



**Kenya Wildlife Services v Joshua & another (Civil Appeal  
E217 of 2023) [2024] KEHC 7581 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7581 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E217 OF 2023  
EM MURIITHI, J  
JUNE 20, 2024**

**BETWEEN**

**KENYA WILDLIFE SERVICES ..... APPELLANT**

**AND**

**SABINA NKIROTE JOSHUA ..... 1<sup>ST</sup> RESPONDENT**

**JOSHUA K. KINENE ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling of Hon. L. W Maina (RM/  
Adjudicator) delivered on 9/11/2023 in Meru SCCOM No. E289 of 2023)*

**JUDGMENT**

1. The Respondents herein, the Claimants in the trial court, sued the Appellant vide a statement of claim dated 31/8/2023 seeking Kshs 693,878.80 plus costs and interest.
2. In dismissing the Respondents' claim vide its judgment delivered on 12/10/2023 the trial court found that, "Indeed, he who alleges must prove. It is without a doubt that a report was made on loss of crops, however, there is no evidence on ownership or possession of a particular portion of property at the alleged area where the incident took place. The crop damage report is issued to the 1<sup>st</sup> Claimant but the title is in the name of the 2<sup>nd</sup> Claimant. The 1<sup>st</sup> Claimant argues they are husband and wife but no proof of the same has been adduced. The 1<sup>st</sup> Claimant also argues that she is the beneficial owner of the property which fact is confirmed by the 2<sup>nd</sup> Claimant, but no documents whatsoever have been adduced of the said transfer of beneficial ownership. Indeed, a chiefs letter is not proof of ownership. The Court has therefore been tasked by the Claimant to award damages on a portion of land allegedly owned by the 2<sup>nd</sup> Claimant which interest on ownership has allegedly been transferred to the 1<sup>st</sup> Claimant. Further, the claim for the demand letter at Kshs 10,000/= must fail given that there is no proof of sending or receiving the same. The Court is of the view that damages have not been strictly proven. Therefore the claim must fail. The Court having considered the Claim,



Response, documentary evidence, witness testimonies, submissions and the analysis abovehand, the Court; The Court finds that the Claimants have not proved their Claim on a balance of probability and consequently, judgment is entered in the following terms;

- a. The Claim is therefore dismissed with costs awarded to the Respondent.”
3. The Respondents filed the application dated 13/10/2023 seeking stay of execution and review of the judgment of 12/10/2023 in view of alleged discovery of new documents which were not available at the time of filing the claim. In allowing the application, the trial court rendered thus, “Indeed, for the Court to allow this Application, the Applicant has the responsibility to prove that the said documents were only accessible after the exercise of due diligence, and that the same were not within his knowledge or could not be produced by him at the time when the decree was passed or the order made. Indeed, it is without doubt that the Claimant was subject to material damage on their property and indeed, a special form was issued by the Respondent in support of the material damage, the said form does not indicate the particular portion of property subject to the material damage. The Respondent argues that the agreement is not new evidence and they had the same before judgment, however, the Claimant has argued that the said document was not produced. Indeed the key word is not only possession but production, the document was not produced as evidence by the time the decree was issued, indeed, on a balance of probabilities, the court finds that the Application has merit, therefore, the Application succeeds save that since beneficial ownership has occurred, the same is solely in favour of the 1<sup>st</sup> Claimant. The Court maintains that it shall not award costs for the demand letter given that there is no proof of service. The Court finds that the Application dated 13<sup>th</sup> October, 2023 has merit and is allowed in the following terms;
1. Liability is apportioned at 80/20 in favour of the 1<sup>st</sup> Claimant as against the Respondent.
  2. The 1<sup>st</sup> Claimant is awarded a sum of (Kshs 683,878.80/= less 20% liability) = Kshs 547,102/=.
  3. Costs and interest are also awarded from date of judgment till settlement in full.”

## **The Appeal**

4. On appeal, the Appellant filed its memorandum of appeal in this court on 8/12/2023 raising 6 grounds as follows:
1. The Learned Adjudicator erred in law and fact by allowing the Respondents’ Notice of Motion Application dated 13<sup>th</sup> October, 2023.
  2. The Learned Adjudicator erred in misconstruing the provisions of Order 45 Rule 1 of the *Civil Procedure Rules* and consequently allowing the Respondents’ Notice of Motion Application dated 13<sup>th</sup> October, 2023.
  3. The Learned Adjudicator erred in law and fact by allowing the Respondents’ Notice of Motion Application dated 13<sup>th</sup> October, 2023 consequently allowing the Respondents’ claim.
  4. The Learned Adjudicator erred in law and fact in allowing the Respondents’ Notice of Motion Application dated 13<sup>th</sup> October, 2023 despite being irregularly in Court and fatally defective.



5. The Learned Adjudicator erred in law and fact in the findings she arrived at in the Ruling, delivered on 9<sup>th</sup> November 2023 so as to amount to a travesty and miscarriage of justice.
6. The Learned Adjudicator erred in law and fact in failing to consider the oral submissions made by the Appellant’s counsel and in failing to consider the legal authorities tendered therewith.

### Submissions

5. The Appellant urges that the Respondents did not satisfy the condition that there was discovery of new and important evidence which, after the exercise of due diligence, was not within their knowledge or could not be produced by them at the time when the decree was passed, and cites *Hosea Nyandika Mosagwe & 2 others v County Government of Nyamira* (2022) eKLR and *Paul Mwaniki v National Hospital Insurance Fund Board of Management* (2020) eKLR. It faults the Respondents for failing to attach the decree which they sought to be reviewed, and cites *Sulciman Murunga v Nilestar Holdings Limited & another* (2015) eKLR. It urges the court to allow the appeal with costs and set aside the ruling of 9/11/2023.
6. The Respondents laud the trial court for correctly applying the provisions of Order 45 Rule 1 of the *Civil Procedure Rules*, and consequently finding that the claim had been proved, and cite *Stephen Mwallyo Mbondo v County Government of Kilifi* (2021) eKLR, *Pancras T. Swai v Kenya Breweries Limited* (2014) eKLR, *Sarder Mohamed v Charan Singh Nand Sing and another* (1959) EA 793 and *Ajit Kumar Rath v State of Orisa & others*, Supreme Court of India cases 596 at page 608. They urge that the agreement for transfer of beneficial ownership was misplaced and could not be found until the judgment was delivered. They urge the court to find that the trial court properly applied the law and its discretion and dismiss the appeal with costs.

### Analysis and Determination

7. This being a first appeal, this court is required to consider the evidence adduced, evaluate it and draw its own conclusions bearing in mind that it did not hear and see the witnesses who testified. (See *Selle & another v Associated Motor Boat Company Ltd & others* [1968] EA 123).
8. The issues for determination are two fold whether the impugned ruling of 12/10/2023 was grounded on law and supported by the evidence and whether the Appellant’s submissions and authorities were considered.
9. Order 45 Rule 1 of the *Civil Procedure Rules* provides 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.”



10. The sole reason why the Respondents' claim was dismissed was the lack of nexus between the damaged crops and the ownership and/or possession of the piece of land where the damage took place.
11. The 1<sup>st</sup> Respondent pleaded at paragraph 4, 5 and 6 of her supporting affidavit to the application of 13/10/2023, "That the reason why the said proof of transfer of beneficial ownership from the 2<sup>nd</sup> Claimant to myself was not filed is because I had misplaced the Agreement of transfer of Beneficial ownership in land dated 29<sup>th</sup> August, 2020 which agreement, I came to trace way after the Judgment date had been given. That my advocate on record at the time of filing the statement of Claim MS/Mungai J. K & Co. Advocates advised us which advice we verily believed to be true that waiting the tracing of the said agreement would render our claim nugatory after it becomes time barred. That I later traced the said agreement and supplied the same to the then advocate on record after the matter was slated for judgment which I thought the said advocate would file but failed to file the same agreement and/or withdraw the claim."
12. Whereas the Appellant contends that the agreement was all along within the knowledge and possession of the Respondents and thus outside the purview of review, the Respondents maintain that they only traced the agreement after a judgment date had been reserved.
13. In *D.J. Lowe & Company Ltd v Banque Indosuez* Civil Appl. Nai. 217/98 (ur), the Court of Appeal stated as follows:

"Where such a review application is based on fact of the discovery of fresh evidence, the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing."

14. Similarly in *Rose Kaiza v Angelo Mpanjuiza* [2009] eKLR, the Court of Appeal held that:-

"An application for review under Order 44 r 1 must be clear and specific on the basis upon which it is made. The motion before the superior court was based on the discovery of new facts. However, it is not every new fact that will qualify for interference with the judgment or decree sought to be reviewed...The construction and application of that provision has been discussed in many previous decisions but we shall take it from the commentary by Mulla on similar provisions of the Indian Civil Procedure Code, 15<sup>th</sup> Edition at page 2726, thus:

Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."



15. Can it be confidently said from the material placed before the court that the Respondents acted with diligence and the existence of the beneficial owner agreement was not within their knowledge when the judgment of 12/10/2023 was made?
16. On 1/11/2023, counsel for the Respondents told court that, “The application is seeking for the admission of the agreement which agreement was a crucial evidence which was missed out the advocate move out to file the said document. It was never presented but it was found and it was traced after judgement. The applicant seeks for it to be admitted. It is crucial for judgment be differed.”
17. In rejoinder, counsel for the Appellant said, “We strongly oppose the application. We have filed a replying affidavit which is comprehensive that is the claimant wishes to introduce a document filled transfer of beneficially ownership of land. It is not denied by claimant that they treat it after judgement that was given. Order 45 Rule 1 provides that new important evidence should have been tried after delivery of judgement and not before this is not new evidence.”
18. The Respondents’ evidence that the agreement was belatedly traced was not meaningfully challenged.
19. It is apparent from the statement of claim that the Respondents had pleaded at paragraph 4 (b) thereof that the 1<sup>st</sup> Respondent was a beneficial owner in land Reference No Meru North/Akithi 1/557 as follows, “The 1<sup>st</sup> Claimant is the wife to the 2<sup>nd</sup> Claimant who is the farmer and is responsible for the farming in land Reference No Meru North/Akithi 1/557 who was issued with the KWS form Serial Number 14665 by the Respondent.”
20. The court finds that the Respondents have demonstrated that the agreement, though within the knowledge, could not have been produced at the time of the judgment, and thus falls within the ambit of Order 45 Rule 1 of the [Civil Procedure Rules](#).

#### **Consideration of the Appellant’s submissions and authorities**

21. The Appellant accuses the trial court of failing to consider its submissions and authorities. Courts have countless held that submissions are merely a guide and a court is not bound to adopt them.

#### **Orders**

22. Accordingly, for the reasons set out above, this court finds the appeal to be without merit and it is dismissed.
23. The appellant shall pay costs of the appeal to the Respondent.

Order accordingly.

**DATED AND DELIVERED ON THIS 20<sup>TH</sup> DAY OF JUNE 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Mr. Mutai for the Appellant.

Mr. Mungai for the Respondent.

