Wanjala v Director, Basakwa Multipurpose & 5 others (Environment and Land Appeal E019 of 2024) [2025] KEELC 7160 (KLR) (15 October 2025) (Judgment)

Neutral citation: [2025] KEELC 7160 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL E019 OF 2024

CK NZILI, J

OCTOBER 15, 2025

BETWEEN

ALBERT WANJALA ..... APPELLANT

AND

THE DIRECTOR, BASAKWA MULTIPURPOSE ..... 1ST RESPONDENT

NEDDY MAMIKASA MUTACHE ..... 2ND RESPONDENT

TOM SHEBELA ..... 3RD RESPONDENT

JOASH WEKOYALA ..... 4TH RESPONDENT

SIMON OKAKI ..... 5TH RESPONDENT

PETER WANYONYI NAPWORI ..... 6TH RESPONDENT

(An Appeal originating from the Ruling of S.N. MAKILA (PM) delivered on 31/07/2024 in Kitale MCELC No. 95 of 2007)

JUDGMENT

1. What is before the court is a memorandum of appeal dated 31/7/2024. The appellant challenges the ruling of the lower court, which dismissed his application dated 16/5/2020, for review of an earlier order dated 20/3/2024, directing the County Surveyor Trans Nzoia to survey his land and hive off one (1) acre in favour of the respondents. The appellant had also sought a stay of execution of the order made on 8/5/2024.

2. The grounds are that the trial court:

    1. Failed to find serious errors apparent on the face of the record.

2. Failed to find that the execution of the decree issued on 19/3/2009 was caught up by time limitation.

3. He was neither a party nor a director of the 1st respondent to be able to satisfy the decree.

4. He was discriminated against, despite an order dated 19/1/2022, requiring him and five other persons to make a refund of Kshs. 200,000/= to the 2nd respondent, which orders he had complied with.

(5) Acted without or in excess of jurisdiction.

3. The appellant supports the grounds through written submissions dated 15/8/2025. It is the appellant's submission that as of 13/3/2009, when the decree was passed, he was neither party to the suit, nor a member or director of the society, hence capable of granting the 2nd respondent a share of the suit land or refund her their claimed money by 30/6/2007.

4. The appellant submits that he merely came into the suit as an interested party, only to be ordered by an order dated 19/1/2022 to refund Kshs. 33,333/= to the 2nd respondent, which he obligated. With this background, the appellant isolates five issues for the court's determination.

5. On whether the trial court acted in excess of its jurisdiction by enforcing a time-barred decree, it is submitted that as per Bosire Ogero -vs- Royal Media Services [2015] eKLR, the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore, where a claim is statute-barred, a court has no jurisdiction to entertain it under Section 4(4) and 7 of the *Limitation of Actions Act*, on recovery of land, and execution of a decree, after 12 years. Reliance is placed on Auma -vs- Khadula Civil Appeal E061 of 2024 [2024] KEHC 11934 [KLR].

6. The appellant submits that the trial court erred in adopting the decree dated 13/3/2009 as an order of the court and ordering the Directors of Basakwa Co-operative to show the 2nd respondent her plot or refund the money.

7. The appellant submits that, without reviewing or setting aside the decree, on 9/4/2025, the trial court directed the appellant and five others to refund Kshs. 33,333/= each to the 2nd respondent when the decree was already stale.

8. As to locus standi, the appellant submits that the 2nd respondent was claiming the share from the society due to her late husband, yet before the court, she had to have a grant of letters of administration for the estate, to do so. Reliance is placed on Law Society of Kenya -vs- Commissioner of Land & Others, Nakuru Civil Case No. 464 of 2000, Alfred Njau & Others -vs- City Council of Nairobi [1982] KAR 229, Julian Adoyo Ongunga & Another -vs- Francis Kiberenge Bondeva (Suing as the administrator of the estate of Fanuel Evans Amudavi (deceased) [2016] eKLR, Estate of James Kiarie Muiruri (deceased), Nairobi HSC No. 2413 of 2003, and Eddah Wangui & Another -vs- Sacilia Magwi Kivuti (deceased) substituted with Ribereta Ngai [2021] eKLR.

9. On whether the satisfaction of the order issued on 21/5/2024 could be effected without reviewing the orders on record made on 9/4/2025 and the decree dated 13/3/21009, the appellant guided by Karanja -vs- Murigi, Civil Appeal 68 of 2019 [2025] KECA 517 [KLR], submits that court may review an order based on mistake or error apparent on the face of the record, which is self-evident as held in Francis Origo & Another -vs- Jacob Kumali Mungala [2003] eKLR and in Nyamogo & Nyamogo Advocates -vs- Kago [2001] eKLR.

10. In this case, it is submitted that the orders made on 9/4/2025 for payment of a refund were at variance with the one issued on 20/3/2024 to hive off one (1) acre of the appellant's land in favour of the 2nd

respondent, hence to enforce both, would cause him suffer double jeopardy, especially on an order made when he was not a party to the suit.

11. The appellant submits that an interested party, under Rule 2, *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 Trusted Society of Human Rights -vs- Mumo Matemu & Others [2014] eKLR, should not be subjected to satisfy a decree, since he was not a judgment debtor when the decree was passed, or a party to the suit. Guided by Rai & 3 others -vs- Rai & 4 others [2014] KESC 31 (KLR), the appellant submits that his appeal be allowed with costs.

12. The role of the first appellate court is to re-evaluate, re-assess, and re-analyse the extracts of the lower court records, then determine whether the conclusion reached by the court below can stand, or otherwise. See Abok James Odera T/A J Odera & Associates -vs- J.P. Machira T/A Machira & Co. Advocates [2013] eKLR.

13. The suit at the lower court started on 23/10/2008, when the trial court was asked, and actually adopted an elders' award. The court adopted the same on 13/3/2009 as a judgment of the court. The effect was that the claimant was to get a share of the land from the Directors of Basakwa Co-operative, in the alternative, the directors were to refund her money as at 30/6/2007. A right of appeal was granted to any aggrieved party. As of 8/9/2019, the decree had not been satisfied; hence, warrants of arrest were issued against the directors, one of whom was the appellant herein, who was brought to court on 8/5/2019, but was set free since he denied being a director.

14. By an order dated 15/7/2019, one of the directors of the society was committed to a civil jail for not honouring the decree dated 19/3/2009. To confirm the directors, an order was made on 17/10/2019, for the CR 12 to be availed. A letter was obtained by the decree holder from the Co-operative Tribunal dated 25/2/202o, showing the appellant Benedict Namaswa and Akaro Wamalwa as directors.

15. The record shows that on 31/3/2021, one Albert Lukwesi attended court, and the court, being satisfied that he was a director, ordered him to fully implement the decree within 120 days. Come 28/7/2021, the appellant herein joined the company and was asked to exercise the option of refunding Kshs. 300,200/=, since they had no land. Compliance was scheduled for 22/9/2021, when the decree holder agreed to that option. The court gave the appellant and the five others until 13/4/2022, or else they would be committed to civil jail.

16. When the matter came up, the court was told about a notice of motion dated 4/4/2022. The decree holder was allowed to respond thereto, so she said that she had not yet been paid the money, as of 12/10/2022. The said application was dismissed for non-attendance on 7/12/2022.

17. Another application dated 16/12/2023 was filed and placed for hearing on 1/3/2023. The notice to show cause against the judgment debtors was stayed. Come 1/3/2023, parties opted to go for mediation. A mention date was given for 15/11/2023, to adopt the same. A mediation report was placed for adoption on 20/3/2024.

18. The court made an order adopting the mediation agreement duly signed by the parties on 8/5/2024, agreeing on hiving off one (1) acre in favour of the judgment creditor. It then became an order of the court.

19. The defendant was directed to vacate the land and the OCS Saboti Police Station to oversee the surrender of the land to the judgment creditor. In a strange turn of events, by an application dated 16/5/2024, the appellant sought for review or setting aside of the order dated 20/3/2024, and a stay of the order dated 8/5/2024. The reasons as contained in the affidavit in support sworn on 16/5/2024 were inter alia, that there was an error apparent on the face of the record, he was not a party to the suit

or an official of the society and that the mediation agreement, he purportedly signed off giving his land was not signed by him, he was not among the people to refund the monies, he was likely to be evicted from his land, the mediator is being misused, he is not a party to the suit and the orders referred to are prejudicial to him.

20. In a replying affidavit sworn on 16/12/2024, the decree holder said that on 8/5/2024, he witnessed the appellant append his signature to the mediation agreement, agreeing to give her 0.87 acres upon receiving Kshs. 33,333/=, and that the survey process took place, confirming the 0.87 acres, and therefore, the appellant was now changing his mind too late, with a view to frustrating her and endlessly delaying the finalization of the matter, which has been on for 17 years in delaying justice.

21. In a supplementary affidavit dated 29/12/2024, the appellant deposed that he paid Kshs. 33,333/= through Mpesa as ordered on 19/1/2022, which she was not refunded to her as alleged in her affidavit. The appellant denied agreeing to cede his land as alleged by the judgment creditor, by signing the mediation agreement, whose cumulative effect was that she would retain both the money he had paid to her and the land.

22. Having set the record in this matter since the inception to the present, the court outrightly notes that the grounds of appeal relied upon by the appellant were not contained in the application dated 16/5/2024, leading to the impugned ruling. In Kenya Hotels Ltd -vs- Oriental Commercial Bank Ltd [2018] eKLR, the court cited Thomas Openda -vs- Peter Martin Ahn [1984] KECA 25 (KLR), that grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised and successfully made, issues at the trial. The court held that a new point which had not been raised at the trial cannot be taken on appeal unless with leave of the court.

23. In this appeal, the appellant, for instance, submits on being a member of Likesi Multipurpose Co-operative Society and not a director of Basakwa Multipurpose Society. The 1st respondent, evidently, denies being a party to the decree dated 13/3/2009. That issue from the court record, in general and in particular, in the application dated 16/5/2024, which was supported by two affidavits, was not raised, canvassed, and addressed before the trial court.

24. From the court record, it is not true that the appellant came into the suit as an interested party. It is only his lawyer who filed a notice of appointment dated 16/5/2024, and he described him as an interested party. The court record shows that the appellant has been featured prominently in the matter earlier than the date of instructing a lawyer to represent him. He became a party in the suit when he appeared and bound himself to honour the decree. The appellant even went ahead to honour part of the decree. How else would he then have paid Kshs. 33,333/= via Mpesa to the subject creditor, if he was not a director of the 1st respondent? The doctrine of estoppel prevents the appellant from reneging on his words or conduct at the appellate stage.

25. As to the jurisdiction of the court and an alleged stale decree, again, this issue was not raised, canvassed, and determined at the trial court. The court has set out the history of the matter up to and including the referral of the issue for mediation. The mediation agreement was adopted, signed, and executed before the trial court in the presence of the parties. The appellant did not raise any objection to the adoption, signature, or the impossibility of implementing the same at the earliest opportunity.

26. Parties, from the court record, went to an extent of visiting the locus in quo in the presence of the County Land Surveyor: up to that stage, the appellant had not objected that the decree was stale and the court lacked jurisdiction. The same applied when the appellant sought for stay and setting aside of the decree.

27. On locus standi, the same case applies. The issue was not raised, canvassed, or determined at the lower court. The appellant did not raise the capacity of the 2nd respondent to receive monies as a nominee of the deceased husband when he paid the Kshs. 33,333/= to her.

28. Section 39 of the *Co-operative Societies Act* allows for a nominee of a deceased member to receive the shares or interests of a deceased person. If the appellant was disputing the 2nd respondent's capacity and his directorship, the easiest thing would have been to go to the Co-operative Tribunal, which is the right forum to hear and determine the issue.

29. As to the satisfaction of the order of 21/5/2024 before reviewing the orders of 9/4/2025, again, the issue was not included in the grounds of appeal, but only through written submissions.

30. Needless to say, the court records show that initially, it is the appellant and other respondents who told the trial court that since they had no land to give, they should be allowed to instead refund the claimant's money in place of the land. It is on record that the trial court, after the 2nd respondent opted for the same, gave the judgment debtor time to comply. The notice to show cause was extracted and served upon the judgment debtors, including the appellant. When the appellant appeared before the trial court severally, he did concede to the payments and actually complied by paying his share of Kshs. 33,333/=, without raising any objection that he was not a party to the decree or a member or official of the 1st respondent. A party cannot blow hot and cold, approbate and reprobate at the same time. See Evans -vs- Bartlam 1937 2 ALLER 649.

31. As to whether the trial court should have set aside the mediation agreement, the application before the court was not brought pursuant to Rule 39(3) of the Civil Procedure (Court Annexed Mediation Rules, 2022). The same can only arise where there was misconduct, fraud, or mistake at the time of execution of the agreement. Evidence of such nature was not tendered before the trial court.

32. From the court record, there was no mistake as to the status of the subject land and whether the decree or mediation settlement agreement was capable of being enforced. An error apparent on the face of the record stares one in the face with reasonably no two opinions about it, as held in Nyamogo & Nyamogo Advocates -vs- Kago (supra). A mistake or error, as held in National Bank Kenya -vs- Ndungu Njau Civil Appeal No. 211 of 1996, must be self-evident and require no elaborate argument to establish.

33. In my considered view, the trial court and the parties, up to the mediation settlement agreement and after, had explored all the available options to bring the long-drawn dispute to a close. Courts exist to do justice to the parties by resolving disputes within the law. The trial court cannot be faulted for finding no error or mistake apparent on the face of the record.

34. The court record shows that through an application dated 5/7/2021, the appellant had formally sought to join the suit alongside Tom Shebela, Joash Wekoyala, Simon Okaki, Peter Napwori, and Charles Chuma. In the supporting affidavit sworn by him on 5/7/2021, he admitted that he was the vice chairman of the 1st respondent in 1989 and that Lukesi Multipurpose Co-operative Society Ltd was a cooperative of nine co-operatives.

35. In paragraph 7 of the affidavit, the appellant admitted that he was directed on 31/3/2021 to fully implement the decree within 120 days, and since the proposed defendants were the current officials, there was a need to join them for the just and final determination of the matter. This led to an order dated 19/1/2022 to pay the money instead. After the judgment debtors failed to raise the money, they sought the permission of the trial court to resort to the other option of surrendering the one acre. The agreement dated 8/5/2024 between the 2nd respondent and the appellant is clear that upon hiving off

the one (1) acre, the appellant was to be refunded the Kshs. 33,333/=. It cannot, therefore, be true that the 2nd respondent was eventually going to retain both the money and the land.

36. The upshot is I find no errors, both in law and in facts, in the ruling of 16/5/2024. The appeal is dismissed with costs.

37. Orders accordingly.

RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 15TH DAY OF OCTOBER 2025.

HON. C.K. NZILI

JUDGE, ELC KITALE.

In the presence of:

Court Assistant - Dennis

No appearance.