

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
CIVIL APPEAL NO E001 OF 2024

JANE MAINA
APPELLANT

VERSUS

CATHERINE NEKESA MALABA (suing as the legal and personal
representative of the late EDWARD TALE
NABANGI)RESPONDENT

**(Being an appeal from the ruling and order of Hon. W.K.
Onkunya (PM) delivered at Kimilili PM Courts on
30/12/2024 in ELC Case Number 41 of 2019).**

JUDGMENT.

Introduction.

1. Vide a memorandum of appeal dated 12/01/2025, Jane Maina-the Appellant herein was the Defendant before the trial court (herein referred to as “the former suit”)while CATHERINE NEKESA MALABA (suing as the legal and personal representative of the late EDWARD TALE NABANGI)-the Respondent herein was the Plaintiff.

2. By way of background, the Respondent sued the Appellant in the former suit vide an amended plaint dated 09/10/2023 where she averred that she was the owner of land parcel no. Kimilili/Kamakuywa/2277 and 2278. The appellant filed a statement of defence dated 23/09/2019 wherein he denied the Plaintiffs claim and stated that she purchased various plots from Edward Tale Nabangi

3. The Appellant filed an application dated 09/12/2024 seeking for the following orders;

a) That service of this application be dispensed with in the 1st instance.

b) That it pleases the honourable court to review, vary, withhold and or suspend orders pending inter-parties hearing of this application.

c) That the said orders be set aside and or vacated in its entirety.

d) Costs of this application be provided for.

4. The application was premised on grounds inter alia that the orders were obtained without disclosure of material facts of the dispute, that the said application was not served and that the orders refer to a different land parcel no. Kimilili/Kamukuywa 2277 which is closed and 2278 which belongs to one Hassan Juma. The application was supported by the affidavit of the applicant of even date.

5. The application was canvassed by way of written submissions. In determination of the said application, the trial magistrate found that it lacked merit and dismissed the same with costs.

The Appeal.

6. The following seven (7) grounds of appeal have been preferred:

- a) The Learned Magistrate erred in law and fact in failing to afford a hearing to the Appellant, who was acting in person, as regards the right to prosecute her application for review dated 9/12/2024 either orally or by way of written submissions.**
- b) The Learned Magistrate erred in law and fact in holding that the Appellant was duly served with all Court Process, Notices, submissions prior to the ex-parte hearing that culminated into the Judgement delivered on the 3/7/2024.**
- c) The Learned Magistrate erred in law in entertaining the Claim by the Respondent as to the ground position, location and boundaries in respect of Kimilili/Kamukuywa 2277 and 2278 allegedly owned by the Respondent on one hand and Kimilili/Kamukuywa 5310 and 2957 on the other owned by the Appellant, when such JURISDICTION was reserved for the Land Registrar as provided for under section 18 and 19 of the Land Registration Act.**
- d) The Learned Magistrate erred in law and fact in failing to find and hold that the suit had abated on 30/7/2021 following the demise of the original Plaintiff on the 29/7/2020. Further proceedings were a nullity in law 5. The Learned Magistrate erred in law and fact in failing to find and hold that Kimilili/Kamukuywa 2278 did not belong to the**

Respondent, but HASSAN JUMA WAMALAW who was not a party in the suit.

e) The Learned Magistrate erred in law and fact in failing to find and hold that Kimilili/Kamukuywa 2277 did not belong to the Respondent, but ELIJAH SIMIYU IBRAHIM MUKHWANA who was not a party in the suit.

f) The Learned Magistrate erred in law and fact in failing to find and hold that Kimilili/Kamukuywa 2277 that belonged to ELIJAH SIMIYU IBRAHIM MUKHWANA no longer existed on the ground, having been subdivided on 20/1/2005 into four (4) different plots viz; Kimilili/Kamukuywa 1500,1501,1502 and 1503.

g) The Learned Magistrate erred in law and fact in issuing injunction and eviction orders in respect of properties, that did not belong to the Respondent, did not exist and above all when their proprietors were not parties before the court.

7. The Appellant prayed for the following orders;

a) This appeal be and is hereby allowed.

b) The Ruling and resultant Order of Ruling and Order of HON. W.K. ONKUNYA Principal Magistrate delivered at Kimilili PM Courts on 30/12/2024 in ELC Case Number 21 of 2019 be and is hereby set aside.

c) The application dated 9/12/2024 by the Appellant in Kimilili PM Courts in ELC Case Number 21 of 2019 be and is hereby allowed with Costs.

d)The costs of this Appeal be and are hereby awarded to the Appellant.

8. The Appeal was agreed to be canvassed by way of written submissions.

Appellants submissions.

9. The Appellant in her submissions seemed to canvass his substantive suit and did not make reference to the grounds of appeal enumerated in the memorandum of appeal or orders sought in the application whose ruling is subject of this appeal. He discussed the ownership issue of the subject parcels of land, the jurisdiction to determine the application and that the suit had abated.

Respondents submissions.

10. The Respondent filed submissions dated 12/08/2025 where she submitted that the record of appeal has no certified copy of order the Appellant is appealing of. It was further submitted that the application dated 9/12/2024 for review, was incompetent and abuse of court process as the same was filed by Appellant in person when she was represented by the firm of G.M. Maengwe & Co. Advocate. The Respondent went on to respond to the issue of jurisdiction to grant injunction, abatement of the suit and ownership of the subject parcels of land as was raised by the Appellant. It was further submitted that the application as drafted was not proper as it did not address issues of review of the trial courts judgment. Reliance was placed in the case of

Aribam Tuleshwar Sharma vs Ariban Pishak Sharma (1979) 45CC 389 1979(11) and Cherop vs Bowen (Civil case E009 OF 2022) (2024) KEHC 10425 KLR where it was stated that the requirements for orders for review had not been met.

Analysis and determination.

11. I have duly considered the record of appeal before this Court together with the submissions of learned counsel. In my view, this appeal based on seven (7) grounds is challenging the ruling of the trial magistrate for dismissing the Appellant's application may conveniently be determined by in one singular issue of whether the trial court erred in its order dismissing the said application

12. Before, I proceed to discuss the merits or otherwise of the appeal, I shall venture briefly into the background of the suit before the trial court. The Respondent at the time Edward Tale Nabangi filed a Complaint dated 30/08/2019 and the Appellant entered appearance and filed a statement of defence dated 23/09/2019. Before the suit was heard, the Appellant filed an application dated 16/12/2019 which the record does not indicate was determined. Thereafter, the Respondent filed an application dated 05/08/2021 to substitute Edward Tale Nabangi with Catherine Nekesa Malaba which was allowed.

13. The Appellant filed a Notice of preliminary objection which was dismissed for lack of merit. The Appellant further sought to amend her defence and despite being granted leave none seems

to have been filed. The matter was later set down for hearing and proceeded for hearing on 15/05/2024 in the absence of the Appellant who was served but did not attend. The court entered judgment on 03/07/2024 where it allowed the Respondents claim in its entirety. The Appellant proceeded to file an application dated 12/11/2024 which was dismissed and again filed the application dated 09/12/2024 which ruling is subject of this appeal.

14. The Appellant in his application sought to have the judgment delivered on 03/07/2024 reviewed, varied, vacated and set aside in its entirety.

15. The grounds of appeal as presented do not in any way relate to the ruling which is the subject of the present appeal. A close scrutiny of the record reveals that the Appellant's grounds are directed at the findings of the trial court in its judgment delivered on 03/07/2024, and not at the impugned ruling which is the proper subject of challenge herein. This amounts to a deliberate and improper attempt by the Appellant to reopen or re-litigate matters that had already been determined at the trial, under the guise of an appeal against the ruling. Such an approach is not only procedurally irregular but also an abuse of the appellate process.

16. That said, the only semblance of an arguable ground discernible is ground no. 1, wherein the Appellant alleges that she was not accorded an opportunity to prosecute her application. However, the record of proceedings clearly

demonstrates otherwise. On 11/12/2024, the court directed the Appellant to serve the application upon the Respondent. Subsequently, on 18/12/2024, the Respondent duly confirmed having filed both a replying affidavit and submissions in opposition to the application. The Appellant was, in turn, granted leave of 14 days to file and serve a further affidavit and submissions prior to the delivery of the ruling. It is therefore evident that the Appellant was not denied the right to be heard, as adequate opportunity was accorded by the court to ventilate her case.

17. It is also worth noting that the application in question was one for review. The governing laws and principles on review, as set out under **Order 45 of the Civil Procedure Rules** and **Section 80 of the Civil Procedure Act** and as consistently expounded in judicial precedent, were properly identified and applied by the trial court. The Appellant, however, failed to satisfy the requisite legal threshold for review, namely the discovery of new and important matter, an error apparent on the face of the record, or any other sufficient reason. Instead, as borne out by the record and as alluded to above, the Appellant merely sought to re-litigate her case in line with the position taken in her defence before the trial court. This was a clear misapprehension of the scope and purpose of review proceedings, which cannot serve as a substitute for an appeal.

18. In light of the above, it is apparent that the grounds of appeal, save for the first, are misplaced and incapable of

supporting the present appeal. Even ground no. 1, when tested against the record, collapses for want of factual and legal foundation. Accordingly, the appeal is devoid of merit and the same is hereby dismissed with costs to the Respondent.

19. It is so ordered.

DATED DELIVERED and **SIGNED** at **BUNGOMA** this 6th day of November, 2025.

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HON.E.C CHERONO
ELC JUDGE

In the presence of;

1. Mr. Wattangah for the Respondent.
2. Appellant/Adocate-absent.
3. Bett C/A.