



**Ntabo & another v Chweya (Environment and Land Appeal
E023 of 2023) [2025] KEELC 5725 (KLR) (29 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5725 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL E023 OF 2023**

M SILA, J

JULY 29, 2025

BETWEEN

DAVID NTABO 1ST APPELLANT

CHARLES MWENZI NGANGI 2ND APPELLANT

AND

ALFRED MATOYA CHWEYA RESPONDENT

*(Being an appeal from the ruling of Hon. C.A Ocharo, Senior Principal Magistrate,
delivered on 5 December 2023 in the suit Kisii CMCCEL No. 96 of 2018)*

JUDGMENT

(Respondent having sued appellants for eviction; respondent having purchased the suit land from the mother of the appellants; appellants claiming that their mother did not sell the land in question to the respondent; suit heard culminating in a judgment in favour of the respondent; appellants filing an appeal; appellants subsequently filing an application for review on basis that the person who demarcated the land and testified as a surveyor was actually not a surveyor; application for review dismissed on basis that the issue of whether he was a surveyor could have been canvassed at the hearing; appellants filing a second application for review on the basis that the person who testified as surveyor has been convicted of falsely pretending to be a surveyor; application dismissed on basis that it is res judicata; appellants filing appeal against that ruling; court of opinion that the remedy of review was not available to the appellants as they had already exercised their right to appeal; moreover, the application was res judicata as a first application had been dismissed; appeal dismissed)

1. The respondent herein commenced two separate suits against each appellant in the superior Environment and Land Court at Kisii. The first case, registered as Kisii ELC No. 100 of 2015 was against Ogega Ngangi also known as David Ntabo, the 1st appellant, and was filed on 12 March 2015.



The second case was registered as Kisii ELC No. 340 of 2015 against Charles Mwenzi Ngangi, the 2nd appellant, and was filed on 8 July 2015. The two appellants are brothers and sons of one Maria Ngangi Gwako. Maria owned the land parcel Wanjare/Bokeire/1467. She sold part of it to the respondent and the respondent proceeded to obtain a title reading Wanjare/Bokeire/5541. In his suits against the appellants, the respondent complained that the appellants had interfered with his land and he wished to have them permanently restrained from the land. In a very brief defence, the 1st appellant pleaded that the respondent bought land from his mother measuring 45 x 145 feet and that what he bought is well demarcated on the ground. He denied interfering with it. My perusal of the court record does not reveal to me any defence filed by Charles Mwenzi Ngangi, the 2nd appellant herein. The two cases were transferred to the Magistrates' Court by Hon. Justice Mutungi on 11 April 2018. Upon transfer, they were consolidated into one suit, Kisii CMCC No. 96 of 2018, with the 2nd appellant cited as 1st defendant and the 1st appellant as the 2nd defendant.

2. The case was heard, culminating in a judgment delivered on 10 September 2019. In his judgment, the trial court found that it was not in dispute that some land was sold to the respondent but what was disputed was the location on the ground of what was actually sold. He found that the sale agreement did not indicate what was being sold only stating that it is land measuring 60 x 160 feet. He found that the appellants had filed no counterclaim nor pleaded any particulars of fraud and/or forgery. Part of the evidence taken was that of the seller, and the court found it at variance with the evidence of the appellants. The court found that she testified that she only intended to sell and denied entering into a sale agreement with the respondent, but this was in conflict with the evidence of the appellants who conceded that there was a sale but contested the space sold. He also found the contention by the seller that the respondent intended to buy land at the hind and not the front to be unsupported by any evidence. In any event he held that a title had already issued to the respondent. He found that he could not cancel it there being no prayer for cancellation of title. He held that nothing was presented by the appellants to prove that the title is unlawful or was fraudulently acquired. He ordered them to give vacant possession in 45 days.
3. Aggrieved by the judgment, the appellants filed an appeal to this court being Kisii ELCA No. 25 of 2019. Despite the pendency of the appeal, on 5 August 2020, through an application dated 4 August 2020, the appellants applied for review of the judgment on the grounds that one of the witnesses of the respondent, a Mr. Evans Mose Maosa, who had testified that he is a surveyor, was actually not a surveyor and had been charged in Kisii Criminal Case No. 111/2020 for the offence of falsely pretending to be a surveyor contrary to Section 37 (b) of the *Survey Act*, Cap 299. It was contended that this was new evidence that called for a review of the judgment. That application was opposed partly on the reason that there was already an appeal pending. This application for review was dismissed in a ruling delivered on 27 October 2020. The court reasoned that the issue of the professional qualification of the witness could not be said to be new evidence since the appellants had a chance to take the witness to task on his qualifications.
4. Undeterred, on 5 September 2023, through a motion dated 4 September 2023, the appellants filed another application for review. The application was based on the ground that Mr. Evans Mose Maosa was found guilty of falsely pretending to be a surveyor as charged in Kisii Criminal Case No. 111 of 2020 vide a judgment delivered on 31 August 2023. The application was opposed on the grounds that the application is res judicata and further that the appellants had a pending appeal, being the appeal Kisii ELCA No. 25 of 2019. A preliminary objection was filed on the same grounds and the court directed parties to file their submissions on it. In a ruling delivered on 5 December 2023, the court upheld the preliminary objection. She agreed with the respondent that the application was res judicata and further that the applicants had already exercised their right of appeal and could not therefore seek review. The trial Magistrate found the application to be a total abuse of the process of court.



5. Aggrieved by this ruling, the appellants filed this appeal on the grounds that the preliminary objection raised contentious issues of fact as opposed to pure points of law; that the second application for review raised different issues from the first one; that *res judicata* was not satisfied; that the trial court failed to consider the appellants' submissions; and that the ruling was made with undue regard to technicalities.
6. In the course of the appeal, the 1st appellant, David Ntabo, withdrew from the appeal. The 2nd appellant, Charles Ngangi however prosecuted the appeal, acting in person. In his submissions he stated that the trial Magistrate did not consider all the evidence especially that of one Britinus Ongangi who had been given the responsibility to sell the land by his mother. He further submitted that the surveyor was arrested, charged and convicted, and he was the one who prepared the mutation form and the title deed of the respondent. He submitted that his mother was illiterate and documents that she was not aware of were being taken to her to sign while in hospital.
7. On his part, Mr. Ombachi, learned counsel for the respondent, saw no issue with the ruling. He submitted that the appellants had already launched the appeal Kisii ELCA No. 25 of 2019 and an earlier motion for review, that dated 4 August 2020.
8. I have considered all the above. First, I need to inform the 2nd appellant that what I have before me is not an appeal against the judgment itself, but an appeal against the ruling which dismissed the second application for review. I cannot therefore go into assessing the evidence that was presented at trial. This second application for review was dismissed on two grounds, first that the same was *res judicata*, and secondly, that there was already a pending appeal. It was not disputed before the trial court that there was a pending appeal against the judgment of 10 September 2019. Even within the hearing of this appeal, the fact of that appeal was not contested. It is the law that one cannot file an application for review and appeal at the same time. This is well captured in Section 80 of the *Civil Procedure Act*, Cap 21, Laws of Kenya, which provides as follows :
 80. Any person who considers himself aggrieved –
 - (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
9. It is clear from the foregoing that the avenue for review is only available to the person who has not preferred an appeal. In other words, you cannot be entertained on an application for review when you have filed an appeal. The court was right in proceeding to dismiss the application for review on the basis that the appellants had a pending appeal against the whole judgment. They could not maintain the two proceedings at the same time. It was never said that the appeal had been withdrawn prior to the application for review being filed and therefore the filing of the application for review while there was a pending appeal was an abuse of the court process.
10. Apart from the foregoing, I am also persuaded that the trial court was correct in rejecting the second application for review for being *res judicata*. There had already been a first application for review and it was raising the same issue that was raised in the second application i.e whether the person who testified on behalf of the respondent and was a qualified surveyor. In the first application for review, the court was of opinion that the issue about his professional qualifications could not be a new issue to support an application for review based on discovery of new evidence, the reasoning being that his qualifications could have been put to test when he testified. The fact of conviction was not the basis upon which the application for review was dismissed. It was dismissed on the reasoning that the



issue of his qualifications was not new evidence and could have been tested at cross-examination. That reasoning could only change on an appeal against that ruling but not through a second application for review. The application was clearly res judicata. It was raising the same ground for review a second time.

11. Apart from all the above, I even wonder why the 2nd appellant would feel aggrieved for he never filed any defence to the respondent's suit.
12. For the above reasons, it is clear that I find no merit in this appeal by the 2nd appellant and it is hereby dismissed with costs. For avoidance of doubt it is the 2nd appellant to pay the costs of this appeal as the 1st appellant withdrew from it.
13. Judgment accordingly.

DATED AND DELIVERED THIS 29 DAY OF JULY 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

2nd appellant – acting in person

Mr. Ombachi for the respondent

Court Assistant – Michael Oyuko

