



**Juma & 3 others v Nechesa (Environment and Land Appeal
E016 of 2021) [2023] KEELC 17278 (KLR) (9 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17278 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E016 OF 2021**

DO OHUNGO, J

MAY 9, 2023

BETWEEN

**RAPHAEL JUMA 1ST APPELLANT
DANIEL JUMA 2ND APPELLANT
SIMON JUMA 3RD APPELLANT
ISAYA JUMA 4TH APPELLANT**

AND

DINA NECHESA RESPONDENT

(Being an appeal from the ruling of the Senior Principal Magistrate's Court at Butali (Hon. Z.J Nyakundi, Senior Principal Magistrate) delivered on 22nd April 2021 in Butali MCELC No. 26 of 2018 Raphael Juma & 3 Others -v- Dina Nechesa)

JUDGMENT

1. This appeal traces its roots to Notice of Motion dated 6th October 2020, an application which the appellants filed in the Subordinate Court seeking the following orders:
 1. That this Honourable court be pleased to review and set aside its order made on 25th April 2019 to pave way for the hearing and final determination of this case.
 2. That the costs hereof be in the cause.
2. Upon hearing the application, Hon. Z.J Nyakundi, Senior Principal Magistrate delivered a ruling on 22nd April 2021 and dismissed the application. Dissatisfied with the outcome, the appellant filed this appeal through Memorandum of Appeal dated 18th May 2021.
3. The following are the grounds of appeal as listed on the face of the memorandum of appeal:



1. The learned trial magistrate erred in dismissing the appellant's application for inordinate delay when the same had been occasioned by compelling and excusable circumstances which had been sufficiently explained.
 2. The learned trial magistrate erred in holding that litigation must come to an end despite the fact that the appellant's case had never been heard.
 3. The learned trial magistrate misdirected himself by holding that the appellants had not established any single ground for review under Order 45 of the *Civil Procedure Rules* and in the face of 2 errors on record in the form of orders declaring the appellant's case as being res judicata and also transfer orders.
 4. That the aforesaid decision by the learned trial magistrate has violated the appellants' rights to a fair trial as they have been barred from having their case heard.
 5. That the decision by the learned trial magistrate is casual, rash, perfunctory and was arrived at without due circumspection thereby occasioning miscarriage of justice.
4. Based on those grounds, the appellants urged the court to set aside the ruling and in its place make an order allowing the appellants application dated 6th October 2020 with costs.
 5. The appeal was canvassed through written submissions. The appellants submitted that they had initially filed Kakamega HCCC No. 153 of 2011 seeking eviction orders against the initial defendant one John Nabwera (deceased) who was thereafter substituted with his widow, the respondent herein. That upon substitution, the case was given a new number Kakamega ELC No. 461 of 2017 which matter was thereafter transferred to Kakamega Chief Magistrate's Court as Kakamega MCELC No. 155 of 2018 and ultimately to Butali Law Courts as Butali MCELC No. 26 of 2018 from which this appeal emanates.
 6. It was the appellants' further submissions that when the matter came up before Hon. E.W. Muleka on 25th April 2019, the learned magistrate made an order that the matter was res judicata having been heard and determined by Hon. Justice Chitembwe on 23rd June 2010. That the said magistrate further ordered that the matter be placed before the Deputy Registrar, Kakamega for further orders. The appellants therefore argued that the above position taken by the Honourable Principal Magistrate was erroneous as the appellant's case had neither been heard nor determined. They argued that before filing the suit herein, the said John Nabwera (deceased) had sued them vide Kakamega HCCC No. 82 of 1997 (O.S) claiming 12 acres of plot number 37 Mabusi Settlement Scheme by adverse possession and the matter was dismissed by Honourable Justice Chitembwe on 3rd June 2010. That after the said dismissal, the appellants filed Kakamega HCCC No. 153 of 2011 seeking eviction of John Nabwera (deceased) from the said parcel.
 7. The appellants therefore submitted that Hon. E.W. Muleka failed to appreciate that the two matters were distinct and as such the order made that their case was res judicata was an error on the face of record and was therefore amenable to review yet Hon. Z.J Nyakundi dismissed their application. The appellants further submitted that they explained the delay in their application that as at the time the res judicata orders were made, their advocate on record was ailing and eventually passed away sometime in December 2019 and that it took them considerable time to retrieve their file from their late advocates' firm and procure services of new counsel. They also cited Covid 19 pandemic which restricted access to courts. The appellants therefore urged this court to allow their appeal.
 8. In response, the respondent argued that the Subordinate Court rightfully dismissed the application dated 6th October 2020 since the issue raised in Butali MCELC No. 26 of 2018 related to land parcel



number Kakamega/Mabusi/37 previously known as plot No. 37 Mabusi Settlement Scheme and with the same parties and that the matter before the Subordinate Court was therefore *res judicata*. The respondent further submitted that the appellants failed to satisfy the conditions for granting review. She therefore urged this court to dismiss the appeal with costs.

9. I have carefully considered the grounds of appeal and the parties' respective submissions. The issues that arise for determination are whether the learned magistrate properly applied the law and principles applicable to an application for review and whether Notice of Motion dated 6th October 2020 ought to be allowed.
10. The principles that guide an appellate court while considering an appeal against an order made in exercise of discretion are settled. The Court of Appeal recently reiterated in the case of *Mombasa Cement Limited v Kitsao & 34 others* (Civil Appeal E016 of 2020) [2022] KECA 562 (KLR) (24 June 2022) (Judgment) that an appellate court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong due to misdirection or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration with the result that it arrived at a wrong conclusion.
11. The law relating to review is found at Section 80 of the *Civil Procedure Act* which provides:
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. Additionally, Order 45 Rule 1 of the *Civil Procedure Rules* makes further provisions on review as follows:
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. The mainstay of the appellants' case in their Notice of Motion dated 6th October 2020 was that Hon. E.W. Muleka's holding that their case was *res judicata* was an error on the face of record. The Court of Appeal stated in *National Bank of Kenya Limited v Ndungu Njau* (1997) eKLR as follows:

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.



14. To determine whether there was an error on the face of record, it is important to review the principles applicable to res judicata. For res judicata to apply in a particular matter, there must have been a previous suit in which the matter was in issue, the parties in both matters must be the same or litigating under the same title, the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit. See *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR and *Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others* [2018] eKLR.
15. In the order that provoked the filing of Notice of Motion dated 6th October 2020, Hon. E.W. Muleka stated thus:

I have looked at the applications before in this matter and Justice Chitembwe had already proceeded judgment on this matter on 23rd June 2010 and a decree issued on 5th December 2014.

Therefore in my view the matter is res judicata and any subsequent proceedings thereafter lie in the High Court (Land Court) as a Subordinate Court I don't have jurisdiction to entertain any application or issue orders thereafter. The matter was erroneously transferred here from the High Court. In view of this fact any subsequent proceedings by this court are null and void. The matter be placed before the DR ELC Kakamega for further orders and directions.
16. A perusal of the record shows that the file was placed before Hon. Lopokoiyit DR ELC Kakamega on 24th May 2019 who made a note on the file that parties ought to file a miscellaneous application seeking transfer. It seems no order for transfer was ever made, hence the continued proceedings before the Subordinate Court resting with the order appealed from.
17. Further perusal of the record shows that litigation in the matter from which the appeal emanates commenced on 8th November 2011 when the appellants herein filed plaint dated 8th November 2011 in Kakamega HCCC No. 153 of 2011 seeking eviction orders against John Nabwera who later passed away and was substituted with his widow, the respondent herein, pursuant to an order made on 22nd July 2014. The matter was transferred to this court on 23rd November 2017, and it became Kakamega ELC No. 461 of 2017. Once again, it was transferred to Chief Magistrate's Court Kakamega where it became Kakamega MCELC No. 155 of 2018 and ultimately to Butali Law Courts where it was assigned the case number Butali MCELC No. 26 of 2018. There is no judgment on record since the matter is yet to be heard and determined.
18. As explained by the appellants in the affidavit in support of Notice of Motion dated 6th October 2020, the other related matter is Kakamega HCCC No. 82 of 1997 (OS) wherein John Nabwera sued the appellants herein seeking a declaration that he had acquired 12 acres of Plot No. 37 Mabusi Settlement Scheme by adverse possession. Judgment was delivered in the matter by Chitembwe J on 3rd June 2010, dismissing the plaintiff's case with an order that each party bears own costs.
19. In view of the foregoing, the holding by Hon. E.W. Muleka that judgment was delivered in the matter on 23rd June 2010 was clearly an error apparent on the face of the record which led to his subsequent finding that the matter was res judicata. Existence of an error apparent on the face of the record is a valid basis upon which to grant review.
20. Under Order 45 Rule 1 of the *Civil Procure Rules*, it is a requirement that an application for review be made without unreasonable delay. What constitutes unreasonable delay varies from case to case as was held by Munyao J. in *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] eKLR.



21. The orders sought to be reviewed were made on 25th April 2019. The application for review was filed on 6th October 2020, about 18 months after the order was issued. The appellants explained that the delay was occasioned by illness and ultimate death of their advocate on record as well as the effects of the Covid 19 pandemic that led to reduced access to the courts. The respondent did not offer any evidence to dispute the claim illness and ultimate death of the appellants' counsel in December 2019. Regarding the effects of the Covid 19 pandemic, this court takes judicial notice that court operations were substantially scaled down from mid-March 2020 up to and including the date of filing of Notice of Motion dated 6th October 2020.
22. In view of the foregoing, I am satisfied that in his terse ruling dated 22nd April 2021, the learned magistrate neither identified nor properly applied the law and principles applicable to an application for review and thereby failed to properly exercise discretion.
23. The appeal has merit and is therefore allowed. The order made by the Subordinate Court on 25th April 2019 that the matter before it was res judicata is hereby reviewed and set aside. The appellants shall have costs of Notice of Motion dated 6th October 2020 and costs of this appeal.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 9TH DAY OF MAY 2023.

D. O. OHUNGO

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Delivered in open court in the presence of:

Mr Nyikuli for the appellants

No appearance for the respondent

Court Assistant: E. Juma

