

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT KILGORIS
ELCLA E016 OF 2024

JOHN MOMBOSHI
APPELLANT

VERSUS

KINGASUNYE ENOLE KIMEEI..... **1ST**
RESPONDENT

SIMION LESALOI OLICHO.....2ND****
RESPONDENT

JUDGMENT

1. John Momboshi the Appellant herein being aggrieved by the Ruling of Hon. M.I.G Moranga Chief Magistrate delivered on 11th June 2024 in Kilgoris CMEL NO. 35/2020 appealed to this court seeking that: -
 - (i) His appeal be allowed.
 - (ii) The judgment of the Chief Magistrate (Hon. M.I.G Moranga) be reversed.
 - (iii) The Appellant’s claim set out in the Plaint be allowed with costs.
2. It is important to clarify that the Appeal herein relates to the Ruling in relation to a review application the review sought was in respect of the judgment dated 17.03.2022.
3. The Appellant penned 9 grounds of Appeal as set out hereunder; -
 - (i) That the Learned Magistrate erred in entering judgment against the Appellant and dismissing the Appellants suit and also the application for review of judgment.
 - (ii) That the Learned Magistrate failed to consider the fact that the main suit was undefended and also the application for review of judgment was unopposed.
 - (iii) That the Learned Magistrate erred in holding and finding that the Appellant did not present sufficient evidence in support of his case.

- (iv) That the Learned Magistrate failed to consider the fact that the appellant is a purchaser for value and was given possession in dispute and has fully developed the portion.
 - (v) That the Learned Magistrate failed to consider the fact that all the other aspects of her judgment were favourable to the appellant. The application for review would cure the ownership issue which the appellant did but still the application was dismissed.
 - (vi) That the Learned Magistrate did not consider the evidence presented by the appellant at trial.
 - (vii) That the Learned Magistrate failed to cumulatively and/or exhaustively evaluate the entire evidence on record and hence failed to capture and decipher the salient issues and/or features of the suit before Him (sic) and thus arrived at an erroneous conclusion, contrary to a contradiction to the evidence adduced.
 - (viii) That the Learned Magistrate erred by stating the appellant did not produce ownership documents yet in application for review, the appellant had attached a copy of certificate of official search.
 - (ix) That the Learned Magistrate was biased and maliciously dismissed the appellant's main case together with the application for review without any proper ground/reason.
4. Upon directions being issued culminating into the admission of the Appeal, the court directed the appeal to be canvassed by way of written submissions which the Appellant filed.
5. It appears from the grounds 1 and 2 of Appeal, the suit was undefended before the trial court and was before this court too.

Appellant's Submission

6. The Appellant did not frame any issues for determination but generally submitted on the grounds of Appeal and the merits thereof.

7. It is the Appellant's submission that whereas the Judgment by the trial court had found that proof of ownership by the 1st Respondent was not proven, in the application for review an official search for Transmara/Oldanyati/3 was annexed showing 1st Respondent as the registered owner, hence proof of ownership was availed.
8. The Appellant further submits that since the suit and the subsequent review application were not defended, he discharged the burden of proof and the application for review ought to have succeeded. The Applicant further submits that he did not take 12 years to file after judgement to file the application for review.
9. The Appellant further relied on Article 159(a) of the constitution of Kenya 2010.
10. On the strength of the above the Appellant submits that the court to allow the Appeal.
11. The common thread in this Appeal and the suit and application for review before the trial court is that the Appeal as well as the suit and the application for review were undefended and/or unopposed.
12. The issues for determination in this case are; -
 - (i) Whether or not the Appeal is merited? In deciding this issue, the court shall also decide whether or not the review application before the trial court was merited.
 - (ii) What reliefs ought to issue.
 - (iii) Who bears the costs?

Analysis and Determination

13. It is important for litigants to note that even in undefended suits and/or unopposed applications, the burden to prove their cases vide evidence, remains with the persons so wishing the court to enter judgment in their favour based on the facts pleaded; as was held in the decision in the case of Karugi & 3 Others Vs. Kabiya & 3 Others (1983) eKLR, where the court held, ***“the burden on a plaintiff to prove his case remains the same throughout the***

case even thought the burden may become easier to discharge where the matter is not validly defended, the burden of proof is not way lessened because this is heard by way of formal proof..”

14. The above holding in the Karugi case essentially disposes ground 2 of the grounds of Appeal. The Onus placed under Section 107 of the Evidence Act always requires a party seeking judgment based on a set of facts to prove the said facts by way of evidence.
15. The court is aware of its duties herein as a first appellate court, as was stated in the case of Selle & Another Vs. Associated Motor Boat, **“An appeal to this court from a trial by the High Court is by way of retrial by and the principles upon which this court is such an appeal are well settle. Briefly put they are that this court must reconsider the evidence evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.....”**
16. I have reviewed the Record of Appeal, the gravamen of the Appellant’s case as plaintiff before the trial court is pleaded at paragraphs 5-11 of the Plaint appearing at pages 7 and 8 of the Record of Appeal.
17. In a nutshell, it was the plaintiff’s case before the trial court, that he purchased from the 1st Defendant/Respondent herein 5.5 acres, in Transmara/Oldonyati/3 and was given vacant possession developed the parcel although he now faced eviction as subdivision and transfer to him having not been effected by the 1st Defendant/Respondent.
18. In its judgment, the trial court found the Agreements for sale exhibited by the Plaintiff/Appellant to be valid, but did not enter judgment in his favour as there was no proof of the suit property belonged to the 1st Defendant/Respondent.
19. The Appellant/Plaintiff filed a review application in 2024 against the said judgment that was delivered in 2022 and annexed a copy of an official search dated 15th March 2024 showing the 1st Defendant/Respondent as the owner of suit parcel, vide the Ruling dated 11.06.2024 the review

application through unopposed was dismissed, as the court made a finding that the official search was always available to the Appellant as Plaintiff/Applicant even at the time of filing the suit hence it was not a discovery of new evidence that was the basis of the application, that said Ruling provoked this Appeal.

20. The issue arising will thus be; was the official search, discovery of new evidence that was not available at the time of filing suit; or was it merely a second bite at litigation aimed to seal loopholes exposed in the Judgment?

21. In her Ruling the Learned Trial Magistrate observed that the official search that was sought to be placed before court by the plaintiff in the application had been available all along to the Plaintiff as the Plaintiff had filed a caution on the suit property on 10.08.2020, and was aware that the Defendant was the registered owner and hence the official search on Transmara/Oldonyati/3 was not discovery of new evidence, not previously available.

22. Indeed, the copy of the official search exhibited in the application for review reveals a caution filed on 10.08.2020. The Plaint before the trial court is dated 29.10.2020.

It follows that the plaintiff filed the caution against the title of Transmara/Oldonyati/3 before filing suit, he thus knew the registered owner of the suit property, and this was not discovery of new evidence. The ownership details of the Defendant were well within the Plaintiff's/Appellant's knowledge before filing suit and an attempt to introduce the same after judgment through the review application was essentially an attempt to seal the loophole exposed in the judgment and certainly not discovery of new evidence.

23. The finding by the Learned Trial Magistrate and as confirmed by this court is in tandem with the general law as espoused by the Court of Appeal its decision in the case of Unigroup Transporters Limited Vs. Mwasawe (Civil Appeal No. E088 of 2021 (2024) KECA567) where the court observed *inter alia*; -

“Applications on this ground must be treated with great caution. Review cannot be sought to supplement the evidence or to introduce new evidence. The Applicant must show that he could not have produced the evidence in spite

of due diligence; that he had no knowledge of existence of the evidence or that he had been deprived of the evidence at the time of the trial. It is so easy to the party who lost his case to see what the weak part of his case was and the temptation to lay and procure evidence which will strengthen that part and put a different complexion upon that part of the case must be strong. The Rule that permits a new trial to be granted on account of the discovery of new evidence, has therefore been fenced round with many limitations and the party asking for a new trial must show that there was no remissness on his part in adducing all possible evidence at the trial...Review cannot be used to supplement evidence or to produce new evidence."

24. From the above, the Learned Magistrate did not err in finding that the evidence was available all along and thus she reached the correct legal position, in dismissing the application.
25. The other grounds of Appeal and submissions by the Appellant are meant to seek sympathy of the court to the plight of the Appellant and the same have no merits.
26. It follows therefrom that the application for review before the trial court was not merited and equally the Appeal before court has no merits.
27. Having found that the Appeal has no merits, the inevitable but painful conclusion is that the Appeal does not succeed as it is hereby dismissed.
28. Since the Appeal was undefended there will be no order as to costs.

Dated at Kilgoris this 9th day of October, 2025.

Hon. M.N Mwanyale
Judge

In the presence of

CA - Emmanuel/Sylvia/Sandra

Mr. Kiprotich h/b for Ms. Pion for the Appellant