



REPUBLIC OF KENYA



**KENYA LAW**  
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**Yongo v Auma (Environment and Land Appeal E023 of 2023)  
[2024] KEELC 13612 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13612 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAAYA  
ENVIRONMENT AND LAND APPEAL E023 OF 2023**

**AY KOROSS, J**

**DECEMBER 5, 2024**

**BETWEEN**

**ANTONY OMONDI YONGO ..... APPELLANT**

**AND**

**JAMES OGUDA AUMA ..... RESPONDENT**

*(Being an appeal from the ruling of the SPM Hon. J.P.  
Nandi delivered on 7/09/2023 in Bondo ELC E020 of 2022)*

**JUDGMENT**

**Background**

1. The subject of this appeal emanates from a ruling rendered by the learned trial magistrate in respect of a notice of motion dated 22/09/2023 that was filed by the law firm of M/s. Otieno Okanda & Co. Advocates who allegedly acted for the appellant.
2. The reliefs sought by the appellant that were the subject of the impugned ruling were: -
  - a. The Hon. Court does review and, or vary its judgment delivered on 25/08/2023 on the alternative prayer of refund of the purchase price and award the same.
  - b. Alternative to prayer (a) above, the Hon. Court does review and, or vary its judgment delivered on 25/08/2023 and order for a rehearing of the case.
3. In advancing the motion, the appellant relied on his grounds in support of the motion and on the supporting affidavit that he swore on 22/09/2023.
4. A summary of the contestations made in these documents was that in his amended plaint dated 20/06/2022, he had sought an alternative prayer of a refund of the purchase price or the current market



value of the suit property. Yet, the trial court ignored this relief in its judgment rendered on 25/08/2023 and dismissed his entire suit with no orders as to costs.

5. According to him, this was an error or mistake by the trial court because the court failed to consider his further list of documents dated 14/09/2022 (further list) that contained certified copies of Mpesa statements that proved payments of the purchase price. This motion was not opposed.
6. The matter was canvassed by the appellant's written submissions and in the impugned ruling that was rendered on 7/12/2023, the learned trial magistrate made findings inter alia, the law firm of M/s. Otieno Okanda & Co. Advocates was not properly on record and documents contained in the further list were never produced.

### **Appeal to this court**

7. The above outcome did augur well with the appellant and aggrieved by the said ruling, the appellant preferred an appeal to this court on 6 grounds as set out in his memorandum of appeal dated 19/12/2023.
8. A scrutiny of these grounds demonstrates that they were not only on the impugned ruling but also on the judgment. The appellant in his submissions that were filed before this court by M/s. Otieno Okanda & Co. Advocates dated 25/08/2024 abandoned some of the grounds that challenged the ruling but retained a ground that challenged the judgment.
9. Therefore, the residual grounds of appeal confronted the findings of the learned trial magistrate on the ruling and judgment and asserted that he erred in: -
  - a. Law and fact by failing to review and, or vary his judgment delivered on 25/08/2023.
  - b. Law and fact by making a finding on the issue of legal representation when the issue was never the subject of determination.
  - c. Failing to appreciate that failure by the law firm of M/s. Otieno Okanda & Co. Advocates to seek leave to come on record was a procedural technicality that did not affect the substance of the dispute before the trial court.
  - d. Failing to grant the prayer for a refund of the purchase price which was against the weight of evidence on record and the law on unjust enrichment.
10. Consequently, the appellant urged this court to allow the appeal, set aside the impugned ruling, and decree, make an order that the suit be heard afresh and costs of the appeal.

### **Parties' submissions**

11. The appellant's submissions that were highlighted earlier in this judgment condensed the grounds of appeal into 3 issues for determination- whether failure by the law firm of M/s. Otieno Okanda & Co. Advocates to seek leave to come on record for the appellant was fatal, whether the motion had met the threshold for review, and whether the prayer for a refund of the purchase price was merited.
12. Despite Mr. Onyango, counsel for the respondent being given 7 days from 1/10/2024 to file his written submissions, he did not file them within the stipulated timelines. As of the time of penning down this decision, they have not been filed and if at all they will be filed, they shall be disregarded.
13. Upon identifying and considering the issues for determination, this judgment shall later on in its analysis and determination, consider counsel's arguments on the particular issues that will be identified



by the court. It will also bear in mind the provisions of law and judicial precedents that have been relied upon by the appellant to buttress his arguments.

### **Issues for determination.**

14. As this is a first appeal, this court is called upon to re-evaluate, re-examine, and reassess the evidence from the trial court and come up with its own deduction. Madan, JA (as he then was) succinctly stated the role of an appellate court in *United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd* (1985) EA 898 as follows:

“The court of appeal will not interfere with the discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. The court of appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

15. Having evaluated the records and appellant’s submissions including relevant provisions of law and judicial precedents, the issues that arise for resolution and shall be addressed simultaneously are: -
- a. Whether the motion was competently before the trial court.
  - b. Whether the appellant’s motion met the threshold for review.
  - c. Whether upon seeking review of the judgment before the trial court, the appellant could raise grounds of appeal against the judgment before this court.
  - d. What orders should this court issue including an order as to costs?

### **Analysis and determination**

#### **a. Whether the motion was competently before the trial court.**

16. As rightfully submitted by the appellant’s counsel, Order 9 Rule 9 of the Civil Procedure Rules (CPR) captures the post-judgment process where an advocate or party seeks to come on record in place of an advocate who was previously on record. This provision provides as follows;

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

- (a) upon an application with notice to all the parties; or
  - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
17. A reading of this proviso demonstrates it does not impede a litigant from choosing an advocate of his choice or for him to act in person and the mischief of this legal provision is to cure the roguery of litigants circumventing paying the legal fees of an advocate who was previously on record and also to inform the court and parties of such change.



18. However, it outlines procedures to be adhered to and if a party seeks to change Advocates, post-judgment, the first scenario is that the incoming advocate or litigant who now wants to act in person must make a formal application to the court with notice to all parties who participated in the suit for grant of leave to come on record or act in person.
19. In the alternate scenario, the incoming advocate or litigant in person, has to obtain the written consent of the previous advocate on record, file the consent in court, and then seek leave to come on record.
20. The appellant's counsel argues that the learned trial magistrate strictly applied the provisions of law instead of considering the miscarriage of justice and relied on the Court of Appeal decision of Tobias M. Wafubwa v Ben Butali [2017] KECA 142 (KLR). In this decision, the court stated thus:
 

“We would go further to add that, provided that where the failure to comply with the rule 9 did not undermine the jurisdiction of the court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then, Article 159 of the *Constitution* and the overriding principles could be called upon to aid the court to dispense substantive justice through just, efficient and timely disposal of proceedings.”
21. The Tobias case (Supra) is distinguishable from the circumstances of this case since in it, the court was interrogating the application of Order 9 Rule 9 of the CPR in cases in which the subject matter is an appeal and not on proceedings that are before the trial court.
22. In this case, the learned trial magistrate was interrogating the application of the law on a matter which he presided over as a trial court and not as an appellate court.
23. In the situation of this case, the law firm of M/s. Mulinge & Ochieng Co. Advocates were on record for the appellant before the trial court and no evidence was presented by the law firm of M/s. Otieno Okanda & Co. Advocates to show that the law firm of M/s. Mulinge & Ochieng Co. Advocates ever granted them consent to come on record.
24. The law firm of M/s. Otieno Okanda & Co. Advocates did not also seek leave to come on record for the appellant. I find the motion was incompetent. I find the learned trial magistrate did not err in finding the law firm of M/s. Otieno Okanda & Co. Advocates was not properly on record.

**b. Whether the appellant's motion met the threshold for review & Whether upon seeking review of the judgment before the trial court, the appellant could raise grounds of appeal against the judgment before this court**

25. Despite the learned trial magistrate finding the motion incompetent, he considered the motion on merits and particularly on whether he could review the judgment of the trial court. Since these issues are related, they shall be dealt with together.
26. The applicable provisions that govern the review of court orders are encapsulated by Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 states that;
 

“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.”



27. The salient conditions brought out in Order 45 Rule 1 (1) of the CPR are that a review must demonstrate the discovery of new and important matters, mistakes, and sufficient cause. All these conditions had to be proved by the appellant who was the applicant. This provision of law 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.”

28. The criteria for considering an application for review were enunciated by the Court of Appeal decision of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR where the court stated: -

“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.”

29. On considering the motion that was before him, the trial court found the motion was not merited since the Mpesa statements were never produced as evidence. But, the appellant’s counsel is of a contrary view and insists they were produced as evidence.

30. Although I agree with the appellant’s counsel that oversight by the court to consider documents that were produced during the trial was a ground for review as it amounted to apparent error as defined by the persuasive decision of *Omote & another v Ogutu* [2022] KEHC 16441 (KLR) which was relied upon by the appellant’s counsel, I find no error in the reasoning and finding of the learned magistrate.

31. On examination of the record, these Mpesa statements were never produced. The appellant only produced 3 documents which were marked as Pex 1- 3.

32. They were an official search of land parcel no. Siaya/Mahaya/2538 which was not even the parcel of land that was the subject of the dispute, a hand-scribbled schedule of payments which allegedly demonstrated payments in cash, by Mpesa application or Mpesa tills either to the respondent or undisclosed persons and lastly, an agreement for sale on land parcel no. West Asembo/Maheya/2538 (suit property) that was allegedly solely executed by the respondent.

33. I have also observed the appellant filed a further list of documents dated 14/09/2022. Nevertheless, although it lists one of the documents as a Mpesa statement, this document was never filed. And if at all it was filed which for the record it was not, one would have expected the appellant to produce it before the trial court.

34. The case belonged to the appellant and the onus was on him to prepare his case well. Thus, he cannot cry foul and blame the learned trial magistrate. He also cannot be heard to say the learned trial



magistrate erroneously failed to consider his evidence. He was the sole author of his misfortune. On the 1<sup>st</sup> limb of this issue, I find this ground of appeal fails.

35. On the 2<sup>nd</sup> limb of the issue, my understanding of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the CPR is that a party cannot seek both a review of the judgment and an appeal against the same judgment.
36. Upon the appellant seeking a review of the judgment before the trial court which review was denied by the learned trial magistrate, he lost his right of appeal against the said judgment and could only appeal against the impugned ruling.
37. The position of this court is drawn from the Court of Appeal decision of Gerald Kithu Muchanje v Catherine Muthoni Ngare & another [2020] eKLR where the court expressed itself thus:

“Under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, where a party opts to apply for review of a judgment and decree, such a party cannot after the review application is rejected exercise the option to appeal against the same judgment and decree that he sought to review... An appeal could only lie on the outcome of the application for review.”

38. In my humble view, the appellant was seeking an appeal against the judgment of the trial court through the backdoor which is not tenable. His actions are tantamount to forum shopping and an abuse of the court process which this court cannot entertain. Accordingly, on this issue, I must find that this ground of appeal is an abuse of court process and unmerited.
39. In the end, I find and hold that this appeal is devoid of merit. I hereby dismiss it and uphold the ruling of the learned trial court delivered on 7/12/2023 which dismissed the motion that was filed by the appellant dated 22/09/2023. Accordingly, the appeal fails and is hereby dismissed. It is trite law costs follow the event and because the respondent and his counsel participated in the proceedings, costs are awarded to the respondent.

It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 5<sup>TH</sup> DAY OF DECEMBER 2024.**

**HON. A. Y. KOROSS**

**JUDGE**

**5/12/2024**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Mr. Okanda for the appellant

Mr. Onyango for the respondent

Court assistant: Ishmael Orwa

