Wesonga v Tsimonjela & another (Environment and Land Appeal E025 of 2022) [2025] KEELC 5429 (KLR) (16 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5429 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ENVIRONMENT AND LAND APPEAL E025 OF 2022

A NYUKURI, J

JULY 16, 2025

BETWEEN

PHILIS WESONGA ..... APPELLANT

AND

RICHARD AVOMBA TSIMONJELA ..... 1ST RESPONDENT

ERICK AKATU ..... 2ND RESPONDENT

RULING

Introduction.

1. By a Notice of motion dated 10th July 2024, the appellant/ applicant sought the following orders;

    a. That the judgment of this honourable court delivered on 19th June 2024 be reviewed and or set aside.

    b. That judgment be entered for the appellant as prayed in the lower court.

2. The application is supported by the affidavit sworn by the applicant dated 10th July 2014. The applicant's case is that the reason the court entered judgment herein against her was because other purchasers who had interest in the suit property were not joined to this suit. Further that she was the only occupant of the land measuring 0.4 Ha part of parcel South Kabras/Chesero/3289. That although the 1st respondent had sold part of the said parcel to other buyers, her parcel measuring 0.4 Ha has not been resold to anyone as she solely occupies the same to the exclusion of everyone else. She maintained that no one will be prejudiced if orders of specific performance are issued. That the court was supposed to strictly construe the evidence depicting the 1st respondent as a cunning land owner who had sold his land to several buyers but failed to proceed with the required transfer of the same. She maintained that the other purchasers' portions were separate and distinct from hers and that this court erred in holding that several purchasers purchased the portion in which she has an interest.

3. No response was filed against the application.

4. The applicant filed submissions dated 25th November in support of her application.

Submissions

5. It was the applicant's submission that there was a mistake on the face of the record and that the court wrongfully interpreted her testimony where she stated that the suit land had been sold and resold to mean that the portion in which she is in exclusive possession had been sold and resold.

6. The applicant relied on the case of *Zablon Mokua v Solomon M. Choti & 3 Others* [2016] eKLR and provisions of order 45 of the *Civil Procedure Rules* and argued that where there is sufficient cause a review ought to be issued. She argued that she was not affected by the respondent's sale of portions of the property herein as she was in exclusive occupation of her portion measuring 0.4 hectares and that she only needs title of the suit property.

Analysis and Determination

7. The court has carefully considered the application and submissions filed by the applicant. The only issue that arise for the court's determination is whether the applicant has met the threshold for review.

8. The power to grant review is provided for in section 80 of the *Civil Procedure Act* while the conditions upon which review can be granted are in Order 45 Rule 1.

   Section 80 of the *Civil Procedure Act* provides as follows;

   > " Any person who considers himself aggrieved—
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   > (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."

   Order 45 rule 1(b) of the *Civil Procedure Rules*, provides as follows:

   > " (1) Any person considering himself aggrieved—
   >
   > (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
   >
   > (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
   >
   > (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party

except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

9. Essentially, the grounds upon which review can be sought are as follows;

   a. Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

   b. On account of some mistake or error apparent on the face of the record, or

   c. For any other sufficient reason; and whatever the ground of the application, there is a requirement that the same has to be made without un reasonable delay.

10. In the case of *Nyamogo & Nyamogo v Kogo* [2001] EA 170, the court discussed what constitutes an error apparent on the face of the record, and stated as follows:-

> " An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal."

11. In the case of *Republic v Advocates Disciplinary Tribunal Ex parte Appollo Mboya* (2019) eKLR the court was of the view that a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. Further, it was held that review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.

12. In the instant case, the justification for the prayer for review by the applicant is that the court misapprehended her evidence and wrongly reached a conclusion that the applicant's land had been sold and resold and that the court failed to take into account the fact that the appellant has always been in exclusive possession of 0.4 Ha of parcel No. South Kabras/Chesero/3289 to the exclusion of other purchasers. Further that if the court had granted orders of specific performance, none of the parties would have been adversely affected. That while the 1st respondent had sold parts of the suit property to other buyers, the applicant's 0.4 hectares has not been sold to anyone and that he is the sole occupant thereof to the exclusion of other persons who have separate portions. The appellant specifically faulted this court's finding at paragraph 4 of the judgment to the effect that the appellant had not met the threshold for grant of orders of specific performance. She argued that from paragraphs 14 and 15 of the appellant's statement, it was clear that the 1st respondent continued to sell his land and that there is no doubt that her claim is only for 0.4 Ha. The applicant argued that her argument raised sufficient ground.

13. In essence, the applicant is saying that this court misapprehended her evidence and that it was wrong in reaching the conclusion it made. That it ought to have made a finding in favour of the appellant, but because it did not take into account the appellant's evidence, it reached a wrong conclusion.

14. The applicant is indeed entitled to, and has every right to fault the findings of this court. The only issue is that fault finding with the judgment of this court can only be done before the Court of Appeal and not before this court as this court has no jurisdiction to sit on appeal of its own decision. The applicant cannot lawfully raise the issue that the court misapprehended her evidence, give a long winding justification in support of the same through an application for review. She can only escalate her grievance vertically by moving the Court of Appeal. The questions she has raised can only be raised in the Court of Appeal and not in this court.

15. For those reasons I find no merit in the application dated 10th July 2024 which I dismiss with no order as to costs.

16. It is do ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT/VIRTUALLY AT KAKAMEGA THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM ON 16TH DAY OF JULY, 2025

A. NYUKURI

JUDGE

In the presence of;

Mr. Iddi for the appellant/applicant

No appearance for the respondent

Court Assistant: M. Nguyai