Nyandat & 3 others v Osura & 5 others (Civil Appeal 80 of 2019)
[2026] KECA 767 (KLR) (24 April 2026) (Judgment)

Neutral citation: [2026] KECA 767 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 80 OF 2019

HA OMONDI, LK KIMARU & JM NGUGI, JJA

APRIL 24, 2026

BETWEEN

RISPER AJWANG NYANDAT ..... 1ST APPELLANT

ELKANAH NYARIRO ..... 2ND APPELLANT

JANE AWINO WOGA ..... 3RD APPELLANT

JACKTON OYARO WOGA ..... 4TH APPELLANT

AND

ALLAN OKATCH OSURA ..... 1ST RESPONDENT

JACKTON OYIENGO OSURA ..... 2ND RESPONDENT

HON ATTORNEY GENERAL ..... 3RD RESPONDENT

PROF WILLIS KOSURA ..... 4TH RESPONDENT

NATIONAL LAND COMMISSION ..... 5TH RESPONDENT

THE DIRECTOR OF SURVEY KENYA ..... 6TH RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kisumu (Cherere, J.) dated 6th December, 2018 in Constitutional Pet. No. 20 of 2018)

JUDGMENT

1. This appeal arises from the ruling of the High Court at Kisumu (Cherere, J.) delivered on 6th December, 2018 in Constitutional Petition No. 20 of 2018. By that ruling, the learned Judge dismissed a constitutional petition filed by the appellants and the interlocutory application filed together with it on the ground that the proceedings constituted an abuse of the process of the Court.

2. The background to the dispute spans more than five decades of litigation. The controversy revolves around land parcel EAST GEM/NYANDIWA/574 (suit property) which has been the subject of litigation between the parties and their predecessors since the early 1970s.

3. The record shows that in Kisumu High Court Civil Case No. 111 of 1973, judgment was ultimately delivered on 10th September, 1986 in favour of the respondents' predecessors in title together with an order of eviction against the judgment debtors occupying the suit property. The judgment debtors unsuccessfully appealed that decision to this Court in Civil Appeal No. 100 of 1987 thereby leaving the decree of the High Court intact and executable. It would appear, though, that the High Court judgment was not executed.

4. Many years later, in October, 2018, the present appellants filed High Court Petition No. 20 of 2018 together with a notice of motion dated 17th October, 2018. In the petition, the appellants sought, among other reliefs, orders restraining the respondents from executing the eviction decree arising from the 1973 litigation. The petition was triggered by the issuance of a Notice to Show Cause why the judgment debtors should not be evicted from the suit property in execution of the 1986 decree.

5. The appellants contended before the High Court that execution of the decree after such a long lapse of time was unlawful and unconstitutional. They asserted that the decree had become time-barred and that its execution would violate their constitutional rights including their rights to property, dignity and fair administrative action.

6. The respondents opposed both the petition and the accompanying application. They argued that the appellants were merely attempting to frustrate the execution of a valid decree through repeated proceedings and that any issues relating to execution ought properly to be raised in the executing court in the original suit.

7. After considering the material placed before her, the learned Judge concluded that the petition constituted a collateral attack on a decree that had long been finalized through the ordinary appellate process. The learned Judge further found that the petition amounted to an attempt to relitigate matters that ought properly to be addressed within the framework of the existing civil proceedings. The learned Judge, therefore, held that the petition and the application constituted an abuse of the process of the Court and struck them out accordingly.

8. The appellants, dissatisfied with that decision, lodged the present appeal. In their memorandum of appeal, they raised several grounds including that the learned Judge failed to properly evaluate the evidence; misinterpreted constitutional provisions; and erred in finding the petition unmeritorious.

9. The appeal came up for hearing before us on 16th February, 2026. Learned counsel Mr. Omondi T. appeared for the appellants while learned counsel Mr. Hussein B. Indimuli appeared for the 1st, 2nd and 3rd respondents. The appellants did not file written submissions and, therefore, relied entirely on oral arguments made before the Court during the hearing. The respondents, however, filed written submissions dated 13th February, 2026 which counsel highlighted during the hearing.

10. Counsel for the appellants submitted that the central grievance of the appellants concerns the execution of the decree issued in High Court Civil Case No. 111 of 1973. He argued that a Notice to Show Cause seeking eviction had been issued more than three decades after the judgment and that such execution was time-barred and, therefore, unlawful.

11. Counsel further contended that the respondents had slept on their rights and could not lawfully execute a decree so many years after it had been issued. He submitted that equity aids the vigilant and not those who sleep on their rights. He also argued that eviction of the appellants after such a

long period would violate their constitutional rights under Articles 20, 40 and 259 of *the Constitution*. According to counsel, the appellants and their families had occupied the land for many years and eviction would disrupt communities comprising numerous households.

12. On their part, the respondents urged this Court to uphold the decision of the High Court and dismiss the appeal. In their written submissions and oral highlights, the respondents maintained that the appellants had deliberately avoided addressing the central legal issue arising in the appeal. In their view, the dispute concerns the execution of a decree and therefore falls squarely within the scope of section 34(1) of the *Civil Procedure Act*.

13. Mr. Indimuli emphasized that section 34 provides that all questions relating to execution, discharge or satisfaction of a decree must be determined by the court executing the decree and not by a separate suit. Counsel submitted that the appellants had attempted to circumvent this statutory framework by instituting a constitutional petition instead of raising their concerns before the executing court in the original civil proceedings.

14. The respondents further argued that the High Court lacked jurisdiction to entertain the constitutional petition because the dispute concerned land and, therefore, fell within the jurisdiction of the Environment and Land Court. They maintained that the petition was not a genuine constitutional dispute but merely an attempt to frustrate execution of a decree that had been upheld through the appellate process decades earlier.

15. Having considered the record of appeal, the rival submissions of the parties, and the law applicable to the dispute, the central question that arises for determination is whether the learned Judge erred in striking out the appellants' constitutional petition as an abuse of the process of the Court.

16. It is important at the outset to identify the proper appellate standard of review applicable in the circumstances of this case. The decision under appeal involved the exercise of judicial discretion by the High Court in determining whether the petition constituted an abuse of the process of the Court. As this Court stated in Mbogo & Another v Shah [1968] EA 93, an appellate court will not interfere with the exercise of judicial discretion unless it is shown that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that the judge was clearly wrong in the exercise of discretion. In the oft-cited passage in that decision, Sir Charles Newbold P. stated:

> " A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice."

17. In other words, the standard of review is one of abuse of discretion, and the task of this Court is not to substitute its own view merely because it might have reached a different conclusion, but rather to determine whether the High Court exercised its discretion on proper principles.

18. With that standard in mind, the resolution of the present appeal depends largely on the proper characterization of the dispute presented before the High Court.

19. The record leaves little doubt that the appellants' grievance arose directly from the execution of the decree issued in Kisumu High Court Civil Case No. 111 of 1973. Indeed, counsel for the appellants candidly acknowledged during the hearing that the appellants' complaint relates to the manner in which the 1973 decree is being executed. That acknowledgement is significant because Kenyan civil

procedure has long established a clear and mandatory framework governing disputes relating to execution of decrees.

20. Section 34 of the *Civil Procedure Act* provides as follows:

> 1. All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
>
> 2. The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court fees.

21. The purpose of this provision has been repeatedly emphasized by the superior courts. In Lalji Bhimji Sanghani Builders & Contractors v City Council of Nairobi [2012] eKLR, this Court reiterated that Section 34 requires all questions relating to execution of a decree to be determined by the executing court and not by way of a separate suit. The rationale underlying the provision is closely tied to the broader principle of finality of litigation. As this Court observed in Pop-In (Kenya) Ltd & 3 Others v Habib Bank AG Zurich [1990] KLR 609, parties are not permitted to reopen matters that have already been conclusively determined. The Supreme Court has since reaffirmed that principle in Benjoh Amalgamated Ltd & Another v Kenya Commercial Bank Ltd [2014] eKLR, emphasizing that litigation must at some point come to an end.

22. The purpose of section 34 of the *Civil Procedure Act* is, thus, to ensure that execution proceedings remain within the control of the court that issued the decree, thereby preventing collateral attacks through parallel litigation and preserving the finality of judicial decisions. The principle has been consistently applied by courts to prevent litigants from circumventing execution procedures by instituting fresh proceedings raising issues that ought properly to be raised in the executing court.

23. When the appellants filed Petition No. 20 of 2018, the substance of their claim was that the decree arising from the 1973 litigation could no longer lawfully be executed. That is a classic execution question. It is precisely the type of dispute that section 34 of the *Civil Procedure Act* requires to be addressed before the court executing the decree.

24. By filing a constitutional petition raising the same questions, the appellants effectively sought to create a new cause of action founded upon the execution process itself.

25. In law, however, the execution of a decree cannot generate an independent cause of action separate from the original suit. Any objections relating to limitation, procedural irregularity, or legality of execution must be raised within the execution proceedings themselves.

26. To allow litigants to challenge execution through fresh constitutional litigation would undermine the finality of judgments and destabilize the orderly administration of justice. It would permit endless cycles of litigation in which parties repeatedly relitigate matters that have already been conclusively determined.

27. The learned Judge was, therefore, correct to conclude that the petition constituted a collateral attack on a finalized decree. The learned Judge was equally correct to hold that the petition amounted to an abuse of the process of the Court. Courts possess inherent jurisdiction to prevent misuse of their processes, and that jurisdiction is exercised to ensure that judicial procedures are not employed as instruments of delay, harassment, or obstruction of justice. As was observed by this Court in Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR, abuse of the court process includes

the use of judicial proceedings in a manner that is oppressive, vexatious, or intended to undermine the proper administration of justice.

28. In the present case, the history of litigation surrounding the suit property demonstrates repeated attempts to reopen matters already decided. The High Court was, therefore, entitled to intervene to prevent further abuse of its process.

29. Applying the abuse-of-discretion standard of review, we are unable to conclude that the learned Judge misdirected herself in law or exercised her discretion improperly. We, therefore, find no basis upon which to interfere with the decision of the High Court.

30. In the result, this appeal lacks merit and is hereby dismissed with costs to the respondents.

31. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF APRIL, 2026.

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR