



REPUBLIC OF KENYA



Ongombe & 2 others v Mingili (As Administrator of the Estate of Mingili Auma) & 2 others (Environmental and Land Originating Summons 2 of 2018) [2025] KEELC 113 (KLR) (21 January 2025) (Ruling)

Neutral citation: [2025] KEELC 113 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 2 OF 2018**

BN OLAO, J

JANUARY 21, 2025

BETWEEN

JACINTA AKUMU ONGOMBE 1ST PLAINTIFF

SEBASTIAN OKELLO WANGOMBE 2ND PLAINTIFF

GODFREY WANGOMBE 3RD PLAINTIFF

AND

CHRISPINUS ODHIAMBO MINGILI (AS ADMINISTRATOR OF THE ESTATE OF MINGILI AUMA) 1ST DEFENDANT

PETRONILA OKWERO AS TRUSTEE FOR JULIUS JUMA AND DENIS ODUORI ONYANGO 2ND DEFENDANT

DANIEL ONYANGO ODUORI 3RD DEFENDANT

RULING

1. The dispute between Jacinta Akumu Ongombe, Sebastian Okello Wangombe and Godfrey Wangombe (the 1st, 2nd and 3rd Plaintiffs respectively) over the land parcels No Marachi/elukongo/2942 and 2943 (the suit land) was determined vide my judgment dated 19th July 2023 against Chrispinus Odhiambo Mingili, Petronila Okwero and Daniel Onyango Oduori (the 1st, 2nd and 3rd Defendants respectively). An amended decree was subsequently issued on 27th September 2023 and costs were taxed and allowed in the sum of Kshs.145,485 on 5th February 2024.
2. The Defendants who were then represented by the firm of Shivachi Mutoka & Company Advocates were aggrieved by that judgment and filed a Notice of Appeal dated 23rd July 2023 and lodged herein on 31st July 2023.



3. Vide a consent order dated 9th October 2024 and signed both by the 3rd Defendant and the firm of Shivachi Mutoka & Company Advocates, the 3rd Defendant filed a Notice to Act in person.
4. And acting in person, the 3rd Defendant approached this Court by his Notice of Motion dated 9th October 2024 and premised under the provisions of Section 3 and 3A of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. He seeks the following orders:
 1. Spent
 2. That the proceedings and/or orders of this Honourable Court dated 27th September 2023 particularly on part of sharing the land as per the claim of the Plaintiffs and all consequential orders hereof made in favour of the Plaintiffs against me by this Honourable Court be reviewed, set aside and/or vacated.
 3. That leave be granted to the 3rd Defendant for the said sharing affecting my side of land be reviewed.
 4. That this Honourable Court do issue other and/or further orders as shall meet justice.
 5. That costs of this application be provided for.
5. The application is based on the grounds set out therein and is supported by the 3rd Defendant's affidavit of even date.
6. The gravamen of the application is that the 3rd Defendants land is Marachi/elukongo/2943 which borders the 2nd Defendant's land parcel No Marachi/elukongo/2942 and therefore, this Court should not have directed in its judgment that the Plaintiff's jumps over another parcel of land to lay claim to the land parcel No Marachi/elukongo/2943. That in real sense, the Plaintiffs claimed a portion of the land parcel No Marachi/elukongo/2942 as proved by the evidence of the Land Surveyor who visited the suit land. It is therefore in the interest of justice that the Court reviews its judgment because the Plaintiffs do not occupy any portion of the Defendant's land parcel No Marachi/elukongo/2943.
7. The following documents are annexed to the application:
 1. Notice to act in person filed by the 3rd Defendant.
 2. Surveyor's report and map showing the land parcels No Marachi/elukongo/2941, 2942 and 2943.
 3. Extracts of the judgment delivered on 19th July 2023.
 4. Copy of the amended decree.
8. When the application was placed before me on 14th October 2024, I directed that it be served upon the Plaintiffs within 7 days after which they would have 14 days to file and serve their response and submissions.
9. The record shows that the Plaintiffs neither filed their responses nor submissions to the application as directed. And although the record also shows that when the matter came up on 4th November 2024 before the Deputy Registrar to confirm compliance and whereas Mr Otieno holding brief for Mr Juma counsel for the Plaintiff informed the Deputy Registrar that Mr Juma had complied, I could not



trace the Plaintiffs' responses or Mr Juma's submissions. Indeed my Researcher Ms Azenga confirms in paragraph 6 of her draft ruling that:

- 6: "The Plaintiffs chose not to participate in this application because despite being served with the same as evidenced by the affidavit of service dated 18th October 2024 ..."

The application is therefore not opposed and only the 3rd Defendant filed submissions. That notwithstanding, this Court must consider the application in accordance with the law and relevant precedents.

10. The 3rd Defendant seeks the order that this Court reviews the judgment delivered on 19th July 2023 and the subsequent Decree dated 27th September 2023.
11. Section 80 of the *Civil Procedure Act* provides for the law on review of judgment and orders. It reads:

- 80: "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."

The procedure for review is set out under Order 45 Rule 1(1) of the Civil Procedure Rules 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."
- Emphasis mine.



It is clear from the above that a person seeking the remedy of review of a judgment or order must satisfy the following:

1. Show that there has been a discovery of new and important matter or evidence; or
2. Establish that there is some mistake or error apparent on the face of the record; or
3. Demonstrate any other sufficient reasons; and
4. Make the application without unreasonable delay.

The 3rd Defendant is acting in person and being a pro se litigant, it is not surprising that he has not identified which of the grounds set out in (1) to (3) above he seeks to rely on in this application. I must nonetheless consider his application doing the best I can.

12. The record shows that following this Court's judgment delivered on 19th July 2023, he promptly filed a Notice of Appeal dated 23rd July 2023 and lodged herein on 31st July 2023. Having filed a Notice of Appeal, it is obvious that the remedy of review is not available to the 3rd Defendant. Order 45 Rule 1(1) (a) of the Civil Procedure Rules is clear that the remedy of review is available where "no appeal has been preferred". In the case of [OTIENO RAGOT ADVOCATES -V- NATIONAL BANK OF KENYA LTD C.A. CIVIL APPEAL NO. 60 and 62 of 2017](#) [2020 eKLR], the Applicant had filed an application for review after lodging a Notice of Appeal. The Court stated as follows:

"Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time when the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed it would then pursue the appeal. It was gambling with the law and judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place. There can be no place for review once an intention to appeal has been intimated by filing a notice of appeal (see *Kamalakshi Amma -V- Karthayan* [2001] AIHC 2264)."

And in *Karani & 47 Others -v- Kijana & 2 Others* 1987 KLR 557, the Court held that:

"... once an appeal is taken, review is ousted and the matter to be remitted by review must merge in the appeal."

It is clear therefore that the 3rd Defendant having lodged a Notice of Appeal against the judgment delivered on 19th July 2023, he cannot again approach this Court seeking the remedy of review against the same judgment. For that reason alone, the application must fail.

13. However, that is not all. The judgment sought to be reviewed was delivered on 19th July 2023. This application is dated 9th October 2024 though the date when it was filed is not very legible from the margin of the application. Nonetheless, since the application is dated 9th October 2024, the earliest it could have been filed was on the same date. The judgment having been delivered on 19th July 2023, the application was filed some 16 months later. That delay is unreasonable and has not been explained by the 3rd Defendant in any way.
14. The application must therefore be dismissed.
15. With regard to costs, the Plaintiffs did not participate in the Motion as no response was filed. There shall be no order as to costs.



16. The up-shot of all the above is that the Notice of Motion dated 9th October 2024 is accordingly dismissed with no order as to costs.

BOAZ N. OLAO

JUDGE

21ST JANUARY 2025

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 21ST DAY OF JANUARY 2025.

BOAZ N. OLAO

JUDGE

21ST JANUARY 2025

