



**Ngatia & another v Shisunu (Environment and Land Appeal  
E012 of 2024) [2025] KEELC 5584 (KLR) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5584 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL E012 OF 2024**

**MD MWANGI, J**

**JULY 24, 2025**

**BETWEEN**

**IRENE WAIRIMU NGATIA ..... 1<sup>ST</sup> APPELLANT**

**JOHN KIARIE NJOROGE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOYCE KOGA SHISUNU ..... RESPONDENT**

*(Appeal is against the ruling of Hon. Pamela Achieng (Senior Principal Magistrate) delivered on 29th February 2024 in Ngong MCELC No. E001 of 2023)*

**JUDGMENT**

1. This appeal is against the ruling of Hon. Pamela Achieng (Senior Principal Magistrate) delivered on 29<sup>th</sup> February 2024 in Ngong MCELC No. E001 of 2023. It was initiated by way of the memorandum of appeal dated 28<sup>th</sup> March 2024 whereby the Appellants have listed eight (8) grounds of appeal as follows:
  1. That the Learned Magistrate erred in law and fact in dismissing the application for setting aside when indeed the material before her warranted a setting aside/review.
  2. That the Learned Magistrate erred in law and misdirected herself when she failed to find and hold that there was sufficient reason/cause for her to exercise her discretion in favour of the Appellant as,
    - a. The procedure to bring an application for eviction is clearly provided for in law and it was set out for her in the 1<sup>st</sup> Appellant's supplementary affidavit.



- b. Sections 152B, 152C, 152D, 152E and 152F of the Land Laws (amendment) Act and [Legal Notice No. 280 of 2017](#) provide the procedure to bring an application for eviction.
  - c. The High Court has previously held that suits for eviction under the Land Laws (amendment) Act can be commenced by way of Miscellaneous Application (Notice of Motion) as a specific procedure for the same is not clearly stipulated.
  - d. She failed to follow precedent in the cases decided by the High Court which were provided to her.
3. That the Learned Magistrate erred in law and fact by failing to apply the governing principles of obtaining eviction orders by the lawful owners of the property.
  4. That the Learned Magistrate erred in law by failing to utilize the overriding objectives of the Court as captured in Sections 1A and 1B of the [Civil Procedure Act](#) and Article 159 (2) of [the Constitution](#) of Kenya 2010 and allow the appellants case to be decided on merits.
  5. That the Learned Magistrate erred in law by failing to exercise her discretion in a judicious manner on the available evidence and her decision amounted to an error in principle.
  6. That the Learned Magistrate erred in law and fact and as a result arrived at a wrong decision and in all circumstances failed to do justice to the appellants.
  7. That the whole ruling is bad in law and does not enunciate any of the conditions for granting and/or denying orders of setting aside/review.
  8. That the ruling of the Honourable Court has occasioned a failure of justice and/or resulted in a gross injustice.
2. It is proposed to ask the Honourable Court for orders;
    - a. The appeal be allowed.
    - b. The ruling in favour of the respondent be set aside.
    - c. The appellant be allowed the costs of the appeal.
  3. The Appellants pray that their appeal be allowed and the ruling of the trial court set aside. The Appellants further pray for the costs of the appeal.
  4. The memorandum of appeal was subsequently amended on 8<sup>th</sup> November 2024 whereby the Appellants made an additional prayer 2A, praying that the Honourable Court do issue an order against the Respondent, her servants, heirs and dependents from land parcel comprising of L.R. No. Ngong/Ngong/37863.

#### **Proceedings before the Trial Court.**

5. The Appellants had approached the trial court by way of a miscellaneous application seeking an eviction order against the Respondent, her servants, agents, heirs and dependents from land parcel comprising of L.R. No. Ngong/Ngong/37863 (hereinafter referred to as the “suit property”). The Appellants’ basis for the application was that they were the owners of the suit property and had served the statutory three months’ notice to vacate upon the Respondent in terms of the provisions of Section 152E of the Land Laws (amendment) Act, 2018 and Regulations 65 and 67 of the Regulations of [Land Act](#), 2017.



6. The Respondent's response to the application was by way of her replying affidavit sworn at Nairobi on 13<sup>th</sup> February 2023 and Grounds of Opposition dated 6<sup>th</sup> February 2023. Additionally, the Respondent filed a notice of preliminary objection dated 6<sup>th</sup> February 2023 framed as follows;
  - i. This Honourable Court lacks the jurisdiction to hear and determine this Miscellaneous Notice of Motion noting that the suit land in question is measuring 0.40 ha with buildings comprising washrooms, servants quarters and water tanks valued approximately Kshs. 40,000,000.00 which amount is beyond the pecuniary jurisdiction of this court.
  - ii. The applicants lack the locus standi to file a suit in a representative capacity for the members of the two beneficiaries to the suit land being Tunza Children Centre (CBO) and Internship Community Development Group (CBO) and are therefore not known in law and the application therefore is incurably defective and must be struck out.
  - iii. The pleadings by the applicants drawn and filed before court are fundamentally defective because the applicants have not been given any written authority to swear affidavit(s) and plead on behalf of the members of the two community based organizations.
  - iv. The applicants have not issued a notice of the suit to members of the two community development groups (CBOs) and that no evidence has been tendered before court in proof of compliance with the law.
  - v. The applicants lack the legal capacity to commence or maintain the present proceedings and therefore the entire suit is null and void ab initio and cannot be cured by way of amendment.
  - vi. The application before the court is an outright abuse of the court process for grossly offending the appropriate mandatory provisions of the Civil Procedure Rules and other laws.
7. In its ruling of 25<sup>th</sup> May 2023, the court allowed the preliminary objection by the Respondent noting that the matter before it was commenced by way of a miscellaneous application rather than a plaint. The court was emphatic that eviction orders being the orders sought are final orders and cannot therefore be issued on the basis of a miscellaneous application. Consequently, the Appellants' miscellaneous application was struck out with costs.
8. Aggrieved by the decision of the court, the applicants filed a notice of motion application dated 19<sup>th</sup> July 2023 seeking to review, vary and or set aside the order made on 25<sup>th</sup> May 2023 striking out their miscellaneous application. The applicants first and foremost asserted that there was an error or mistake apparent on the face of the record. Secondly that there was sufficient reason to review, vary or set aside the order of the court. Finally, that the proper manner for commencing the matter was by way of a miscellaneous application as they had done.
9. The application by the Appellants was opposed by the Respondent.
10. The court in its ruling of 29<sup>th</sup> February 2024 dismissed the application for review for want of merit finding that there was no justifiable ground to warrant review, varying or setting aside its orders of 25<sup>th</sup> May 2025.
11. It is this ruling that the Appellants have appealed against in this court.



## Court's directions on the disposal of the appeal

12. The court's directions were that the appeal be canvassed by way of written submissions. Both sides complied and filed their respective submissions which the court has had occasion to read and consider in writing this judgment.

## Issues for determination

13. In framing the issues for determination, it is worth reiterating that this appeal is against the ruling delivered on 29<sup>th</sup> February 2024 in Ngong MCELC E001 of 2023, which was a ruling in respect of the Appellant's application seeking to review the earlier ruling of 25<sup>th</sup> May 2023 that had upheld the preliminary objection by the Respondent.
14. The issues for this court to consider then are whether the application for review by the Appellants before the subordinate court was merited and whether the ruling of the Learned Magistrate ought to be set aside. The court too will definitely have to consider the issue of the costs of this appeal.

## Analysis for determination

15. This being a first appeal, the court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent conclusion on whether or not to allow the appeal. A first appellate court is allowed to subject the whole of the evidence to fresh scrutiny and make conclusions about it.
16. Mativo J (as he then was) in the case of Mursal & another v Manese (suing as the legal administrator of Daphine Kanini Manese) (Civil Appeal No. E20 of 2021) [2022] KEHC 282 (KLR) (6<sup>TH</sup> April 2022) (Judgement), had this to say on the responsibilities of a first appellate court,

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses firsthand”.
17. The Learned Judge emphasize on the critical role of a first appellate court further stating that;

“A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair and independent consideration of the evidence at the appellate stage. Anything less is unjust. The 1<sup>st</sup> appeal has to be decided on facts as well as on law.

In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of the *Civil procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion”.
18. circumstances under which a court can review its own decision are specified in Section 80 of the *Civil Procedure Act* as well as Order 45 Rule 1 of the Civil Procedure Rules. They include discovery of new and important matter or evidence, mistake or error apparent on the face of the record and sufficient cause. (emphasis).



19. In the case of Parliamentary Service Commission v Wambora & 36 others [2018] KESC 74 (KLR), the Supreme Court while quoting the decision of Mbogo and Another v Shah indicated that the following principles ought to guide courts while exercising their discretion on review of their decisions.

“Consequently, drawing from the case law above, particularly Mbogo and Another v Shah, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows;

- i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court.
- ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
- iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application;
- iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically
- v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
- vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
  - a. as a result a wrong decision was arrived at; or
  - b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”

20. The grounds upon which the Appellants’ application for review was premised on were an error apparent on the face of the record and sufficient reason. The Appellants reiterated that the proper manner for commencing the matter was by way of a miscellaneous application as they had done before the subordinate court. In the amended memorandum of appeal, the Appellants added the ground that the learned Magistrate misapplied the law and there is an obvious error in the ruling.

21. The court of appeal in the case of National Bank of Kenya v Ndungu Njau Civil Appeal No. 211 of 1996 [1995-98] 2 EA 249, held that where review is sought on the basis of an apparent error or omission;

“...the error or omission must be self-evident and should not require an elaborate argument to be established”.

22. The apparent error that the Appellants in this case refer to as clearly discernible from their application before the subordinate court and the amended memorandum of appeal is the misapplication of the law by the learned Magistrate, which they term as an obvious error in the ruling.



23. In their submissions dated 29<sup>th</sup> April 2025, the Appellants elaborated on their position submitting that;
- “The learned Magistrate instead of following the provisions of the procedure for eviction instead only faulted the procedure that the Appellants had used to try to obtain an order for eviction”.
24. The Appellants further fault the learned Magistrate for failing to appreciate the merits of the case and decide it based on merits. They reiterate that;
- “This clearly was a misapplication of the law and an obvious error in the ruling. We submit that there was an error or mistake apparent on the face of the record in not only dealing with a notice which was not opposed in accordance with the relevant statute but also dismissing the procedure which decided cases/authorities have held to be proper”.
25. It is therefore clear that the apparent error or mistake that the Appellants based their application for review on, was the alleged misapplication of the law by the Learned Magistrate.
26. It is long established by precedents that misapplication of the law or an incorrect exposition of the law cannot be the basis of review.
27. The Court of Appeal in the case of National Bank of Kenya v Ndungu Njau (supra) was emphatic on that issue. The court stated that;
- “Nor can it be a ground of review that the court proceeded on an incorrect exposition of the law and reached erroneous conclusion of the law. Misconstruing a statute or other provision of the law is not a ground for review.
- ...if he had reached a wrong conclusion of law, it would be a ground for appeal but not for review. Otherwise the Learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it”.
28. The Court of Appeal had expressed a similar view in the case of Mumby’s Food Products Limited & 2 others v Co-operative Merchant Bank Limited Civil Appeal No. 2 of 2002, emphasizing that misconstruing a statute or other provisions of the law cannot be a ground for review.
29. The upshot is that the Learned Magistrate was right in holding that there was no justifiable ground to warrant a review of her earlier ruling of 25<sup>th</sup> May 2023.
30. That said, the appeal by the Appellants fails. It is hereby dismissed with costs to the Respondent.
- It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 24<sup>TH</sup> DAY OF JULY 2025.**

**M.D. MWANGI.**

**JUDGE**

In the virtual presence of:

Mr. Kiplang’at h/b for Mr. Ombati for the Appellant

N/A by the Respondent

Court Assistant: Edwin



**M.D. MWANGI**  
**JUDGE**

