



REPUBLIC OF KENYA



KENYA LAW
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**Okero v Onchoke (Civil Appeal 143 of 2020)
[2026] KECA 346 (KLR) (27 February 2026) (Judgment)**

Neutral citation: [2026] KECA 346 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 143 OF 2020
MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA
FEBRUARY 27, 2026**

BETWEEN

HARON OBONYO OKERO APPELLANT

AND

VINCENT MATARA ONCHOKE RESPONDENT

*(Being an appeal from the judgment and decree of the Environment & Land court
at Kisii, (Onyango, J) dated 23rd April, 2020 in E.L.C APPEAL NO. 24 OF 2019)*

JUDGMENT

1. Apparently Haron Obonyo Okero, “the appellant”, filed two appeals in respect of the same judgment and decree, being this appeal as well as Civil Appeal No E070 of 2020. This came out during the plenary hearing of this appeal. We accordingly directed that civil appeal number E070 of 2020 be subsumed into this appeal and this judgment apply mutatis mutandis to the other appeal as well.
2. This is a second appeal arising from a land dispute between the appellant, and Vincent Matara Onchoke, “the respondent”. The dispute originated in the Chief Magistrate’s Court at Kisii where the appellant by way of a plaint sued the respondent claiming that he had entered into a land sale agreement with the respondent for the purchase of all that piece or parcel of land known as L.R. No. Central Kitutu/Darajambili/625 “the suit property”. He alleged that he paid the full purchase price of Kshs.2,600,000/=. However he later discovered that the respondent’s title to the suit property was not genuine but fraudulent and thus incapable of passing good title to him. In the suit, the appellant sought a refund of the purchase price together with damages for the breach of the sale agreement.
3. The respondent in his statement of defence denied fraud attributed to him by the appellant, stating that he had genuinely sold and transferred the suit property to the appellant who went ahead and obtained a certificate of title in respect of the suit property. He averred that if deregistration occurred



- subsequently, liability lay with the Land Registrar and not him. He therefore prayed for the dismissal of the suit.
4. Following a full hearing, in which the appellant and his witness testified, but not the respondent, the trial Court, found that the appellant had failed to prove fraud or his claim to the required standard and dismissed the suit with costs.
 5. Dissatisfied, the appellant filed an application pursuant to Order 45 of the Civil Procedure Rules, seeking a review and setting aside of the judgment and decree on the grounds that the trial court had failed to consider the pleaded fraud, failed to recognize and appreciate new evidence pointed out in the application; and error apparent on the face of the record, wrongly held that the court was functus officio. The trial court in its ruling dismissed the application with costs to the respondent, holding that the issues raised were matters best left for an appeal and not review, and that the application was incompetent and an abuse of the court process.
 6. Still aggrieved, the appellant lodged an appeal in the Environment and Land Court at Kisii,” the ELC”, on grounds that the trial court erred in dismissing the application for review, failed to appreciate the provisions of Order 45 of the Civil Procedure Rules, failed to recognize new evidence and error apparent on the face of the record, wrongly held the court was functus officio, and failed to exercise judicial discretion properly.
 7. The appellant argued that he was an innocent purchaser for value and that documents presented by the respondent were fraudulent. He relied on a certificate of official search and a letter from the Land Registrar, which he claimed were new evidence showing that the respondent’s title was not genuine.
 8. The respondent countered the appellant’s by stating that they were fit for appeal, not review, and that the alleged new evidence was neither new nor unavailable as at the time of trial.
 9. The ELC upon considering the appeal held that the trial court had indeed considered the issue of fraud, and found that the appellant had not proved it. The alleged new evidence, including the certificate of search and the Land Registrar’s letter, were available before the suit was filed and therefore did not qualify as new and important evidence. That the appellant’s application essentially sought a re-evaluation of evidence, which was the province of an appellate court and not for an application for review. The court emphasized that the power of review is narrow and cannot be used as an appeal in disguise. On that account, it dismissed the appeal with costs to the respondent.
 10. Dissatisfied with the ELC’s judgment and decree, the appellant is now before this Court, on a second and perhaps last appeal on grounds that the ELC erred in law by failing: to re-evaluate the evidence tendered before the trial court as required; to appreciate that the appellant’s claim before the trial court was for a refund of the purchase price; to appreciate that at the time of filing the application for review the appellant had discovered that the original title documents were not genuine; to adhere to the principles of natural justice, and finally, by failing to appreciate that the effect of the decision was to cause the appellant to lose the purchase price paid for the sale of a non-existing suit property. The appellant thus prayed that the appeal be allowed and the judgment and decree of the ELC be set aside.
 11. The appeal was canvassed by way of written submissions with limited oral highlights. When called out, Mr. Nyambati, learned counsel appeared for the appellant, whilst, Dr. Zablon Mokua, holding brief for Mr. C. Okenye learned counsel appeared for the respondent.
 12. Counsel for the appellant relied on Peter Waweru Maina v Thuku Mugiria [1983] KECA 117 KLR, Kenya Breweries Ltd v Godfrey Odongo [2010] eKLR, and Stanley N. Muriithi & Another v Bernard Munene Ithiga [2016] KECA 821 (KLR), to argue that the ELC failed to appreciate the nature of the appellant’s claim, which was for a refund of money paid for a non- existent suit property, and instead



- focused narrowly on the question of fraud. He contended that the trial court failed to determine the issue of refund, which was an error apparent on the face of the record, and that the ELC failed to correct this error. He submitted that the respondent never denied receiving the purchase price.
13. He argued that the principle of *nemo dat quod non habet* applied, since the respondent could not pass good title to the appellant as he had none. He emphasized that the appellant's claim was not entirely dependent on fraud but was also for a refund of the purchase price. He submitted that the two courts below erred in failing to consider this issue, thereby occasioning grave injustice to the appellant and unjust enrichment to the respondent. Counsel reiterated that following the Judgment of the trial court, the appellant had since come across new evidence, including the certificate of official search that manifested encumbrances that he had not been aware of, and the Land Registrar's letter alluding to confusion in the Land Registrar's records with regard to the suit property. Counsel further submitted that due to the respondent's fraudulent acts, he caused him to be arrested, charged, convicted and sentenced in Kisii Chief Magistrate's Court Criminal Case No. 2525 of 2015. He concluded by submitting that the appeal was merited, and that substantive justice requires that the respondent refund the purchase price. He urged the court to allow the appeal, set aside the judgment of the ELC, and in lieu thereof allow the application for review.
 14. Counsel for the respondent on the other hand submitted that the trial court dismissed the claim after hearing it on merits, and that the subsequent application for review was properly rejected as the issues raised therein were matters for appeal and not review.
 15. He submitted that the ELC correctly found that the trial court had considered the issue of fraud pleaded in the plaint, noting that merely raising allegations of fraud was insufficient without proof. He argued that the alleged new evidence relied upon by the appellant was not new, since the official search was conducted long before the suit was filed, and therefore could not form a basis for review application. He further submitted that the appellant's attempt to have the trial court re-scrutinize documents amounted to pursuing an appeal in disguise, which was not permitted under Order 45 of the Civil Procedure Rules.
 16. He submitted that the ELC could not be faulted for declining to re-evaluate the evidence, since the trial court had already addressed the issue of fraud. He argued that failure to address the claim for refund by the trial court cannot be a proper ground for review but rather for appeal, citing this Court's decision in *George M. Muhoro v Mwalimu Investment Company & Another* [2020] eKLR, in which it was held that review powers are restricted and distinct from appellate jurisdiction. He also submitted that the alleged discovery of encumbrances on the title was not new evidence, as the appellant was aware of the official search results before filing the suit.
 17. He submitted that the ELC was guided by the Court's decision in *CSL v CASN* [2020] eKLR, which emphasized that review cannot be used to fundamentally alter a decision or act as an appeal in disguise. He argued that the issue of better title was for the Land Registrar to resolve, and that the appellant was aware of the confusion in the registry long before filing suit. He further submitted that the appellant failed to call the Land Registrar as a witness, and therefore could not rely on that ground. Counsel further submitted that the appellant's reliance on criminal proceedings was misplaced, since he was the complainant in Kisii Chief Magistrate's Court Criminal Case No. 2525 of 2015 and therefore it was not new evidence. He added that, in any event, the respondent's conviction in that case was later quashed on appeal in Kisii High Court Criminal Appeal No. 41 of 2020, and thus not relevant.
 18. He submitted that the appellant's pleadings were founded on fraud, which he failed to prove. He maintained that the appellant's attempt to separate fraud from the claim for refund was untenable, since the pleadings were clear that the money was allegedly obtained through fraud. He concluded by



submitting that the appeal had no merit, and that the ELC's judgment was sound in law. He prayed that the appeal be dismissed with costs to the respondent.

19. This is a second appeal and the law is settled that on a second appeal, this Court is confined to dealing with issues of law only unless it is demonstrated that the courts below considered matters, they ought not to have considered or failed to consider matters they ought to have considered, or that the decision was perverse. See *Pithon Waweru Maina v Thuka Mugiria* [1983] KECA 117 (KLR).
20. From the record and submissions, the central questions for determination in this appeal are whether the ELC erred in law by failing to recognize that the appellant's claim was essentially for a refund of money paid for a parcel of land that did not exist, and if such omission constituted an error apparent on the face of the record. In addition, we must consider whether the ELC correctly interpreted and applied the principles governing review as set out in Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.
21. On the first issue, the appellant contends that his claim was not entirely founded on fraud but was primarily for refund of money paid for the suit property that was never transferred to him. He argues that the trial court and the ELC erred in tying his claim exclusively to proof of fraud, thereby ignoring the substantive prayer for refund. The question before us is whether such omission constitutes an error of law apparent on the face of the record. In *National Bank of Kenya Ltd v Ndungu Njau* [1997] eKLR, this Court held that:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

22. Applying this principle, if indeed the trial court failed to address the prayer for refund despite clear pleadings and evidence of payment, such omission would amount to an error apparent on the face of the record. However, the ELC found that the trial court had considered the issue of fraud and dismissed the claim for lack of proof. The claim for refund was on the basis that the respondent had fraudulently obtained the purchase price from the appellant. That being the case, we do not see how the question could have been separately addressed. After all the two issues were intertwined. The trial court could not have dealt with one without roping in the other. But even if the contrary was true, then such grievance required appellate intervention, not review. As the trial court correctly observed and upheld by the first appellate court, reconsidering the issues in the manner suggested by the appellant in the application would have been tantamount to the trial court revisiting the evidence tendered re-evaluate it afresh so as to reach a different determination.

That cannot be the jurisdiction of a court on an application for review. The two courts below were therefore correct in holding that the issue was fit for appeal and not review. Accordingly, this ground fails.

23. On the second issue, the law on an application for review is settled.

Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules restrict review to discovery of new and important evidence that was not within the applicant's knowledge despite due diligence at the time of hearing of the suit, error apparent on the face of the record, or other sufficient reason. The ELC held that the evidence relied upon by the appellant, including the certificate of official



search and the Land Registrar’s letter, were available even before the suit was filed and therefore did not qualify as discovery of new and important evidence that was not within the applicant’s knowledge despite due diligence at the time of hearing of the suit. Lastly, criminal conviction of the appellant is neither here or there. After all, the appellant was the complainant in the criminal case and in any event, the conviction by the trial court was subsequently quashed by the High Court. In the case of CSL v CASN, (supra), this Court emphasized that:

“Indeed, a review ought not to be done in a manner that can be construed as an appeal in disguise whereby an erroneous decision is determined afresh and fundamentally altered. It can only lie if one of the grounds as set out above is demonstrated. The purpose is not to enable a Judge rewrite a judgment or ruling because the initial one is erroneous but rather to address a new and important matter, address a mistake on the record or where established, any other sufficient reason.”

24. The Supreme Court of Kenya has also weighed in on the narrow scope of review in *Benjoh Amalgamated Ltd & Another v Kenya Commercial Bank Ltd* [2014] eKLR, stating that review jurisdiction is not an avenue to re-litigate matters already determined. Guided by the foregoing, the ELC cannot be faulted for holding that the appellant’s application was in substance an appeal disguised as a review application .
25. Before we pen off, it is also important to point out that whether or not grant an application for review, is an exercise in discretion by the trial court. And as has been constantly stated by this Court, an appellate court will interfere with the trial court’s discretion only when the trial court acted on wrong principle, overlooked material factors exercised discretion arbitrarily, capriciously or perversely, or if the decision falls outside the “general ambit within which a reasonable disagreement is possible” not simply because the appellate court would have chosen a different solution. See *Chatur v Habib & 6 Others* [2025] KECA 1463 (KLR). The appellant did not demonstrate to our satisfaction that both courts below were guilty of any of the above misadventures
26. In conclusion, the appellant has not demonstrated that the ELC misapprehended the law on review or ignored matters it ought to have considered. The concurrent findings of the two courts below were based on proper appreciation of the law and evidence. Accordingly, we find no merit in this appeal which is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF FEBRUARY, 2026.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

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H.A. OMONDI

JUDGE OF APPEAL

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L. KIMARU

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

