

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

ELC APPEAL CASE NO. 6 OF 2023

**MILELE HOMES
LIMITED.....APPELLANT**

VERSUS

**MAMBOMOTO HOMES LIMITED.....
RESPONDENT**

***(Being an Appeal against the Ruling of Hon. I. M. Kahuya
delivered on 31st August 2022 in Kajiado ELC Case No.
E043 of 2022)***

JUDGEMENT

1. In her **Ruling dated 31st August 2022 in Kajiado ELC Case No. E043 of 2022**, Hon. Kahuya declined the Appellant's application to review her **Ruling dated 6th July 2022** and dismissed the Appellant's application dated 7th July 2022 with no orders as to costs.

2. Aggrieved by this decision, the Appellant filed a **Memorandum of Appeal dated 6th September 2022** seeking that it be set aside on the grounds that;

- i. The Learned trial Magistrate erred in law and in fact in her Ruling by determining the Respondent's case at an interlocutory stage leaving nothing for trial.***
- ii. The Learned trial Magistrate erred in law and in fact by failing to find that the Appellant was condemned unheard and the review application was meritorious.***
- iii. The Learned trial Magistrate erred in law and in fact by failing to appreciate that there was an error apparent on the face of record that threw the Appellant from the seat of justice.***
- iv. The Learned trial Magistrate erred in law and in fact by dismissing the Appellant's application dated 7th July 2022 which showed***

that she was biased in favour of the Respondent.

v. The Learned trial Magistrate erred in law and in fact by failing to comprehend the extensive damage her orders have on the Appellant, and thereby exercising her discretion wrongly and applied wrong principles.

3. The Appellant therefore sought that this Appeal be allowed, the Ruling delivered on 31st August 2022 be set aside, and the Application seeking the setting aside of the orders issued on 6th July 2022 be allowed together with costs of this Appeal.

4. This Appeal was canvassed by way of written submissions..

The Appellants' Submissions.

5. They are dated 15th August 2023. They raise three issues for determination;

i. Whether the Appellant was condemned unheard by the Trial Court.

ii. Whether the Appellant was a candidate worthy of Review Orders being granted.

iii. Whether the Appellant is entitled to the orders sought?

6. Counsel submitted that interlocutory orders are meant to preserve the substratum of the suit pending hearing and determination of the main suit and that the grant of interlocutory injunctions is not meant to occasion prejudice to any party.

That the aspect of the goods being seized if any, and the same being carted away is a factual allegation and the moment it was disputed by the Appellant, it behaved upon the party alleging such facts to supply evidence and the same considered by the trial court before any finding is made by the trial court. He has put forward the case of **Liabatari M'Mairanje & Others Vs. Blue Shield Insurance Co. Ltd CA No. 101 of 2000 (2005) 1 EA 280.**

7. It is further submitted that the court failed to take judicial notice of the bare fact that the suit premises was undergoing renovation works in order for the Respondent to venture into a

new line of business. It was also submitted that the courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law to ensure the ends of justice are met. Reliance was placed on the case of **Omulele & Tolo Advocates Vs Mount Holdings Ltd (2018) eKLR** which quoted with approval the case of **Branco Arabe Espanol Vs. Bank of Uganda (1999) 2 EA 22.**

That by granting final and compelling orders, the Appellant was driven off the seat of justice without being accorded a chance to present its case.

8. It is also submitted that mandatory injunctions ought to be granted in the clearest of cases. He has put forward the cases of **Lucy Wangui Gachara Vs Minudi Okemba Lore (2015) eKLR; Joseph Kaloki t/a Royal Family Assembly Vs. Nancy Atieno Ouma (2020) eKLR** where the court reaffirmed its decision in **Kenya Breweries Limited & Another Vs. Washington O. Okeyo (2002) eKLR.**

It is submitted that the Respondent did not establish any special circumstances to be entitled to the issuance of the mandatory

orders compelling the Appellant to release the goods and fixtures allegedly carted away before the main suit could be put down for formal hearing.

9. It is submitted that the basic structure for consideration in an application for review of a Judgement or Ruling is guided by the principles of discovery of a new and important matter or evidence, error apparent on the face of the record or any other sufficient reason. He has put forward the cases of **Muyodi Vs. Industrial & Commercial Development Corporation & Another (2006) 1EA 243; National Bank of Kenya Ltd Vs. Ndungu Njau, Cano 201 of 1996 (1997) eKLR; Zablou Mokua Vs. Solomon M. Choti & 3 Others (2016) eKLR.**

10. The Appellant also faults the trial court for granting the orders in the first instance based on mere averments without granting the parties a chance to make out their case. The Trial court ought to have reviewed its decision as the conditions for review had been met.

11. It is also submitted that the Trial court abused the exercise of discretion and exhibited biasness to which the Appellant is aggrieved. Reliance is placed on the case of **United India**

**Insurance Co. Ltd Vs. East African Underwriters (Kenya)
Ltd (1985) E.A**

It is submitted that the Trial court misdirected itself out in law in terms of special circumstances upon which mandatory orders may be issued at an interlocutory stage and misapprehended the facts as established by the parties in their pleadings. He prays that the orders be set aside.

The Respondent's submissions.

12. They are dated **29th September 2023**. They raise three issues for determination;

- i. Whether the Appellant was condemned unheard by the Trial Court.**
- ii. Whether the Appellant was a candidate worthy Review Orders being granted.**
- iii. Whether the Appellant is entitled to the Orders sought.**

13. Counsel submitted that the Appellant failed to demonstrate strong grounds that would warrant review orders from the trial court. The trial court properly exercised its discretion in

dismissing the said application. Reliance is placed on the cases of **Sarder Mohammed Vs. Kenya Breweries Limited (2014) eKLR; Republic Vs. County Assembly of Kisii Committee of Powers of Privileges & 4 Others Exparte Karen Nyamoita Magara (2020) eKLR ; Justin Masolo Nyakundi Vs. Attorney General & Another.**

It is also submitted that from the proceedings at the trial court the Appellant was accorded a fair hearing.

14. It is also submitted that the claim laid before this court by the Appellant falls outside the scope of what constitutes a mistake or an error apparent on the face of the record.

Reliance is placed on the cases of **Republic Vs. Advocates Disciplinary Tribunal Exparte Apollo Mboya (2019) eKLR; National Bank of Kenya Ltd Vs. Ndungu Njau CA No. 211 of 1996, (1997) eKLR; Muyodi Vs. Industrial and Commercial Development Corporation & Another (2006)1EA 243** where the Court of Appeal made reference to the case of **Nyamogo Vs. Nyamogo (2001) EA 174.**

15. It is also submitted that the appellant was granted a fair hearing at the Trial court and that the application for review

failed to meet the required standard hence its dismissal by the court. Reliance is applied on **Order 45 rule 1 of the Civil Procedure Rule** and the case of **Ajit Kumar Rath Vs. State of Orisa & Others**. He prays that the Appeal be found to lack merit and be dismissed.

Analysis and Determination.

16. I have considered the Record of Appeal, the ruling, the grounds of Appeal, the authorities cited as well as the parties' respective written submissions. Though the Appeal is mounted upon six grounds the same can be summarized as follows:

- i. Whether the Learned Trial Magistrate erred in law and in fact by failing to find that the Respondent's case was determined at an interlocutory stage leaving nothing for Trial by her ruling by allowing the injunction application.**
- ii. Whether the Learned Trial Magistrate erred in law and in fact by failing to find that the Appellant was condemned unheard and the Review Application was meritorious.**
- iii. Whether the Appeal is merited.**

iv. Who should bear costs of this Appeal?

17. This being a first Appeal this Court has a duty to re-analyse the facts and evidence tendered at the Lower Court and come up with its own determination. See **Kimani v Magua [2025] KECA 1383 (KLR)**.
18. Similarly in **South Nyanza Sugar Company Vs. Leonard O. Arera (2020) eKLR Mrima J** stated thus;
- “As the first Appellate court it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter (see the case of Selle & Another Vs. Associated Motor Boat Co. Ltd (1968) EA -123.”**
19. The dispute at hand began in 2022 when the Respondent (Plaintiff at the Lower Court) filed a suit **Kajiado CMC ELC Case No. E043 of 2022** through the **Plaint** dated 28th April 2022.
20. Through its Director, Lucy Kamau, the Respondent claimed that they entered a Lease agreement dated 13th December 2017 with the Appellant for Kajiado/Kaputiei North/1007 where she set up a baby shop.

21. On 21st April 2022, the Respondent was illegally evicted from the premises by the Appellant and goods together with fixtures worth Kshs. 1,300,000 carried away by the Appellant as distress for rent. This was done without issuance of the 14 days proclamation notice. The Respondent claims that at the time the Appellant levied for distress, they had sought indulgence with a proposition of a repayment model for the outstanding two months rent arrears of Kshs. 315,500. They therefore sought for the following orders as summarised herein below;

i. General damages

ii. A permanent injunction restraining the Appellant from dealing in any way with the goods and fixtures carted away from business property Kajiado/Kaputiei North/1007

iii. The release of the goods and fixtures taken away by the Appellant

iv. And costs of the suit.

22. The Complaint was filed under Certificate of Urgency and accompanied by an application which sought the following orders as summarised here below:

- i. Spent***
- ii. A temporary injunction restraining the Defendant (herein the Appellant) from selling, disposing, or in any way dealing with the goods and fixtures carted away from business property Kajiado/Kaputiei North/1007 pending the hearing of the application and the suit.***
- iii. The Defendant (herein the Appellant) be compelled to release goods and fixtures carted away from business property Kajiado/Kaputiei North/1007 pending the hearing of the application and the suit.***
- iv. Any other orders the Court deems fit and just.***

23. The Record of Appeal does not have the Appellant's response. However, in the submissions filed, the Appellant contested the allegation of carting away goods stating that the Respondent had on several occasions failed to make prompt payment of rent, had issued issuing bouncing cheques and the Appellant had accommodated them. However, the rent arrears had increased to Kshs. 1,300,000 which necessitated the

Appellant to find another tenant but it neither evicted the Respondent nor carried away their goods.

24. This application was determined and the Learned Trial Magistrate Hon. I. Kahuya in her Ruling dated 6th July 2022. The orders issued on 15th July 2022 reads;

i. A temporary injunction be and is hereby issued restraining the Defendant/Respondent, their agents, servants or any person acting through them from selling, disposing or whatsoever dealing with the goods and fixtures carted away from the Plaintiff's business premises on property Kajiado/Kaputiei North/1007 pending inter parte hearing of this suit.

ii. The Defendant/Respondent be compelled to release all the goods and fixtures taken away from the Plaintiff's business premises on property Kajiado/Kaputiei North/1007 pending

inter parte hearing and determination of this suit.

iii. Costs of this application be in the cause.

iv. ...

“... I believe it is too early at this stage to determine who between the parties had a prima facie case with a probability of success...”

25. Dissatisfied with this Ruling, the Appellant filed an **Application dated 7th July 2022** seeking stay of execution and/or enforcement of the orders and that the Lower Court do review, vary, set aside or discharge the said orders.

26. The grounds were that the orders issued disposed of the main suit at an interlocutory stage without granting them an opportunity to be heard. That the trial was yet to commence and the Ruling should be reviewed.

27. The Respondent contested the application and sought for dismissal on grounds that a review under **Order 45 of the Civil Procedure Rules** was limited to correcting errors, mistakes or omissions but the Appellant was inviting Court to sit on its own appeal.

28. The Learned Trial Magistrate in her **Ruling** dated **31st August 2022** which is the subject of this Appeal, held:

“... I do not find any valid reason to warrant a review of the orders given on 6th July 2022... The Defendant should consider other avenues of dealing with the matter which includes ... lodging an Appeal against the Ruling delivered on 6th July 2022... Subsequently, the Notice of Motion dated 8th July 2022 stands dismissed with no orders as to costs...”

29. The Appellant in his Application asked the Lower Court to review the ruling delivered on 6th July 2022 on grounds that the learned Trial Magistrate issued orders that determined the entire suit at the interlocutory stage. The learned Trial Magistrate however declined to review the said ruling on grounds that a review only serves to cure an error apparent on the face of the record. Did the learned Magistrate err in this finding?

30. **Order 45 Rule 2(1) of the Civil Procedure Rules** provides that: ***“An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence***

as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.”

31. The Court of Appeal in the case of **Multi purpose Co-operative Society Ltd v Serser & 3 others (2023) KECA (KLR) held:**

“... It is trite that not all cases qualify for review. The grounds for review are narrower in scope compared to an appeal. The main grounds for review are; discovery of new and important matter of evidence; mistake or error apparent on the face of the record; and any other sufficient reason and most importantly, the application has to be made without unreasonable delay...”

32. In the aforementioned case of **Multipurpose Co-operative Society Ltd v Serser (Supra)** the Court of Appeal outlined an error apparent on the face of the record as:

“.....in the case of National Bank of Kenya Ltd Vs. Ndungu Njau [1997]eKLR this Court stated thus:

“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.”

33. In the instant case, the Appellant claims that the learned Trial Magistrate erred in determining the suit at an interlocutory stage and the same ought to be reviewed and different orders given. From the above cited Court of Appeal cases, and other authorities, an error apparent is an error that is glaring and does not require analysis into the issues or a different finding. A re-appraisal of the evidence to reach a different determination does

not qualify as an error apparent because that would be an exercise for an Appellate jurisdiction.

34. I am of the view that the Learned Trial Magistrate exercised her discretion properly by ordering that the Respondent's seized goods and fixtures be returned. The lease had not expired. It was not clear if the Respondent had been given the Notice to terminate lease as stated in the Lease Agreement.

In my view this was a clear case where mandatory injunction could be granted. The trial court in arriving at its decision took time to evaluate the evidence that was presented before it by both parties before making the orders.

35. I am satisfied that the Learned Trial Magistrate considered all the evidence and arguments of the parties and applied the relevant law properly before reaching her conclusion. I find no basis to interfere with the said ruling.

36. In conclusion, the Appeal is found to be without merit and the same is dismissed with costs to the Respondent.

Dated, Signed and Delivered virtually at Kajiado this 9th day of October 2025.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Mr. Gachie Mwanza for the Appellant.

Mr. Wanjala for the Respondent.

Peter – Court Assistant.

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