

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ELC L. APPEAL CASE NO. E028 OF 2024

JOHN OUMA

MITALO.....APPELLANT/APPLICANT

VERSUS

JOSEPH OKELLO OKELLO.....1ST

RESPONDENT

JUDGMENT

1. **JOHN OUMA MITALO**, the appellant herein being aggrieved by the Ruling and orders of 31st July, 2024, delivered by Hon. J. P. Nandi (SPM) in Bondo PM ELC Cause No. E038 of 2022 preferred this appeal and sought that the appeal be allowed and that the application dated 3rd July 2024 be allowed in the following terms.

The applicant brought the present application seeking the following reliefs; -

- (i) That leave be and is hereby granted to the firm of Lugano & Achura Advocates to come on record on behalf of the defendant in place of the firm of Odongo Awino & Co. Advocates.
- (ii) That leave be and is hereby granted to the firm of Kowino & Co. Advocates to come on record on behalf

of the plaintiff in place of the firm of Owenga Ombuya & Co. Advocates.

(iii) That the Judgment of the Court delivered on **19th day of December 2023** in **Bondo PM ELC Case No. E038** of **2022** is hereby set aside for a retrial of the entire suit.

2. The appellant through his Advocates Messrs Lugano & Achura Advocates penned 5 grounds of appeal in his memorandum of appeal dated 22.8.2024.

The grounds of appeal as here follows; -

(i) That the Honourable learned trial Magistrate erred in both law and fact in not finding that the appellant's application dated 3rd July 2024 as being merited.

(ii) That the learned trial Magistrate erred in both law and fact in not finding that a litigant has a free choice to representation.

(iii) That the learned trial Magistrate erred in both law and fact in by failing to take into account that the parties had recorded a consent to allow the Appellant's application dated 3rd July 2024.

(iv) That the learned trial Magistrate erred in law and in fact by applying the wrong principles in making her **(sic)** Judgment contrary to decisions and jurisprudence over the same.

3. On the strength of the above the Appellant sought for reliefs and orders set out at paragraph 1 of this judgment.
4. Upon admission of the Appeal the court gave directions for its disposal by way of written submissions which are summarised as here follows: -

THE APPELLANTS SUBMISSIONS

5. The Appellant framed and submitted on two issues for determination to wit (i) whether the judgment delivered on 19th December 2023 in **Bondo PM ELC Case No. E038 of 2022** should be set aside for a retrial of the entire suit, (ii) whether the appeal herein should be allowed with each party to bear its own costs.
6. On issue number 1, The Appellant submits that the basis for seeking a retrial of **Bondo PM ELC Case No. E038 of 2022** is because his previous Advocates never presented key evidence that had been furnished to him by the Appellant, including a demarcation report, matters of Land tribunal done in 1980, judgment for L/C 143, subdivision notes and various demarcation reports for the subject property, letter from the village elder in respect of the status and ownership of the suit property.
7. Further the previous Advocate failed to take witness statements of the appellants witnesses.

8. The Appellant submits that the failure by the previous Advocate to present the evidence and cites the decision in the case of **Belada Mura & 6 others vs Amos Wainaina 1978 KLR,**
9. On the strength of the above submissions the Appellant beseeched the court to allow the appeal.

THE APPELLANTS SUBMISSIONS

10. The Respondent through the firm of Kowinoh & Co. Advocates framed and submitted on the same issue as framed by the Appellants Advocates Messrs. Lugano & Achura Advocates.
11. The Respondents submissions seems to be in tandem with the Appellants submission and in 'essence the Respondent agrees with the Appellant that the application before Court ought to have been allowed and the judgment to be set aside, but each party to bear its own costs.

ISSUES FOR DETERMINTION.

12. Having analysed the record of appeal and the submissions of the parties as well as considered the law, the court frames the following as issues for submission;
 - (i) Whether or not the appeal is merited? In In deciding this the court shall consider the nature of

the application dated 3rd July 2024 and whether the same was merited?

(ii) What reliefs ought to issue?

(iii) Who bears the cost of the appeal?

ANALYSIS AND DETERMINATION

13. The Application by the way of the Notice of Motion was brought under Section 3A of the Civil procedure Act at it sought primarily the setting aside of the judgment of the court delivered on 19th December 2023, and order for retrial of the entire suit.
14. This application was dismissed vide the ruling delivered on 31st July 2024. The court in dismissing the application held that once it had delivered its judgment, a merit judgment as was in the case, the court had no residual power to set aside the said judgment as it was factious officio.
15. The learned Magistrate further observed that although the application dated 3rd July of 2024 was presented as a setting aside application, the same in essence was a Review application.
16. Aggrieved by the ruling, the appellant filed the present appeal and the grounds of appeal as set out earlier in this judgment.

17. The question now to be answered is whether the application dated 3rd July 2024 was merited.
18. In order to determine the above issue, the court shall exercise its duties as a first Appellate Court, to duties to re-analyse the evidence, re-evaluate and arrive its own conclusion as was stated in the case of **Selle and another vs Associated motor Boat Limited Co. (EA.123)**.
19. The gravamen of the application dated 3/7/2024 as can be gained from the grounds in support is inter alia,“(i) that the previous advocates for the defendant did not furnish the court with crucial documentation in support of the defendants case, which the defendant humbly feels if the same was presented the court, would have given a different outcome. (ii) That the defendant had lodged an appeal over the same matter but was advised that a retrial will be the best way to go”.
20. Essentially the Appellant is seeking a retrial so as to produce documents and evidence that their previous Advocates had been furnished with but did not present in court.

21. The Court of Appeal in its decision in the case of **Unigroup Transporters Limited vs Mwasawe Civil Appeal No. E088 of 2021 (2024) KECA 667** in respect of an application for review, observed interalia that “Application on this ground must be treated with caution. Review cannot be sought to supplement one 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 the existence of the evidence or that he had been deprived of the evidence at the time of trial.
22. Let me say 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 or 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.”
23. Even though the above decision was in relation to a review application, the same applies to the application

that was before the learned trial Magistrate by parity of reasoning.

24. The Court thus finds that the attempt to re-open the case to produce evidence that was already available was not justifiable and the application was not merited, this was the same conclusion that the learned Magistrate equally reached.
25. It follows therefore having found that the application before the trial court was merited, then the learned trial Magistrate reached the correct conclusion and further that there were no merits in the grounds of Appeal as presented to the court, thus in answer to issue No. 1, the court finds that the appeal is not merited.
26. On issue number 2, the Appellant having not demonstrated merits in this Appeal, suffers the fate of having the appeal dismissed even though the respondent was essentially not opposed to the Appeal.
27. On costs both parties submitted strongly that each party ought to bear its own costs, and the court makes no order as to costs.
28. The upshot is that the Appeal herein is dismissed with no orders as to costs.

DATED at SIAYA this 30th Day of January 2026

HON. JUSTICE A. E. DENA

JUDGE

30/1/2026

**Judgement delivered virtually through Microsoft Teams
Video Conferencing Platform in the Presence of:**

Lugano for appellant

N/A for Respondent

Court assistant: Ishmael Orwa

ORIGINAL