. Before I delve into the merits or otherwise of the application, I must address my mind to the replying affidavit dated 4th March 2024 filed in opposition to the application. The said affidavit is indicated as having been sworn by Geoffrey Wambura the 2nd Defendant herein. However on page 3 of the jurat, the affidavit indicates that it is sworn and signed by John Wambura who is the 1st Defendant herein. Clearly, that replying affidavit is defective and is not in compliance with the relevant provisions of the [Oaths and Statutory Declarations Act](#) cap 15 Laws of Kenya. It is struck out and it follows therefore, that the Notice of Motion dated 30th January 2014 is not opposed.
11. Notwithstanding the fact that the said Notice of Motion is not opposed, this Court must consider it to determine whether it meets the threshold to warrant the review and/or setting aside the judgment delivered on 20th July 2022 and ruling delivered on 11th December 2023.
12. The law and procedure which governs the Court in review of judgments and orders is set out in Section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1(1) of the [Civil Procedure Rules](#). Section 80 of the [Civil Procedure Act](#) provides that:

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, 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.”

Order 45 Rule 1(1) of the [Civil Procedure Rules](#) which provides for the procedure for review states that:

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(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 the judgment to the Court which passed the decree or made the order without unreasonable delay.”

It is clear from the above that to be entitled to an order for review, the Applicant must demonstrate the following:

1. Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge;
2. Show that there is some mistake or error apparent on the face of the record,
3. Prove that there is any other sufficient reason and,
4. Approach the Court without unreasonable delay.

A party applying for a review of a judgment should not also file an appeal. In the case of *Karani & 47 Others -v- Kijana & 2 Others* 1987 KLR 557, the Court held that;

“... once an appeal is taken, review is ousted and the matter to be remitted by review must merge in the appeal”.

In the case of *Otieno Ragot Advocates -v- National Bank Of Kenya Ltd* C.a. Civil Appeal NO 60 and 62 of 2017 [2020 eKLR], the Court was considering an application where the Applicant had filed an application for review after filing a Notice of Appeal. It said:

“Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time when the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed, it would then pursue the appeal. It was gambling with the law and judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place. There can be no place for review once an intention to appeal has been intimated by filing a notice of appeal (see *Kamalakshi Amma -v- Karthayan* 2001 AIHC 2264)”.

It has also been established by precedents that a party who is questioning the trial Court’s application of the law and evidence cannot seek orders in review of judgment or order. That can only be a ground of appeal. In *Abasi Belinda -v- Fredrick Kangwamu & Another* 1963 E.A. 557, Bennett J held that;

“A point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a ground for appeal.”

The above case was affirmed by the Court of Appeal in the case of *Pancras T. Swai -v- Kenya Breweries Ltd* C.a. Civil Appeal No275 of 2010 [2014 eKLR], where the Court added thus:

“It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly, faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on ground that the decisions were erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which Court decisions that ought to be examined on appeal would be exposed to attacks



in the Courts in which they were made under the guise of review when such Courts are functus officio and have no appellate jurisdiction.”

In the case of *National Bank of Kenya Limited -v- Ndugu Njau* C.A. Civil Appeal No 211 of 1996 [1997 eKLR], the Court had the following to say on the issue of review:

“A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review”.

With regard to the Court’s jurisdiction to set aside a judgment, it is only available in default judgments. In the case *Kenya Power & Lighting Company Ltd -v- Benzene Holdings Ltd T/a Wyco Paints Ltd* C. A. Civil Appeal No132 of 2014 [2016 eKLR], the Judges expressed themselves as follows:

“Apart from the provisions of Order 10 Rule 11, Order 12 Rule 7 and Order 36 Rule 10 of the Civil Procedure Rules dealing with the setting aside of default judgments, the Civil Procedure Rules does not have a provision for setting aside of the final judgment. A party aggrieved by a final judgment can either move the Court under Order 45 for a review of the resultant decree or by lodging an appeal in terms of Order 42.”

13. I shall be guided by the above provisions and relevant precedents in determining the application before me. The Plaintiff seeks two substantive orders being review and setting aside of the judgment/decree dated 20th July 2022 and the ruling dated 11th December 2023. I shall consider them in that order.

1. Review/setting Aside of the Judgment/ Decree Dated 20th July 2022:

14. The record shows that soon after the delivery of the judgment by OmolloJ on 20th July 2022, the Plaintiff lodged a Notice of Appeal in this Courts’ registry on 29th July 2022. He subsequently filed at the Court of Appeal registry in Kisumu, Civil Appeal no 199 of 2022 which is pending. That is clear from the Plaintiff’s supporting affidavit dated 23rd August 2022 filed in support of his application for an order of stay of application pending appeal which application I dismissed vide my ruling dated 14th March 2023. As is clear from the provisions of Order 45 Rule 1 (1) of the *Civil Procedure Rules* as well as the cases cited above including the case of *Otieno Ragot Advocates -v- National Bank Of Kenya* (*supra*), once the Plaintiff filed an appeal against the judgment delivered on 20th July 2022, the remedy of review was no longer available to him.

15. Secondly, the Plaintiff appears to be questioning OmolloJ’s appreciation of the law and evidence in this application yet those are issues to be canvassed on appeal. For instance, in paragraphs 26, 29, 33, 34 and 38 of his supporting affidavit dated 30th January 2024, the Plaintiff has deposed thus:

26: “That, needless to say, that as per the survey report, the Respondents physically occupy a far much smaller piece of the suit land as compared to the proprietor and the Applicant herein, not further forgetting that, the alleged agreement produced by the Respondents is dated 21st August 1975 whereas the Original Agreement produced by the Applicant duly made before the Busia Court District Magistrate is dated 16th July 1977.”



- 29: “That I am advised by my Advocate on record which advise I verily believe to be true that ultimately, in the absence of any such independent, fair and just criteria supported by a sound legal basis and reasoning, informing such decision by the Honourable Court as to the amount of share between the Respondents and the Applicant, it is crystal clear that the Honourable Court in arriving at it’s decision had merely relied on the impugned Tribunal Award and order thereby rendering such decision arrived at, unmerited.”
- 33: “That I am advised by my Advocate on record which advise I verily believe to be true that equally, the purported import of the averments by the Defendants hereinabove under paragraph 32, is that the Defendants had merely implied the existence of a trust, to the effect that, despite the Plaintiff being registered as the sole proprietor to the suit land on account of the claim that the 1st Defendant was residing in Dar-es-Salaam, the Plaintiff held the suit land in trust for the 1st Defendant.”
- 34: “That apparently, this pertinent claim was not impleaded by the Defendants in their prayers in the amended defence and counter-claim as by law required, to warrant a determination on the issue by the Honourable Court”.
- 38: “That the entire judgment and decree thus, is made contrary to the law and the Applicant herein has suffered prejudice.”

The thread that runs through those averments, and several others in the Plaintiff’s 42 paragraph supporting affidavit, is that the Plaintiff is basically trying to re-litigate by re-opening his case through this application because he is aggrieved by the judgment delivered herein on 20th July 2022. That is not the province of an application for review. That is a matter to be canvassed in an appellate Court. Whether the Defendants “occupy a far much smaller piece of the suit land,” as compared to the Plaintiff (paragraph 26), whether there was no “independent, fair and just criteria supported by a sound legal basis & reasoning informing such decision by the Honourable Court” (paragraph 29), whether “the Plaintiff held the suit land in trust for the 1st Defendant” (paragraph 33), whether the claim of trust “was not pleaded by the Defendants in their prayers in the amended defence and counter-claim as by law required to warrant a determination on the issue by the Honourable Court” (paragraph 34) and whether “the entire judgment and decree thus is made contrary to the law and the Applicant herein has suffered prejudice” (paragraph 38) are clearly issues to be canvassed on appeal. Those issues and several others raised in this application go beyond what a Court considering an application under Order 45 of the *Civil Procedure Rules* is required to consider. This Court is not sitting on appeal over the judgment of Omollo J delivered on 20th July 2022. For that reason again, this application must collapse.

16. Thirdly, an application for review must be filed “without unreasonable delay.” What is or is not unreasonable delay must be considered in the context of the circumstances of each case. The judgment sought to be reviewed was delivered on 20th July 2022. This application was filed on 2nd February 2024 some 19 months later a delay which in my view is clearly unreasonable. Aware that the delay is unreasonable and in an attempt to explain it, the Plaintiff has deposed in paragraph 5 of his supporting affidavit thus:

- 5: “That however, following intensive inquiries, investigations and research, the Applicant was eventually able to trace a copy of the original agreement for sale of land L.R No Bunyala/Bulemia/2692 from the Busia Lands Registry Office, notably filed several decades ago, during processing of the land sale transaction between the Applicant herein. Anacletus Wamburaas buyer and Wangwe Musungu(deceased) as the vendor.”



Of course, it may have taken the Plaintiff 19 months to trace the original sale agreement which would have bolstered his case during the trial. However, other than deposing that it took him “intensive inquiries, investigations and research” before he eventually traced the original sale agreement at the Busia Land Registry, the Plaintiff has not told this Court when he eventually managed to trace the said copy of sale agreement. And without that evidence, this Court is unable to exercise its discretion in favour of the Plaintiff other than to find, which I hereby do, that the delay in filing this application is unreasonable and therefore disentitles the Plaintiff to the remedy of review of the judgment herein.

17. With regard to the setting aside of the Judgment dated 20th July 2022, it is clear from the record that the said Judgment was not a default Judgment. It was arrived at by the Court upon hearing all the parties. As is clear from the case of *Kenya Power & Lighting Company Ltd -V- Benzene Holdings Ltd T/a Wycoco Paints Ltd* (supra), that Judgment was a final one which could only be questioned upon review under Order 45 Rule 1 of the *Civil Procedure Rules* or by lodging an appeal. The route of a review, as is now obvious, is no longer available to the Plaintiff. He can only appeal the judgment.
18. In the circumstances, the prayer to review or set aside the Judgment delivered on 20th July 2022 must be declined.

2) Review/setting Aside Of The Ruling Dated 11th December 2023:

19. The ruling delivered by Omollo J on 11th December 2023 arose following an application by the 1st Defendant dated 24th May 2023 in which he sought the following main remedy in paragraph 3 thereof:
 - 3: “That this Honourable Court be pleased to interpret the judgment in relation to the acreage that each party should own as per the said judgment.”The application was placed before Omollo J who, having considered it, delivered the ruling dated 11th December 2023 from which the following order was extracted:
 1. “The Busia County Surveyor shall re-visit the suit land Bunyala/Bulemia/2962 for the purposes of sub-dividing it into two equal parts between the Plaintiff and the Defendants.”
 2. “Each party shall bear its’ own costs.”
20. I have perused the Notice of Motion dated 30th January 2024, and which is the subject of this ruling, to find out what it is that the Plaintiff wishes to be reviewed and/or set aside therein. There is no mention of what new and important matter or evidence, mistake or error apparent on the face of the record or any other sufficient reason to justify a review of that ruling in terms of the provisions of Order 45 Rule 1 of the *Civil Procedure Rules*. In any event, this Court having already declined to review the judgment dated 20th July 2022 and which is the foundation upon which the ruling dated 11th December 2023 was delivered, there can be no basis for a review of the said ruling.
21. And on the same basis upon which this Court declined to set aside the judgment dated 20th July 2022 for not being a default judgment, this Court also finds no merit in the prayer seeking the setting aside of the ruling dated 11th December 2023. It is also declined.
22. The result of all the above is that the Notice of Motion dated 30th January 2024 can only be for dismissal.
23. On the issue of costs, Section 27 of the *Civil Procedure Act* provides that costs “shall be in the discretion of the Court or judge” provided that they “shall follow the event unless the Court or judge shall for good reasons otherwise order”. In the circumstances of this case, and as is already clear from the preceding paragraphs of this ruling, this Court struck out the Defendants’ replying affidavit meaning



that the application was not opposed. Therefore there was no basis upon which the submissions by Mr J. V. Juma counsel for the Defendants could be supported. This application has been determined on reasons other than the Defendants' defective replying affidavit which was struck out earlier in this ruling. In the circumstances, this Court finds it prudent to deny the Defendants the costs of this application.

24. The up-shot of all the above is that having considered the Notice of Motion dated 30th January 2024, this Court makes the following disposal orders:
1. The Notice of Motion dated 30th January 2024 is devoid of merit and is hereby dismissed.
 2. Each party shall meet their own costs.

BOAZ N. OLAO

JUDGE

2ND JULY 2024

RULING, DATED, SIGNED AND DELIVERED ON THIS 2ND DAY OF JULY 2024 BY WAY OF ELECTRONIC MAIL AS WAS ADVISED TO THE PARTIES.

BOAZ N. OLAO

JUDGE

2ND JULY 2024

