



**Lokwaris & another v Lochalinga (Civil Appeal E004 of 2022)  
[2023] KEHC 22274 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22274 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPENGURIA  
CIVIL APPEAL E004 OF 2022  
AC MRIMA, J  
SEPTEMBER 20, 2023**

**BETWEEN**

**CHARLES LOKWARIS ..... 1<sup>ST</sup> APPELLANT**

**SUSAN LEMAKWANGA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PHILEMON PKEMOI LOCHALINGA ..... RESPONDENT**

*(Being an Appeal arising out of the ruling and order of Hon. M.  
M. Nafula (Principal Magistrate) in Kapenguria Senior Principal  
Magistrate's Court Civil Case No. 82'A' of 2010 delivered on 15/06/2022)*

**JUDGMENT**

**Introduction:**

1. The appeal subject of this judgment arose out of the dismissal of an application filed by the Appellants herein seeking to set-aside the judgment of the trial Court.
2. Being dissatisfied with the said outcome, the instant appeal was preferred.
3. The appeal was vehemently opposed, hence, this judgment.

**The Appeal:**

4. A Memorandum of Appeal was lodged on 5<sup>th</sup> July, 2022 against the impugned ruling which was delivered on 15<sup>th</sup> June, 2022.



5. The Appellants proposed the following grounds of appeal: -
1. The learned trial magistrate erred in law and in fact, misconstrued the application and as a result arrived at a wrong conclusion in her ruling of 15/6/2022.
  2. The learned trial magistrate failed to appreciate that the proceedings and judgment were proceeding on the basis of an error apparent on the record which was within the mandate of correcting the same to ensure justice on the part of all the parties in the suit.
  3. The learned trial magistrate erred in law and fact and misconstrued in her reliance to the case of *Esther Wamaitba Njibia & others v Safaricom Ltd* and the case in *Shah v Mbogo* and as result of the same arrived at a wrong conclusion.
  4. The learned trial magistrate erred in law and fact and failed to appreciate that her ruling does not in any way accord the appellant an opportunity to fairly participate in the proceedings herein.
  5. The learned trial magistrate erred in law and fact by failing to appreciate that despite the fact that the firm of Risper Arunga & Company Advocates was on record for the Appellants it had filed an application to cease acting for the appellants.
6. On the basis of the said grounds, the Appellants prayed for the following reliefs: -
- a. Set aside the ruling of Hon M M Nafula, PM delivered on 15.6.2022 vide Kapenguria SPM Civil Suit No 82A of 2010 and in its place setting aside the judgment of 17/5/2018 to allow the appellants prosecute their defence.
  - b. The Respondent be condemned to pay costs of this appeal.
7. On the directions of this Court, the appeal was heard by way of written submissions where both parties duly complied.
8. On their part, the Appellants expounded on the grounds of appeal in urging this Court to allow the appeal. They accused the Learned Magistrate in failing to appreciate that the proceedings and judgment in the lower Court case were in error that was so apparent on the face of the record, which error the Court failed to remedy. The error being that the Appellants, then Defendants, did not close their cases and as such they were denied their right to a fair trial. The Court of Appeal decision in *Martha Karua v IEBC* was referred to in buttressing the submission.
9. The Appellants further argued that whereas there was an omission on the part of their Advocate in the manner she conducted the matter, that omission ought not to be visited upon the innocent Appellants who had a holding defence. The decision in *Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co. Ltd & 2 Others* was cited as well as the provisions of Article 159(2)(a) of the *Constitution* and Sections 99 and 100 of the *Civil Procedure Act*.
10. The Court was faulted in misconstruing some decisions in their application to the then application.



11. The Appellants also took issue with the manner in which the trial was conducted. They, in particular pointed out that the parties' cases were not closed and the Appellants were not accorded an opportunity to be heard.
12. It was their submission that the application that was dismissed was meant to correct the errors on the record.
13. The Appellants, then, urged this Court to allow the appeal as prayed.
14. The Respondent through his elaborate written submissions opposed the appeal. It was his position that the lower Court exercised her discretion appropriately in dismissing the impugned ruling. Several decisions were referred to in support of the submission.
15. The period the matter has been in Court was also raised and in particular to the timing of the application which was meant to delay the matter further. This Court was implored to consider the provisions of Article 159(2)(b) of the Constitution and public policy considerations on the need for expeditious determination of disputes.
16. In the end, the Court was urged to disallow the appeal with costs.

**Analysis:**

17. This being an appeal against a ruling of the trial Court, the role of the High Court, as an appellate Court, is to re-consider the application and the law and to determine whether the resultant ruling be upheld or otherwise be set-aside.
18. In discharging the said duty, this Court is duty bound to appraise itself of the entire lower Court record. The Court has done so as well as considered the grounds of appeal, the written submissions and the decisions referred to by Counsel.
19. The matter before the lower Court was a civil suit. It was Kapenguria Senior Principal Magistrate's Court Civil Case No 82'A' of 2010 (hereinafter referred to as 'the suit'). It was instituted in 2010.
20. The suit did not take off for 7 years. It was until on 15<sup>th</sup> June, 2017 when the trial Court (Hon D M Machage, PM) rejected yet another adjournment application and ordered the hearing to proceed.
21. On the said date, both parties were represented by Counsel. There was Miss. Opondo, Learned Counsel holding brief for Mr Chebii for the Plaintiff and Miss Chebet, Learned Counsel holding brief for Miss. Arunga for the Defendants. Three witnesses testified. They were PW1, PW2 and PW3.
22. The matter was then adjourned to 22<sup>nd</sup> June, 2017. Again, both parties were represented by Counsel. This time round, there was Mr. Chebii for the Plaintiff and Mr. Lowaskou holding brief for Miss Arunga. Three witnesses testified. They were PW1 who was recalled to produce some documents, PW3 who was recalled as he was unwell when he testified on 15<sup>th</sup> June, 2017 and PW4.
23. At the end of the testimonies of the three witnesses, Counsel for the Plaintiff applied to close the Plaintiff's case. He also prayed that the defence case be closed and parties do file written submissions.
24. The suit, once again, went into slumber until on 2<sup>nd</sup> November, 2017 when it was dismissed for want of prosecution. An application to resuscitate the suit was allowed by the consent of the parties on 12<sup>th</sup> April, 2018. That was before Hon P Y Kulecho, RM and again, both parties were duly represented.
25. On the consensus of Counsel, an order was recorded to the effect that 'Matter shall proceed from where it had reached. Mention on 26/4/2018 to conform filing of submissions. Proceedings be typed'.



26. The suit come up before Court on 26<sup>th</sup> April, 2018 and both parties were represented by Counsel. By the consent of Counsel, parties agreed to file their written submissions by 27<sup>th</sup> April, 2018. The matter was eventually fixed for judgment on 30<sup>th</sup> April, 2018. Judgment was rendered on 17<sup>th</sup> May, 2018.
27. On 5<sup>th</sup> July, 2018, Counsel for the Plaintiff and the Defendants recorded yet another consent on the Party to Party Bill of Costs which had been filed by the Plaintiff's Counsel. The costs were agreed at Kshs 100,000/=.
28. The matter did not end there. On 15<sup>th</sup> December, 2021 the matter came before Court on a Notice to show cause why execution should not issue by way of committal to civil jail. It was dated 13<sup>th</sup> December, 2021. Again, both parties were represented. Mr. Chebii appeared for the Plaintiff/Decree holder and Mr. Lowaskou appeared for the Defendants/Judgment debtors, his firm having formally and rightly so, filed a Notice of Appointment of Advocates dated 16<sup>th</sup> November, 2021 as opposed to a Notice of Change of Advocates.
29. To this Court, the firm of Messrs. Lowaskou & Company Advocates appeared alongside that of Messrs. Arunga & Company for the Defendants/Judgment debtors. That is permissible in law and, unlike where there is a change of Advocates after entry of judgment, no leave of the Court is required when a party appoints additional Advocates after judgment.
30. Back to the case at hand, Mr. Lowaskou sought time to talk to the Defendants on the application for execution. The Court allowed Mr. Lowaskou's application and the matter was adjourned to 12<sup>th</sup> January, 2022.
31. On 12<sup>th</sup> January, 2022, Mr. Lowaskou informed the Court that '... I spoke to my client. We are making arrangements on how to pay the decretal sum. I pray for a mention in a month's time.'
32. The application was acceded to and the matter adjourned to 2<sup>nd</sup> February, 2022. On the said date, Mr. Nyamu, Learned Counsel appeared having taken over the matter from both Counsel who previously appeared for the Defendants.
33. Counsel informed the Court of the filing of a Notice of Motion dated 1<sup>st</sup> February, 2022 which directions were given on filing responses and submissions. An interlocutory stay of execution was also granted.
34. The application was heard and dismissed vide the ruling rendered on 15<sup>th</sup> June, 2022 thereby resulting to the instant appeal.
35. Against that background, the Appellants now front the grounds of appeal for consideration.
36. This Court has read and understood the impugned ruling. The Court, correctly so, captured the background of the matter.
37. The Appellants main contention was that they were not accorded an opportunity to present their defence. However, the record does not support such a position. From the proceedings before the trial Court, Counsel for the Defendants, now Appellants, was aware of the manner in which the whole trial was conducted.
38. Both Counsel agreed that the suit proceeds for filing of submissions. Since 22<sup>nd</sup> June, 2017, the Appellants did not raise the issue of wanting to present their defence until when execution was eminent. That was after a period of around 4 years.



39. The Appellants were represented and Counsel participated in the trial. The Appellants were made aware of the state of affairs in the suit until execution. They even sought for time to make arrangements on how to liquidate the decretal judgment sum.
40. Having considered the gist of this appeal, this Court agrees with the finding of the Learned Magistrate in the impugned ruling. The Learned Magistrate correctly exercised her discretion against the application.
41. It is apparent that the application by way of a Notice of Motion dated 1<sup>st</sup> February, 2022 was mainly calculated to stall the execution process. To a large extent, and going by the state of the record, the application was largely a fishing expedition. From the way the trial was conducted, the Appellants cannot claim foul play. There was no single instance where they complained of the trial up until when asked to settle the judgment and after seeking time to liquidate the sums.
42. Counsel for the Appellants conducted the trial in the best way and on the basis of their then instructions. The Appellants cannot now turn around and allege otherwise when they, through Counsel, took part in the hearing of the Plaintiff's case and chose, by conduct and representation, not to call any evidence for the defence.
43. On the contention that there was an error on the face of the record, this Court notes that the application dated 1<sup>st</sup> February, 2022 did not seek to review the trial Court's orders or judgment. An allegation of an error on the face of the record is a ground for an application for review which is provided for under Section 80 of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya and Order 45 of the *Civil Procedure Rules*, 2010. Applications under such provisions are special in nature and are considered on settled legal principles which are different from the grounds and principles in the contemporary applications for setting aside judgments.
44. But, even if this Court is to consider the appeal in the context of the ground of an error on the face of the record, still the principles established by the Supreme Court in Application No. 8 of 2017, *Parliamentary Service Commission v Martin Nyaga Wambora & others* [2018] eKLR, were not satisfied in this matter.
45. The Apex Court quoted with approval the findings of the East Africa Court of Appeal in *Mbogo and another v Shah* [1968] EA and established the following principles: -

(31) Consequently, drawing from the case law above, particularly *Mbogo and Another v Shah*, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows: -

- i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.
- ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
- iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
- iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court,



how the Court erred in the exercise of its discretion or exercised it whimsically.

- v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
- vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
  - a. as a result, a wrong decision was arrived at; or
  - b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.

46. Earlier on, the Court of Appeal had added its voice on the subject in Civil Appeal No. 2111 of 1996, *National Bank of Kenya v Ndungu Njau* when it observed 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 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 proceeds on an incorrect expansion of the law....

47. This Court believes it has said enough to demonstrate that application was that resulted to this appeal was not one for review under Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*, 2010, but for the setting aside of the judgment under other provisions of the law. As such, the ground of an error on the face of the record fails.

48. The ground of an error on the face of the record, therefore, fails on both fronts. To the extent that the Appellants did not tender their defence, their conduct speaks against that, and, to the extent of the context of Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*, 2010, the same does not lie.

49. In the end, the above discussion, hence, settles the appeal against the Appellants.

#### **Disposition:**

50. Drawing from the foregoing, this Court hereby finds no merit on the appeal and makes the following orders: -

- a. The appeal is hereby dismissed.
- b. The Appellants shall bear the costs of the appeal.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**A. C. MRIMA**

**JUDGE**

Judgment delivered virtually and in the presence of: -



Mr. Nyamu, Counsel for the Appellants.

No appearance for Counsel for the Respondent.

Juma/Hellen – Court Assistants.

