



**Shah v Republic (Criminal Appeal E070 of 2021)  
[2024] KEHC 14565 (KLR) (18 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14565 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL APPEAL E070 OF 2021  
MW MUIGAI, J  
NOVEMBER 18, 2024**

**BETWEEN**

**PRASUL JAYANTILAL SHAH ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an application for the review of part of the judgment of  
the Honourable Justice M. Muigai delivered on 25.01.2024))*

**RULING**

**Background**

On 25/01/2024, this Court delivered judgment as follows;

1. In the upshot, this appeal partially succeeds and partially fails, in that the Appellant is acquitted on count iii of charge of Conspiracy to defraud due to lack of evidence.
2. In Count 1 the evidence on record is of the contested legal right /ownership of suit property L R No 1504/11 ( IR 85400) and the Trial Court relied on ELC 166/2011 judgment and decree which was upheld on appeal Court of Appeal 70 of 2018 delivered on 17/2/2023. Therefore, Count 1 is upheld.
3. This Court considers enforcement of ELC 166/2011 & Court of Appeal 70 of 2018 judgments and decrees sufficient in lieu of sentencing in Count 1as it would amount to double jeopardy; more so where the issue of ownership of the suit property remained hotly contested until it was finally settled in the above- mentioned matters.



## Notice Of Motion Application

4. Vide Notice of Motion Application dated 3<sup>rd</sup> April 2024 brought under Articles 22, 23, 159(2) (a), (b) & (e) 165 (6) and (7) of the Constitution of Kenya 2010 and all the other enabling provisions sought orders that;
  1. Spent
  2. That pending the hearing of this application interpartes, the court be pleased to stay the conviction of the appellant for the offence of forcible detainer
  3. That the court be pleased to vary and set aside the conviction of the appellant for the offence of forcible detainer contrary to section 91 of the penal code and substitute it with an acquittal
  4. That the court be pleased to make any other orders and directions as it deems fit
  5. That the cost of this application be provided for
5. The application was supported by the supporting affidavit sworn by Prasul Jayantilal Shah where he deponed that the application seeks partial review of the judgement of this court which confirmed his conviction in Criminal Case No 238 of 2019 of the offence of forcible detainer on account of gross and palpable errors apparent on the face record which have occasioned him a serious travesty of justice.
6. That the findings of the judgement are ex facie grossly erroneous since the documents were produced by him and form part of the record of the proceedings duly marked as defence exhibits
7. That the honourable court arrived at its decision without considering the ruling in Civil Application 64 And 65 Of 2018 *Megvel Cartons Limited Vs Diesel Care Limited & 2 Others* which was produced in the lower court and the sale agreement dated 19.07.2008 between Joseph Odero and Prasul Jayantilal Shah and on erroneous assumption that these documents were not produced in Mavoko CMCC No. 238 of 2019 yet they were produced.
8. That as at the date of the charge 1<sup>st</sup> April 2019, the ruling and orders of the court of appeal in Civil Application No 64 and 65 of 2018 *Megvel Cartons Limited* were in force and the same were presented to the Trial court and that he could not have been in illegal and forceful possession when he was in legal possession under an order of court of competent jurisdiction

## Respondent's Replying Affidavit

9. Via Replying Affidavit dated 8<sup>th</sup> may 2024, Martin Mwangera State Counsel averred that having scrutinized the judgement on appeal, the high court did not err whatsoever in upholding the conviction of the appellant on count 1 of Forcible detainer and that the applicant had not attached any evidence to the application demonstrating that the sale agreement was produced in Criminal Case 238 of 2019, that the court of appeal stay was issued to the judgement and decree of ELC 166 of 2011 and did not apply to criminal proceedings and that the appellant's issue of ownership was dealt with effectively in the High Court ELC 166 OF 2011 and Court Of Appeal Civil Appeal 70 OF 2018. That the appellant had not demonstrated any substantial injustice why the court should revise its decision. That the application lacks merit and should be dismissed entirely.
10. The matter was canvassed by way of written submissions



### **Applicants Written Submissions Dated 12.08.2024**

11. It was submitted that the court relied on two grounds to arrive uphold it's the conviction that is that the Trial court was not informed of the ruling of the court of appeal in civil application no 64 and 65 of 2018 which stayed the judgement and decision of ELC case 166 of 2011 and that Mr Joseph Odero who sold the property LR No 25064 to the applicant failed to produce the sale agreement between himself and the applicant before the trial court.
12. That these findings were erroneous since the documents were in fact produced in the proceedings in the trial court and duly marked as exhibits .Court of Appeal ruling in Civil Application No 64 and 65 of 2018 is exhibit DEXH 4 and DEXH 10 is the sale agreement dated 19.07.2008 produced by Jerry Odero. The court arrived at the decision without considering these two documents produced at the trial court and with the assumption that both documents were not produced.
13. Reliance was made to the case of *Johnson Kobia M'impwi V Director Of Public Prosecution Kenya* [2020] eKLR on review of decisions in criminal cases
14. The court was thus urged to review the portion of the judgement convicting the appellant and hereby substitute it with an acquittal

### **Respondent's Written Submission Dated 13.08.2024**

15. It was submitted that the state opposes the application. Reliance was placed on the case of *Chandrakant Joshibhai Patel V R* {2004} to buttress the point that an error stated to be apparent on the face of the record must be such as can be seen by one who runs and reads that is an obvious and patent mistake.
16. Reliance was made to the case of *National Bank of Kenya Ltd vs Ndungu Njau*[1997] on conditions for grant of review.
17. It was submitted that paragraph 128 presents an elaborate argument to counter the applicant's allegation hence the mistake or error on the face of the record cannot hold water.
18. It was further submitted that the applicant is asking the court on appeal of its own decision and reverse it. That the matters are for appeal rather than review which is limited in scope
19. It was their final issue that the remedy sought by the applicant for the court to review its own judgement does not have merit and prayed that the application be dismissed and court to uphold the conviction on Count 1

### **Analysis And Determination**

20. I have considered the material placed before me in this matter.
21. Order 45 rule 1(b) of the *Civil Procedure Rules*, 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. (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

22. The foregoing provisions are based on section 80 of the *Civil Procedure Act* Cap 21 Laws of Kenya which states 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.”

23. The Applicant seeks review of the Court’s judgment of 24/01/2024 which upheld the offence of Forcible detainer contrary to Section 91 of the *Penal Code* due to errors on the face of the record which this Court [ 1<sup>st</sup> Appellate Court] needs to revisit and correct and avoid the travesty of justice. The Applicant filed for review to set aside the conviction.

24. The grounds upon which the review is sought are;

This Court is alleged to have erred at Paragraph 128 of the judgment, in finding that the Trial Court was not informed of the Ruling of Court of Appeal Civil Application No 64 & 65 of 2018 *Megvel Cartons Limited vs Diesel Care Limited & 2 Others* which stayed the Judgment & Decree of ELC No 166 of 2011 *Diesel Care Limited vs Megvel Cartons Limited & 2 Other*

Also at Paragraph 132 & 135 of the Judgment, that Mr. Joseph Odero who sold property LR No 25064 to the Applicant failed to produce a Sale Agreement between himself & the Applicant before CMCC No 238 of 2019 Republic vs Prasul Jayantlal Shah yet reference was made to the Sale Agreement in the Record Of Appeal by the evidence/testimony of the Accused person Prasul Jayantlal Shah who produced the same as DMFI-4

The Court upheld the conviction on the basis that there was no Agreement for Sale between the Seller & Buyer over contested property and the fact that Criminal Proceedings went on despite stay of proceedings order granted by Court of Appeal.

25. This Court’s judgment reads in part as follows;

126. The ELC Court determined the issue of ownership vide Judgment of 26/1/2018 in ELC 166 OF 2011. Thereafter, the Appellant filed an appeal and stay of the orders in ELC 166 OF 2011 were granted pending hearing and determination of the appeal vide Civil Application 65 of 2018.

127. Therefore, at this juncture the Trial Court was within its rights to rely on the finding of ELC 166 of 2011 as the Court mandated to determine Land and Environment matters. Secondly, in the hierarchy of Courts, the Trial Court was bound by the decision of the ELC Court.

128. saI find the Trial Court acted legally and appropriately as at Pg 16 the Trial Court adopted the finding of ELC 166 of 2011 in determining the commission of the criminal offences. There is also no part of the proceedings and judgment of the Trial Court that confirms the Trial Court



was informed and/or presented with Ruling of Court of Appeal staying judgment of ELC 166 of 2011. The Trial Court judgment was on 29/10/2021 and Ruling on stay of execution of ELC Court was on 20/4/2018. Even then the Trial Court relied on ELC 166 of 2011 and awaited the outcome of the appeal by Court of Appeal as the said Ruling was to stay the judgment pending hearing and determination of the Appeal.

The Trial Court 's judgment of 29/10/2021 at Pg 16, the Trial Court found;

It is on record that the issue of ownership of this property has been canvassed in ELC 166 of 2011. Both parties presented their evidence and the Court determined the issue of who holds a valid title. The Court held that grant for LR No 25064 was declared null and void. As per the evidence adduced and on record, I have no doubt that the Complainant holds a valid and genuine title.

26. The Trial Court proceedings at Pg 45 the Applicant testified that after ELC 166/2011 proceeded the Ruling was against him he went on appeal and obtained a stay which remained in force since 2018 and he was charged in 2019. Various documents were produced and marked and produced as exhibits. The actual exhibits were not availed on appeal. This Court dealt only with what was physically availed. If the Sale Agreement was produced, the same was not availed to this Court. The Court of Appeal case on stay of ELC case was provided by the ODPP in this Court. Thus, the judgment referred to what was availed only and therefore there is no error on the face of the record.
27. The stay of execution in the Court of Appeal case pending appeal of ELC 166/2011 was not stay of criminal proceedings and until the appeal was heard and determined on merit the decision of ELC 166/2011 remained a valid and legal order of the Court and bound the Trial Court. Of importance the Appeal was heard and dismissed by Court of Appeal and ELC 166/2011 was upheld. A appeal to the Supreme Court was declined /dismissed. This Court's decision to uphold the conviction of 1<sup>st</sup> Count was in part as follows;
  130. In the criminal proceedings, the prosecution has to prove its case beyond reasonable doubt in Count 1 in the charge of forcible detainer one of the ingredients of the offence ie legal right and ownership of the land was hotly contested; it was one team's word against the other team notably personnel from Ministry of Lands. The matter rested on the forged document. Therefore, to the offence of Forcible detainer c/s 91 of the Penal Code; the Court thus agrees with the findings of the Trial Court in reliance of ELC 166/2011 judgment that the suit property belonged to the Complainant.
28. The issue complained of is the Court's reasoning and outcome of the Trial Court judgment, evaluation of facts as per Court record and application of the law to these facts and the findings thereof, these are matters to be considered on appeal.
29. In *National Bank Of Kenya Limited V Ndungu Njau* [1997] eKLR, the Court held;

“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. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”
30. . In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the



Respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise, we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.

### **Disposition**

1. Therefore, the application for review is dismissed conviction in Count 1 upheld.
2. I note from the Record on 25/01/2024 the Applicant sought leave to appeal and stay pending appeal which the Court sought formal application to be filed.
3. In light of these proceedings this Court grants stay of execution of this Court's orders of 25/01/2024 for 90 days hereof for filing appeal in the Court of Appeal.

**RULING DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT ON 18/11/2024 (VIRTUAL/ PHYSICAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**

In the presence of:

Mr. Obuya - For The Appellant

Ms Makena Odpp - For The Respondent

Geoffrey - Court Assistant

