Joseph v M'iringo & another (Environment and Land Appeal E031 of 2024) [2025] KEELC 6262 (KLR) (25 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6262 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E031 OF 2024

JO MBOYA, J

SEPTEMBER 25, 2025

BETWEEN

ANDREW KOBIA JOSEPH .... APPELLANT

AND

MORRIS KIMATHI M'IRINGO .... 1ST RESPONDENT

RAEL KAAKA MURIUNGI .... 2ND RESPONDENT

(Being an appeal against the ruling of the senior resident magistrate's court at Maua – Hon. Muchiri – SRM) in Maua CM ELC NO. 9 OF 2019 delivered on 3rd April 2024)

JUDGMENT

1. The Appellant herein [who was the Plaintiff in the subordinate court] filed a Plaint dated 18th January 2019; and wherein same sought various reliefs. The reliefs sought at the foot of the Plaint are as hereunder:

    a. An order of Permanent injunction restraining the defendants, their agents, servants and or anyone acting on their behest from interfering with the plaintiff's peaceful occupation of parcel No. Igembe Ndoleli Athiru Ruujine/13892 which was excised from parcel numbers Athiru/Ruujine/Adjudication Section/1449 and Athiru Ruujine Ndoleli/3810.

    b. An order Compelling the Land Registrar Meru North to rectify the title deed of parcel No. Igembe Ndoleli Athiru Ruujine/13892 to read 0.60 acres and not 0.04 ha which is equivalent to 0.010 acres.

    c. Payment of Kshs.30,860 Only.

    d. Any other or better relief the court deems fit to grant.

    e. Costs of the suit.

2. The suit before the subordinate court was heard and disposed of vide Judgment delivered on 10th February 2023; and wherein the learned trial magistrate allowed the appellant's suit. However, the reliefs that were granted were at variance with the reliefs that had been sought by the appellant. For coherence, the learned trial magistrate granted the following reliefs:

    I. The DCI to investigate whether there was fraud involved in changing the position of the plaintiff's land on the ground and on the maps.

    II. The district land registrar, Meru and the subcounty surveyor to investigate and see whether the anomaly of the plaintiff's land on the ground and on the maps can be corrected.

3. The appellant was aggrieved by the judgment and the consequential decree. To this end, the appellant proceeded to and filed an application for review dated 17th January 2024. The said application was thereafter heard and disposed of vide ruling delivered on 3rd April 2024.

4. It is the said ruling on review which has now provoked the subject appeal.

5. The grounds highlighted at the foot of the memorandum of appeal dated 29th April 2024 are as hereunder;

    i. The learned magistrate erred in law and fact in holding that the appellant did not satisfy the threshold for review when in deed there were sufficient grounds for the same.

    ii. That the learned magistrate failed to appreciate that there was new evidence and/or material facts which was only available after the court's judgment yet the same was on the court record.

    iii. The learned magistrate erred in law and fact in restricting the grounds of review to correcting an error apparent on the fact of the record, whereas the discovery of new and important material evidence is another ground for review.

6. The appeal under reference came up for directions on various dates, resting with the 19th July 2025, whereupon the appellant intimated to the court that same shall canvass the appeal by way of oral submissions. To this end, the court proceeded to and issue directions, including scheduling the appeal for hearing on 16th September 2025.

7. When the appeal came up for hearing, the appellant who appeared in person, adopted the grounds contained at the foot of the memorandum of appeal. Furthermore, the appellant contended that the ruling by the learned magistrate was erroneous and has therefore deprived the appellant of the benefit of using the suit property.

8. In addition, the appellant submitted that the respondents herein have continued to interfere with the suit property and to destroy his crops. In this regard, the appellant implored the court to intervene and to set aside the ruling under reference.

9. The 2nd respondent, who also appears in person, opposed the appeal. According to the 2nd respondent, the appellant's suit in the lower court was fully heard and disposed of. Moreover, it was submitted that the ruling which is being appealed against is well grounded in so far as the appellant herein ought to have filed an appeal and not an application for review. In this regard, the 2nd respondent invited the court to find and hold that the appeal is devoid of merit[s].

10. Having reviewed the record of appeal and upon taking into consideration the oral submissions that were made on behalf of the respective parties; I come to the conclusion that the determination of the subject appeal turns on one key issue, namely; whether the learned trial magistrate erred in dismissing the application for review or otherwise.

11. Before venturing to interrogate and address the singular issue, it is imperative to highlight that what is before me is a first appeal. To this end, it suffices to underscore that this court is seized of the jurisdiction to review the evidence on record and to ascertain whether the factual and legal conclusions arrived at accord with the evidence and the law.

12. Furthermore, it is instructive to observe that this court is at liberty to arrive at an independent conclusion and, where appropriate, to depart from the conclusions and or findings of the trial court.

13. Nevertheless, it is important to underscore that even though the court is seized of the jurisdiction to depart from the factual and legal conclusions arrived at by the trial court, such departure can only be undertaken where it is shown that the findings/conclusions were arrived at on the basis of no evidence; were perverse to the evidence on record; were based on misapprehension of the evidence on record; or where it is shown that the trial court committed an error of principle which vitiates the findings under reference. Simply put, the first appellate court cannot depart from the findings and conclusions of the trial court at will; and for pleasure.

14. The jurisdictional remit of the 1st appellate court has been the subject of various pronouncements by the Court of Appeal. In the case of Kenya Urban Roads Authority & another v Belgo Holdings Limited (Civil Appeal E011 of 2021) [2025] KECA 764 (KLR) (9 May 2025) (Judgment) the court stated thus;

> 37. We have considered the appeal and this being a first appeal, we are under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember that we had no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. We have also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanour of witnesses. In a nutshell, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court, but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement. This position is anchored in section 78 of the Civil Procedure Act, which requires a first appellate court to re-evaluate, reassess and reanalyse the extracts of the record and draw its own conclusions. These provisions have been underscored in numerous decisions of the Superior Courts, among them Peters v Sunday Post Limited [1958] EA 424, where the predecessor to this Court expressed itself as follows:
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> > "Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law, an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with

> caution. If there is no evidence to support a particular conclusion (and this really is a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...

Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question... It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgment of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

15. Back to the issue for consideration. The appellant herein was aggrieved and dissatisfied with the judgment and the consequential decree issued by the trial court. In this respect, the appellant reverted back to the trial court and filed an application for review. The crux of the appellant's application for review was to the effect that the judgment which was rendered by the trial court issued orders which were neither final nor conclusive.

16. Furthermore, the appellant also contended that the judgment of the trial court left the matter hanging without substantive orders. In addition, the appellant also contended that the orders which were issued by the trial court were at variance with the pleadings and hence there was a need to review the decree

and issue orders which are substantive and final in view of the surveyor's report; and the reliefs sought in the plaint.

17. The application under reference was heard and disposed of vide ruling dated 3rd April 2024 and wherein the learned magistrate found and held that the appellant had neither established nor demonstrated the existence of an error or mistake apparent on the face of the record.

18. Furthermore, the learned magistrate also held that the issues being raised by the appellant could only be addressed vide an appeal against the judgment and not by way of review. In addition, the learned magistrate held that the application for review, which was filed by the appellant, was technically an invitation to have the magistrate sit on appeal on the decision of a court of concurrent jurisdiction.

19. Based on the foregoing observations, the learned magistrate proceeded to and held that the appellant had failed to satisfy the threshold for granting an order for review. In the premises, the magistrate proceeded to and dismissed the application.

20. I have reviewed the ruling by the learned magistrate and I beg to state that the learned trial magistrate correctly appreciated and applied the law as pertains to review. In addition, the exposition of the law at the foot of the Ruling is sound and solid.

21. For good measure, the issues that were raised by the appellant constituted an erroneous decision by the learned trial magistrate and which issues could not be corrected vide an application for review. Instructively, there is a distinction between an error and a mistake apparent on the face of the record; and an erroneous conclusion of the law. In respect of the former, an application for review is merited. However, in respect of the latter, the applicant is enjoined to file an appeal.

22. Additionally, I agree with the learned magistrate that the appellant herein was seeking to invite the learned magistrate to sit on appeal on the decision of a court of concurrent jurisdiction, namely; the learned trial magistrate, who rendered the Judgment. Such an endeavor is unacceptable in law. In this regard, the learned trial magistrate properly found and held that the application for review was misconceived.

23. The legal position underpinning the review has been addressed in various decisions. However, it suffices to cite the decision in the case of National Bank of Kenya vs Ndung'u Njau (1997) eKLR, where the Court of Appeal held as hereunder;

> 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.
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>> 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.
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>> 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.

24. Flowing from the foregoing analysis, I come to the conclusion that the appellant adopted a wrong approach in seeking to impugn the judgment of the learned trial magistrate. For good measure, the errors that were alluded to at the foot of the application for review were erroneous conclusions of the law; and thus the appellant ought to have filed an appeal.

25. Before concluding on this issue, it is instructive to reference the holding of the Court in the case of Francis Origo & another v Jacob Kumali Mungala [2005] KECA 356 (KLR).

26. For coherence, the court stated as hereunder;

> Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal, they were proceeding in the wrong direction. They have now come to a dead end.

27. The words captured in the excerpt [supra] apply with equal force to the matter beforehand. The moment the appellant filed the application for review, same missed the opportunity to remedy the erroneous Judgment and decree which was delivered by the trial court.

Final Disposition.

28. Having analyzed the singular issue, which was highlighted in the body of the Judgment, it must have become crystal clear that the appeal beforehand was not only misconceived, but legally untenable.

29. Same courts dismissal.

30. Consequently, and in the premises, the final orders that commend themselves to the court are as hereunder;

    i. The Appeal be and is hereby dismissed.

    ii. The Ruling of the learned magistrate dated 3rd April 2024 be and is hereby affirmed.

    iii. Each Party shall bear own costs of the appeal.

31. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 25TH DAY OF SEPTEMBER 2025.

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE

In the presence of:

Court Assistant Hussein

Andrew Kobia Joseph – Appellant in person

Rael Kaaka Muriungi – 2nd Respondent in person

No appearance for the 1st Respondent