



Hamisi & another (Suing as the administrators of the Estate of the Late Hamisi Shaban Otinga - Deceased) v Shiraho & another (Suing in their capacity as the administrators of the Estate of the Late Richard Shiraho) (Civil Appeal 60 of 2020) [2025] KECA 539 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 539 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 60 OF 2020
MSA MAKHANDIA, P NYAMWEYA & LK KIMARU, JJA
MARCH 21, 2025**

BETWEEN

ALI GADAFFI HAMISI & KHALID HAMISI (SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE HAMISI SHABAN OTINGA - DECEASED) APPELLANT

AND

BEPHINE N SHIRAHU & MARGARET A SHIRAHU (SUING IN THEIR CAPACITY AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE RICHARD SHIRAHU) RESPONDENT

(Being an appeal from the ruling of the Environment and Land Court at Kisumu (Ombwayo, J.) dated 20th December 2019 in Civil Case No 140 of 2015.)

JUDGMENT

1. The appellants herein, Ali Gadaffi Hamisi and Khalid Hamisi, who are administrators of the estate of Hamisi Shaban Otinga (Deceased), are aggrieved by a ruling delivered on 20th December 2019 by the Environment and Land Court at Kisumu (Ombwayo, J.), which dismissed their application for review of an earlier ruling dated 13th July 2016. The Environment and Land Court (hereinafter “the ELC”) had, in the earlier ruling, upheld a Notice of Preliminary Objection filed by the 1st respondent that the appellants’ suit was res judicata, and ordered that it be struck out against the 1st Respondent.
2. A chronology of the events leading to the ruling by the ELC of 20th December 2019 is necessary, to provide the context of this appeal. The appellants filed a suit in the ELC at Kisumu, being Civil Case No 140 of 2015, in which Bephine N. Shiraho & Margaret A. Shirah, sued as the administrators of the estate of the deceased Richard Shiraho (the respondent herein) were the 1st defendant; the National



Lands Commission the 2nd defendant; and the Attorney General the 3rd defendant. The appellants' claim in the said suit was that the deceased Hamisi Shaban Otinga was allocated the property known as Kisumu Municipality Block 5/ 973 (the suit property) by the Commissioner of Lands on 27th April 1998, and the deceased Richard Shiraho thereafter fraudulently obtained a similar allotment letter on 6th May 1998 and proceeded to unlawfully register himself as the proprietor thereof, and was illegally issued with a certificate of lease by the Commissioner of Lands who lacked the powers to make a double allocation of the same property.

3. The appellants accordingly sought the following orders in their Amended Complaint dated 11th May 2016:
 1. A declaration that the allotment letter dated 6-5-1998 issued to the deceased 1st Defendant and subsequent registration of a lease on the same that gave rise to land parcel Kisumu Municipality Block 5/973 was illegal and null.
 2. An order compelling the 2nd Defendant and the office of the Commissioner of Lands / Kisumu County Lands Registrar to strike off the name of the 1st Defendant from the record and replace the same with that of the deceased Plaintiff's name as the bona fide proprietor of Kisumu Municipality Block 5 / 973.
 3. A permanent injunction do issue to restrain the 1st Defendant by themselves, their agents, servants and/ or employees or otherwise jointly and severally from attaching, selling, alienating and/ or in any way whatsoever evicting the Plaintiffs from the suit premises Kisumu Municipality Block 5/973.
 4. Costs of this suit plus interest at court rates.
4. Contemporaneously with the suit, the appellants filed an application dated 13th May 2016 seeking injunctive orders against the said defendants in relation to the suit property. The 1st respondent thereupon filed a Notice of Preliminary Objection dated 8th June 2016 citing a point of law of the jurisdiction of the ELC, on the ground that the appellants' cause action, the issues of law and facts as set out in the body of the Amended Complaint was the subject of a contested litigation between the same parties where the matter went to a full trial before a court of competent jurisdiction in the case of Winam Senior Resident Magistrates' Court Civil Case No. 495 of 2004- Francis Muhia Mutungu & Richard Shiraho versus Ali Gadaffi Hamisi & Farida A. Salim, where judgment was delivered on the same, and an appeal lodged by the appellants against the said judgment in Kisumu High Court Civil Appeal No. 48 of 2013, which was still pending determination. Therefore, the appellants' suit and application constituted a gross contravention of the principles of res judicata.
5. The ELC directed that the Notice of Preliminary Objection be heard and determined first, and in a ruling delivered thereon on 13th July 2016 by S.M Kibunja J., it was found that the issue of ownership and possession of the suit property (formerly unsurveyed Residential Plot No.96 Kaloleni Kisumu Municipality), as between Richard Shiraho and Hamisi Shaban Otinga or those claiming under them was decided in Winam SRMCC No.495 of 2004 on 20th June 2013, and the suit is therefore res judicata as between the appellants and 1st respondent. The appeal in Kisumu High Court Civil Appeal No. 48 of 2013 was subsequently given a new number being Kisumu ELC No. 4 of 2017 and heard, and the ELC (Olola J.) delivered a judgment thereon on 24th October 2017 allowing the appeal, and setting aside the judgment dated 20th June 2013 delivered in Winam SRMCC No. 495 of 2004.
6. The appellants subsequently filed an application dated 8th March 2019, seeking to review and set aside of the ruling and orders issued by the ELC in the ruling of 13th July 2016. The grounds for review were that the ELC acknowledged in the ruling of 13th July 2016 that there is an ongoing appeal being



Kisumu HCCA No. 48 of 2013 (now Kisumu ELC No. 4 of 2017), which appeal was heard to its logical conclusion and the ELC ruled that the subsequent allocation of the suit property to the respondent was an illegal transaction and as such the legal interest acquired by the appellant could not and was not defeated by the said allocation; however that the ELC did not proceed to issue an order to the Lands Registrar to strike off the name of the respondent, which was not an issue arising in the appeal.

7. Further, that the absence of an order cancelling the respondent's title to the suit property meant that even though the appellants are entitled to the suit property, they cannot have it registered in their names for the benefit of all beneficiaries for reasons that the respondent holds the title which even though declared illegal, has not been cancelled; and that the prayer and issue of an order compelling the office of the Commissioner of Lands/Kisumu County Lands Registrar to strike off the name of the deceased respondent from the record and replace the same with that of the deceased appellant's name as the bona fide proprietor of the suit property has not been heard and determined in both the Winam SRMCC No. 495 of 2004 and Kisumu HCCA No. 48 of 2013 (now Kisumu ELC No. 4 of 2017).
8. Ombwayo J., after hearing the parties, delivered the impugned ruling dated 20th December 2019, and in dismissing the appellants' application, held as follows:

“The basis of this application for review of the judgment and orders in this case is that the appeal judgment in Kisumu HCCA No. 48 of 2013 over the same subject matter determined that the allocation of the suit land was illegal and therefore the Certificate of Title was a nullity. This cannot be a sufficient reason for reviewing the earlier orders striking out this suit for being res judicata. The judgment on appeal has no effect on the earlier ruling that this suit is res judicata.

The issue of rectification of the register cannot be divorced from the issue of ownership and possession of the land. It should be noted that upon the delivery of the ruling of res judicata on 13th July 2016, the Applicants neither applied for a review nor appealed the ruling. They only acted three years later in this application, upon the subsequent determination of the appeal Kisumu HCCA No. 48 of 2013. It is clear that the Applicants intend to re-open a proper determination of res judicata in this suit for the sole purpose of correcting their failure to obtain appropriate orders in the other suit. To allow this application would, in the words of the Applicants "defeat the purpose of "res judicata" which is to bring finality to litigation.”

9. The learned Judge also found that the appellants' delay of 3 years after the delivery of the ruling on res judicata was not sufficiently explained and therefore unreasonable. This is the ruling that is the subject of the instant appeal, and the appellants have raised the following grounds in their Memorandum of Appeal dated 20th May 2020:
 1. The Learned Judge erred in law and in fact in failing to find that sufficient cause has been demonstrated by the Appellants.
 2. The Learned Judge erred in law and in fact in holding that the delay in filing the application for review had not been sufficiently explained when the Appellants had given their reasons for the delay.
 3. The Learned Judge erred in law in exercising its discretion wrongly in the circumstances.
 4. The Learned Judge erred in law and in fact in failing to consider the Appellants' submission thereby occasioning a miscarriage of justice.



5. The Learned Judge erred in law in misdirecting himself as to the legal principles applicable in determining an application for review and thereby arriving at a decision that was erroneous.
10. The appellants therefore seek orders from this Court that the impugned ruling by Ombwayo J. be set aside and replaced with orders allowing their application dated 8th March 2019, and the costs of the said application and this appeal be borne by the respondents. We heard the appeal on this Court's virtual platform on 18th November 2024, when learned counsel, Ms. Omondi, appeared for the appellants, while learned counsel, Mr. M.C. Ouma appeared for the respondent. Ms. Omondi relied on written submissions on record dated 11th November 2024, which she conceded had inadvertently not served on the respondent. The respondent had therefore not filed any response to the appeal, and with Mr. Ouma not objecting, we directed Ms. Omondi to email the submissions to the respondent's counsel immediately, and gave Mr. Ouma time to peruse the submissions and leave to respond orally, which she did.
11. This being a first appeal, the duty of this Court is reiterated as was set out in the decision of *Selle & Another vs Associated Motor boats Co. Ltd & Others* (1968) EA 123 which is to reconsider the evidence, evaluate it and draw our own conclusion of facts and law, and only depart from the findings by the trial Court if they were not based on evidence on record; where the said Court is shown to have acted on wrong principles of law as held in *Jabane vs Olenja* (1968) KLR 661 or where its discretion was exercised injudiciously as was held in *Mbogo & Another vs Shah* (1968) EA.
12. The main issue in this appeal is whether the learned trial Judge exercised his discretion injudiciously in declining to review and set aside the ruling of 13th July 2016 .The grounds upon which we can interfere with the exercise of the learned Trial Judge's discretion were set out in the case of *United India Insurance Co. Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co. Ltd Vs East African Underwriters (Kenya) Ltd* [1985] eKLR as follows:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”
13. Ms. Omondi in this respect submitted that section 80 of the *Civil Procedure Act* as read with Order 45 of the Civil Procedure Rules gives courts the jurisdiction to review a decree or order for among other grounds , any other sufficient reason, and the trial court overlooked the fact that in as much as the issue of ownership of the suit property was resolved the by the appeal the issue of striking off the name of the deceased 1st respondent had not been determined in accordance with the provisions of section 80 of the *Land Registration Act*, which provides that rectification of this nature can only be made by the Land Registrar after a court order has been made. Therefore, the only recourse available to the appellants in view of the orders of 13th July 2016 was a review so that the issue raised can be addressed, and they had explained the delay in bringing the application for review.
14. Mr. Ouma on his part submitted that the learned Judge exercised his discretion within the parameters of law in upholding the 1st respondent's Preliminary Objection, and no new issues came up that were not within the knowledge of the appellants nor was there any error apparent on the face of the record. Therefore, that the appellants ought to have filed an appeal and not review.



15. We have set out the history of the dispute between the parties herein, and we note that at the time of filing of the appellants’ application for review dated 8th March 2019, there were two conflicting decisions of the ELC in existence in relation to the effect of the decision made in Winam SRMCC No. 495 of 2004. In the ruling of 13th July 2016, the ELC had confirmed the decision as being binding on the appellants on account of the doctrine of res judicata. Upon appeal, the judgment of 24th October 2017 in Kisumu ELC No. 4 of 2017 set aside the said decision and dismissed the suit filed by the 1st respondent in Winam SRMCC No. 495 of 2004. In our view, this was a relevant factor that the ELC ought to have considered in the appellants’ application for review, particularly since the appeal from the decision in Winam SRMCC No. 495 of 2004 was existing and disclosed to the ELC at the time of hearing of the 1st Respondent’s preliminary objection.
16. In addition, the ELC made a factual and legal error in the ruling of 20th December 2019 by finding that “the judgment on appeal has no effect on the earlier ruling that this suit is res judicata”, when the very effect of that judgment was to fundamentally alter and destroy the basis of the finding in the ruling of 13th July 2016 that the appellants’ suit was res judicata when it found the decision in Winam SRMCC No. 495 of 2004 to be erroneous and set it aside. Lastly, it was also contradictory and in error to find that “upon the delivery of the ruling of res judicata on 13th July 2016, the Applicants neither applied for a review nor appealed the ruling”, when the application that was the subject of that very ruling was seeking to review the ruling of 13th July 2016!
17. We have said enough to demonstrate that the learned Judge did not apply his mind to crucial factors that provided sufficient reason to review the orders made on 13th July 2016, and misapprehended the facts giving rise to the appellants’ application for review. This appeal is therefore for allowing, and we accordingly hereby set aside the ruling and orders of Ombwayo J. dated 20th December 2019, with the result that the appellants’ suit in the ELC at Kisumu, being Civil Case No 140 of 2015, is reinstated for hearing on merit. Given the circumstances giving rise to this appeal, we order that each party bears their own costs of the application dated 8th March 2019, and of this appeal.
18. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF MARCH, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

