



REPUBLIC OF KENYA



KENYA LAW
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**Wanyonyi v Ngunyi (Environment and Land Appeal E002 of 2023)
[2025] KEELC 4009 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4009 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E002 OF 2023**

EC CHERONO, J

MAY 22, 2025

BETWEEN

ISAIAH YANJELA WANYONYI APPELLANT

AND

JOBKEVIN JOSEPH NGUNYI RESPONDENT

*(From the ruling of Hon. T.Orlando PM dated 12/07/2023
in BUNGOMA CMC (EL) CASE NO. E034 OF 2021)*

JUDGMENT

Introduction.

1. Vide a Memorandum of Appeal dated 24/07/2023, the Appellant appeals to this court challenging the Ruling by Hon. Tom Mark Orlando delivered on 12/07/2023 in Bungoma CMC (EL) Case No. E034 OF 2021 wherein the trial court dismissed a notice of motion which had sought orders for review of judgment of the trial court dated 12/05/2023.
2. A brief background of the case is that the Appellant was the Defendant and the Respondent the Plaintiff in Bungoma CMC (EL) Case No. E034 OF 2021. The Respondent's claim in the former suit was for an order of permanent injunction against the Appellant and/or his representatives from interfering and or in any way selling, alienating or interring the remains of the deceased Naomi Nabwala Wanyonyi in land parcel no. E.Bukusu/N.Kanduyi/11369, an order of eviction, costs and interests and any other relief. He averred that he was the absolute registered owner of land parcel no. E.Bukusu/N.Kanduyi/11369 measuring 0.09ha and that the Respondent without any colour of right trespassed therein.
3. The Appellant filed a defence and counter-claim in which he is averred that he was the absolute and registered owner of land parcel no. E.Bukusu/N.Kanduyi/11371 and beneficial owner of land parcel no. E.Bukusu/N.Kanduyi/11370 which is separate from land parcel no. E.Bukusu/N.Kanduyi/11369



and thus denied the claim of trespass. He claimed that he purchased land parcel no. E.Bukusu/N.Kanduyi/11370 measuring 0.5ha and has been in occupation of both parcels of land no. E.Bukusu/N.Kanduyi/11370 and 11371. That on 05/02/2021, the Respondent, in company of police officers stopped the interment of his mother Zainab Nabwala Wanyonyi on land parcel no. E.Bukusu/N.Kanduyi/11370 and that as a result of all the preparations undertaken, sought for damages amounting to Kshs. 326,665/=.

4. After considering the evidence of the parties and their witnesses, the trial court entered judgment in favour of the respondent and awarded him general damages for pain and inconveniences assessed at Kshs. 100,000/= as well as the costs of the counter-claim. Subsequently, the Appellant filed an application by way of Notice of Motion dated 12/05/2023 seeking for a review of the judgment delivered on 11/05/2023 and the setting aside of the orders issued and to enter judgment in his favour for Kshs. 326,665/= as special damages. The trial court heard the application and rendered itself vide a ruling delivered on 12/07/2023 by holding that the said application lacked merit and dismissed the same accordingly. This is the Ruling that is the subject of the present appeal.
5. When this appeal came up for directions, the parties agreed that the appeal be canvassed by way of written submissions. Pursuant to those directions, the Appellant filed written submissions 20/12/2024 while the Respondent filed theirs dated 26/02/2025.

The Appellant's Case

6. The Appellant raised four (4) grounds in is memorandum of appeal dated 26th July, 2023 as follows:
 - a. That the learned trial Magistrate erred in law and in fact by declining to allow the appellants application dated 12/05/2023 seeking for review of the judgment for special damages Kshs. 326,655 by stating that the evidence of the appellant and exhibits produced was not challenged.
 - b. That the learned trial Magistrate erred in law and in fact when he declined to allow the application dated 12/05/2023 by stating that the only option available is to appeal against the judgment when it was clear that there was an error when delivering the primary judgment by not including special damages of Kshs. 326,655/= which judgment required a review by the honourable court itself.
 - c. That the trial court erred in law and in fact by failing to appreciate that a review of a judgment is available under the provision of the law.
 - d. That the trial magistrate erred in law and in fact by dismissing the appellants application dated 12/05/2023 without considering the reasons advanced for review.
7. The Appellant sought to have this appeal allowed and the orders of 12/05/2023 reviewed an order be made that the Appellant has proved his case for Kshs. 326,655/= and that the court was not functus officio and that it had powers to make an order for review under Order 45 of the Civil Procedure Rules and Section 80 of the *Civil Procedure Act*.

Issues for determination

8. I have looked at the grounds of appeal in the memorandum of appeal, the record of appeal, written submissions filed by the parties and the court record generally and identify the following as the issues that commend for determination:
 - a. Whether or not the appellant satisfied the grounds for grant of an order of review in his application in the trial court.



- b. Whether or not the trial court erred in dismissing the application.
 - c. What order to make on costs.
9. In determining whether or not the learned trial magistrate was justified to reach the decision that she did, this court is obligated and indeed under a duty to re-evaluate the evidence and materials placed before the trial court to determine whether the learned trial magistrate made the correct determination. As an appellate court of first instance, this court is not bound by the findings of fact and law made by the trial court and may on re-evaluation reach its own conclusion and findings. This principle was aptly enunciated in the case of *Selle & Another -vs- Associated Motor Boat Co. Ltd & others* (1968) EA 123 where the court of Appeal stated as follows:-

“this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect”.

10. This is an appeal against a ruling on an application for review of judgement and not an appeal against the judgement itself therefore, this court will restrict itself to the said application, response thereto, submissions and resulting ruling.
11. On the first issue for determination, Section 80 of the *Civil Procedure Act* gives the court unfettered discretion to review of its decision. Section 80 provides as follows: -

“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.”

12. Order 45 Rule 1(1) of the Civil Procedure Rules, 2010 sets out the grounds for review and provides as follows: -

“1. (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.”



13. Section 80 of the *Civil Procedure Act* gives the power of review whereas Order 45 sets out the rules which restricts the grounds for review to the following grounds:
 - a. Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
 - b. On account of some mistake or error apparent on the face of the record; or
 - c. For any other sufficient reason
14. In order to succeed in an application for review, an applicant had has a duty to prove, on a balance of probabilities, the existence of the above-mentioned grounds. The ground relied on by the Appellant was that there was an error apparent on the record of the record. The particulars of the alleged error was that, despite the Appellant having filed and paid the necessary court fees and their witness having testified and produced receipts for special damages, those documents were returned to the Appellant and were therefore missing from the court file when the court retired to write its judgment, leading to an erroneous conclusion.
15. The question this court is called upon to interrogate is whether indeed there was an error apparent on the face of the record. The Appellant as stated in the preceding paragraph argued that he attached to his counterclaim receipts for special damages and that during the hearing of his case, he produced the originals which were returned to him. Courts have attempted to define and interpret what constitutes a mistake or error apparent on the face of the record. In the case of *Moses Kipkolum Kogo vs Nyamogo & Nyamogo Advocates* [2000] eKLR the court held;

“There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions a clear case of error apparent on the face of the record would be made out. An error which requires to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.”
16. I have had the opportunity to review the Appellant's statement of defence and counter-claim dated 24/02/2021 and filed in court on 26/02/2021. Notably, the documents filed include the defence and counter-claim, a verifying affidavit, two witness statements, and a list of documents. However, it is important to note that the listed annexures were not attached to his list of documents. The above-mentioned documents were physically presented by the appellant to court. The allegation that originals were produced during the hearing and returned to the appellant is unsubstantiated.
17. This court has not been told who returned the said documents to the Appellant and an affidavit by the said perpetrator to the effect that this indeed happened has not been presented to court in support of the assertion. It would therefore be whimsical for this court to rely on an unsubstantiated assertion to review a judgment of a court of competent jurisdiction. This to me is a clear case of the Appellant and/or his counsel attempting to have a second bite of the cherry as a result of negligence during the trial. In the case of *Evan Bwire –vs- Andrew Nginda Civil Appeal No. 103 of 2000 LLR 8340* the court held that:

“an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case afresh”.



18. Regarding whether the trial court erred in dismissing the application for review, I find that while the dismissal itself was not erroneous, the court's reasoning was, in my view, flawed. I say so because in my considered view, the court was not bereft of jurisdiction to consider the application for review of its judgment on merits. That said and done and based on the foregoing, it is my considered opinion that the Appellant failed to establish the existence of an error on the face of record sufficient to warrant the trial court exercise its review jurisdiction. I further find that there was no error apparent on the face of the record that would affect the substance of the suit.
19. The upshot of my finding is that this appeal is devoid of merit and the same is hereby dismissed with each party to bear their own costs.
20. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF MAY, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Oira H/B for Mr. Onyando for the Appellant.

Mr. Were for the Respondent.

Bett C/A.

