



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wangolo v Kasambula & another (Civil Appeal 156 of 2018)  
[2025] KECA 226 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 226 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 156 OF 2018  
W KARANJA, PO KIAGE & S OLE KANTAL, JJA  
FEBRUARY 7, 2025**

**BETWEEN**

**ROBERT SUNDWA WANGOLO ..... APPELLANT**

**AND**

**DAVID WEPUKHULU KASAMBULA ..... 1<sup>ST</sup> RESPONDENT**

**CHRISTOPHERH WANGA SIMITI ..... 2<sup>ND</sup> RESPONDENT**

*(An Appeal from the ruling of the Environment and Land Court of Kenya at Bungoma  
(Boaz B. Olao, J.) delivered on 18th October, 2018 in ELC Cause No. 177 of 2014)*

**JUDGMENT**

1. The appeal arises from the Ruling of Boaz B. Olao, J. in ELC Case No. 177 of 2014, delivered on 18<sup>th</sup> October, 2018. It is necessary to give a brief history of this matter and the circumstances, which culminated in the Ruling the subject of this appeal, in order to place the appeal in proper context.
2. Christopher Wanga Simiti (the 1<sup>st</sup> respondent herein), now deceased but substituted by his son Eliud Wanga Nyongesa, moved the Environment and Land Court (ELC) by way of originating summons claiming ownership of 3.7076Ha out of land Parcel No. Ndivisi/Khalumuli/1526 (the suit land) as against David Wepukhulu Kasambula and Grace Namakwa, who were the registered owners.
3. His claim was that he had been in continuous and exclusive possession of the said portion and had utilized it without any interference from the owners for a period of 12 years.
4. The originating summons was heard by Mukunya, J. who, in a judgment dated 10<sup>th</sup> March 2017, ruled in favour of the 1<sup>st</sup> respondent and directed that the suit land be sub-divided and the 1<sup>st</sup> respondent's family gets 7½ acres of the land with the two respondents being left with 1½ acres of the land. A decree was drawn to that effect.



5. From the record, we note that a Notice of Appeal was filed on 15<sup>th</sup> March 2017 against that judgment, but the fate of the appeal is not stated. It is not clear from the record whether a record of appeal was ever filed.
6. During the pendency of the said suit, however, before the decree could be executed, David Wepukhulu Kasambula and Grace Namakwa Wepukhulu moved with speed and had the suit land surveyed and subdivided into new parcels which they then proceeded to transfer to themselves and to other third parties. This was done blatantly and in total disregard to the judgment which had been rendered in the matter.
7. That action caused the 1<sup>st</sup> respondent to go back to court by way of an application seeking orders that the sub-division and transfer of the parcels created from the suit land be declared null and void, and ownership of the suit land be reverted to the status it was in before the sub-division exercise. The orders sought were granted and the title deeds issued in respect of the sub-divisions were cancelled.
8. Robert Sundwa Wangolo, the appellant felt aggrieved and moved the court vide an application dated 26<sup>th</sup> February 2018 seeking leave to be joined as a party to the suit, and further beseeching the court to stay execution of the judgment. He also sought orders that the judgment in question be reviewed and/or set aside and he be granted leave to file a defence.
9. That is the application that fell for determination before Mukunya, J. who allowed the joinder of the applicant to the application, but declined to grant any other orders. The learned Judge directed that the application be served on all the other parties and it be heard on priority basis. The learned Judge nonetheless ordered that status quo be maintained.
10. The application was subsequently placed before Olao, J. for hearing and with consent of both counsel appearing for the parties, the application was canvassed through written submissions. After considering the application, the rival affidavits, the submissions and the law, the learned Judge found no merit in the same and dismissed it.
11. The learned Judge found that the applicant's title was obtained through a flawed process "in contempt of court orders and in an attempt to extinguish the subject matter of the suit during the pendency of the case and an abuse (sic) of the process of the court".
12. Judge Olao found that the Titles issued contrary to the court's judgment were void and said that they had been properly cancelled. He also found that the application for review was filed inordinately late; and that the applicant had not placed before the court any new and important material that was not within his knowledge when the matter was heard, which material could not have been obtained with exercise of reasonable diligence. The application was ultimately dismissed. It is that ruling that the appellant challenges before this Court.
13. The appellant has proffered 8 grounds of appeal as hereunder:-
  - “ 1. The learned Judge erred in law and fact by dismissing the appellant's application dated 26<sup>th</sup> February, 2018 on the grounds that there was no evidence of facts or law to review yet it was clear that the court cancelled titles of parties including the appellant who were not party to the proceedings before court which error was glaring open and hence a subject of review and setting aside such judgment.
  2. The learned Judge erred in law and fact by interpreting that the land parcel No. Ndivisi/Khalumuli/4201 was acquired through illegal means, yet it was



clear that the appellant was a purchaser and the acquisition of the suit land was through a succession case No. Bungoma High Court No. 387 of 2012 which process of sub-division and transfer was done above board before filing of Civil Case No. 177 of 2014 and without any injunctive orders.

3. The learned Judge erred in law and fact by dismissing the applicant's application without putting in consideration the provision of Articles 47, 48 and 50 of the constitution which gives every person a fair hearing and access to justice.
4. The trial Judge misdirected himself on the applicability of Section 80 of Civil Procedure Act and Order 10, 12, 36 and 45 of the Civil Procedure Rules on setting aside ex-parte judgment, default judgment and final judgment which interpretation and applicability was not consistent with the issue of review before him.
5. The learned Judge erred in law and fact by condemning the appellant for contempt relying on the earlier judgment by the late Justice Mukunya which condemnation was biased as the appellant was not party to the proceedings and further no illegality was pronounced in the proceedings and judgment.
6. The trial Judge erred in law and fact by failing to consider that cancellation of the appellant's title No. Ndivisi/Khalumuli was premised on an application other than Civil Suit as required in the law hence a serious misnomer in exercising of court discretion.
7. The trial Judge erred in law and fact by condemning the appellant on grounds that the application was filed with inordinate delay yet it was clear that the appellant was not served and had no knowledge of the proceedings until he learned of cancellation of the title which prompted him to file the application.
8. The trial Judge was biased against the appellant."

14. From the above grounds it is clear to us that the appellant's complaints are not restricted to the Ruling appealed against. Whereas he cudgels the learned Judge for declining to review the judgment as sought in the application, and faults the learned Judge for finding that the application did not meet the threshold set for applications for review under Order 80 of the Civil Procedure Rules, the appellant introduces aspects that seem to challenge the judgment of Mukunya J. which has not been appealed against. His main complaint is actually the cancellation of his Title Deed along with the others arising from the sub-division of the suit land. His contention is that the Titles should not have been cancelled without him and the other purchasers being heard. He also accused the trial Judge of bias. These two concerns are nonetheless outside the ambit of this appeal.
15. Basically, the pertinent issue in this appeal is whether Olao, J. exercised his judicial discretion judiciously in declining to review the judgment on the grounds raised by the appellant.
16. In response to the appeal, the 1<sup>st</sup> respondent filed submissions.

According to the 1<sup>st</sup> respondent, the appeal is misconceived, scandalous, vexatious and is an abuse of the process of the court.

The thrust of the submissions is that the trial court had entered the judgment after hearing the parties in the suit and the impugned judgment was not a default judgment capable of being set aside. The



1<sup>st</sup> respondent placed reliance on this Court's decision in *Kenya Power and Lighting Company vs Benzene Holdings Limited T/A Wyco Paints*, Civil Appeal No. 132 of 2014 [2016] eKLR where the Court stated that the *Civil Procedure Act* does not have a provision allowing the setting aside of a final judgment. Counsel for the 1<sup>st</sup> respondent further submitted that the appellant did not demonstrate any of the requirements set out in Order 45 of the Civil Procedure Rules to qualify for the review orders sought. Counsel maintained that the appellant had also failed to prove that his constitutional rights under Articles 47, 48 and 50 of *the Constitution* had been violated.

17. At the plenary hearing of the appeal, neither the parties nor their respective counsel appeared in Court. Word was sent to Court through the court clerk that counsel wished to rely on their submissions and requested that a date be given for delivery of the judgment.
18. We have considered the record before us along with the grounds of appeal and submissions as summarized above. As stated earlier, before the learned Judge was an application for review of the judgment. Setting aside a judgment is a discretionary relief. What we are required to address is whether in dismissing the said application, the learned Judge exercised his judicial discretion properly. The test for this is whether the appellant had satisfactorily demonstrated that in reaching his decision, the learned Judge acted whimsically or misdirected himself in the exercise of his discretion and as a result arrived at a wrong decision. Did the learned Judge in this case consider extraneous matters he ought not to have considered, or fail to consider some relevant matters, as a result of which he arrived at the wrong decision? (See *Shah vs Mbogo* [1968] E.A 93)
19. In this case the learned Judge heard the case and determined it on its merit. The appellant was not a party to the suit by then. He bought the land post judgment and he cannot, therefore, complain that he was condemned unheard. It is clear from the record that the sub-divisions were done after the court had already made its determination, in an attempt to frustrate the judgment of the court.  
  
The sentiments expressed by Mukunya, J. were, therefore, appropriate and well deserved in the circumstances of the case. They did not show bias on his part. The issue of bias raised in this appeal is totally unjustified and misplaced.
20. On whether Olao, J. exercised his discretion judicially, we find that he did. The finding that he could not set aside a merit judgment is well founded in law. Further, we find that the conditions set under Order 45 of the *Civil Procedure Act* to justify review of a judgment or ruling were not demonstrated. There was no apparent error on the face of the judgment; there was no discovery of any relevant material that could not have been obtained by the applicant upon exercise of reasonable diligence; there is nothing on record to show that the learned Judge considered matters that were extraneous or irrelevant to the suit, or failed to consider relevant matters to arrive at his decision.
21. In fact, as expressed by both Mukunya, J. and Boaz Olao, J., it was despicable that the respondents could sub-divide the land and transfer the portions to other parties contrary to the judgment which had already been delivered giving the land to another party.
22. We find no grounds at all to allow us to upset the Ruling of the learned Judge dismissing the application for review. We find this appeal totally devoid of merit and dismiss it with costs to the 1<sup>st</sup> respondent.
23. Finally, we tender our most sincere apology for the delay in delivery of this judgment. The judgment was, by inadvertent omission not diarized and it was also missed out from the list of pending judgments that was circulated subsequently. We regret any inconvenience that may have been occasioned to the parties.

**DATED AND DELIVERED AT KISUMU THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2025.**



**W. KARANJA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

