Marete & 2 others v Kinyua (Sued as the Legal representative of the Estate of Patrick Kinyua Iringo - Deceased) (Civil Appeal E034 of 2021) [2025] KECA 1003 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KECA 1003 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL E034 OF 2021

JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA

MAY 30, 2025

BETWEEN

STEPHEN MUTHAMIA MARETE ..... 1ST APPELLANT

DAVID GATOBU MARETE ..... 2ND APPELLANT

JULIUS MURIITHI MARETE ..... 3RD APPELLANT

AND

MARY MATORE KINYUA (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PATRICK KINYUA IRINGO - DECEASED) ..... RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court at Meru (Mbugua, J.) delivered on 17th February 2021 in ELC Appeal No. 26 of 2014)

JUDGMENT

1. The brief facts of the case are necessary to contextualize the matter. Patrick Kinyua Iringo, whose estate is being represented by the respondent, filed Case No. 358 of 1998 in the Chief Magistrate's Court, seeking an order of rectification of the register for Nkuene/L. Mikumbune/856, 857, 858, 859, 860, 861, 862, 863 & 864, and for the appellants' names to be replaced with that of the respondent.

2. It was the respondent's case that on 8th September 1997, he agreed with the 1st appellant to sell a ¼ acre of Nkuene/L. Mikumbune/840 (the original undivided property) at a price of Kshs. 170,000/-. He averred that he was, at all material times, the registered owner of the said property up to October 1997, when the same was fraudulently transferred to the appellants as trustees of Nkuthu Kaumo Impuza Mugambi Self Help Group (the Self-help group) and who subdivided the suit property into nine (9) portions; Nkuene/L. Mikumbune/856 to 865 and allocated the same to themselves.

3. The appellants filed a defence dated 8th May 1998 and admitted that the respondent originally owned the land. However, they denied transferring the same to themselves fraudulently. They averred that the respondent voluntarily sold the said land to them as trustees of the self-help group. They denied having bought only a ¼ of an acre, stating that the respondent sold the entire suit property. They contended that the suit was actuated by greed, malice and ill-will and sought for the same to be struck out.

4. In a judgement delivered on 6th February 2014, the trial court found in favour of the respondent and ordered the Land Registrar Meru to rectify the registers in respect to Nkuene/L. Mikumbune/856, 857, 858, 859, 860, 861, 862, 863, and 864, and replace the names appearing therein with those of the respondent. However, the court found that the claim for general damages was not well-founded and dismissed it. Costs were awarded to the respondent.

5. Aggrieved by the judgement, the appellants preferred an appeal to the Land and Environment Court (ELC) in a memorandum of appeal dated 7th August 2014 and amended on 27th April 2018. According to the High Court record dated April 24, 2017, directions were issued for the appeal to be disposed of by way of written submissions, along with the dates for filing such submissions.

6. The initial respondent died on 1st October 2016, and Limited Letters of Administration Ad litem were issued to his widow, Mary Naitore Kinyua, vide Nkubu SRM Misc. Succession Cause No. 39 of 2017. After some back-and-forth, the appellants filed an application dated 27th April 2018, seeking that Mary Naitore Kinyua be substituted for the deceased respondent. The orders were granted.

7. The matter was mentioned before L. Mbugua J. on 19th of October 2017, when the court was informed that the appellants had already filed their submissions. The respondent was given a final chance to file her submissions. On the 28th of June 2018, the matter was placed before a visiting judge; M. Njoroge, J., who issued new directions on submissions. The appellants were given 21 days to file submissions, and likewise, the respondent upon service. In giving his directive, the judge may not have considered the record and was oblivious to the fact that the appellants had already filed submissions according to an earlier order. Surprisingly, the counsel then in court did not inform the court that the appellants had already submitted their arguments. The appellants did not file a fresh set of submissions. Upon the respondent's counsel filing submissions, the Deputy Registrar dispatched the file to 'the visiting judge, who subsequently, on the 20th of December 2018, delivered his judgement, dismissing the appeal due to lack of submissions. He was seemingly unaware that the appellant had filed submissions a long time ago.

8. Aggrieved by the judgement, in particular, the judge's finding that the appellants had not filed submissions, the appellants filed an application dated 30th October 2019, seeking a stay of execution of the judgment/decree and a review of the judgment.

9. The application was predicated on the grounds that the court erroneously determined the appeal on a technicality and based its judgment on a wrong premise; that the appellants had not filed submissions when the submissions had been filed and were on record on time; the impugned judgment was delivered without notice to the appellants' advocate; the appellants stood to suffer significant loss and prejudice unless the orders sought were granted and that it was in the interest of justice that the orders sought be granted.

10. The respondent opposed the application. She filed grounds of opposition dated 6th July 2020, stating that the application lacked merit and was vexatious; the application had not met the requirements of Order 45 of the Civil Procedure Rules; the appellants had failed to comply with the directives of the 'visiting judge' issued on 28th June 2018; thus failing to prosecute their appeal and that there was no

new matter before the court to necessitate a review. She urged for the dismissal of the application and costs.

11. The parties canvassed the application, and in a ruling delivered on 17th February 2021, the application was found to have no merit. It was dismissed with costs to the respondent, precipitating the appeal before us, which raised nine grounds of appeal in a memorandum of appeal dated 16th March 2021.

12. We have collapsed the grounds into two; namely that the learned judge erred in law and fact; by ignoring the fact that the appellants' submissions dated 2nd October 2017 were filed in court on 2nd October 2017 pursuant to a directive of the court, which was not vacated and or set aside and which submissions were properly on record; in maintaining that the appellants had failed to prosecute their appeal by the failure of filing submissions and in dismissing the appellants' appeal on that ground.

13. Learned counsel for the appellants filed submissions dated 18th December 2023, urging that the appellants' submissions filed on 2nd October 2019 were overlooked either due to several extensions sought by the respondent's counsel to enable them file submissions or failure to substitute the deceased respondent promptly; or erroneous observation made by the Deputy Registrar on 6th September 2018, or pressure of work by the 'visiting judge', further that the learned trial judge failed to notice the appellants' submissions. Learned counsel further faults the learned judge for declining to review what was an error on the face of the record, noting, inter-alia that the learned 'visiting judge' obviously overlooked the submissions in the court file.

14. Counsel further submitted that the appellants did not withdraw their submissions dated 2nd October, 2017 and neither did they at any time thereafter, move the High Court to either substitute their submissions of 2nd October 2017 or file additional submissions; the finding by the learned judge of the High Court to the effect that the only submissions that the learned 'visiting judge' could have relied on were those filed within 21 days of 28th June 2018 and not the ones filed before that date is not only prejudicial to the appellants but totally biased and indeed against the very spirit of Sections 1A and 1B of the *Civil Procedure Act* as well as Article 159 of *the Constitution* that requires that justice be administered without undue regard to technicalities and with the sole objective of dispensing substantive justice to the parties.

15. In further submissions dated 8th August 2024, learned counsel submitted that there was no obligation on the part of the appellants to file another set of the duplicate submissions they had already filed on 2nd October 2017 and that, therefore, the learned judge erred in declining to grant the appellants' application for review by holding at page 137 of the record, that the only submissions that the visiting ELC judge would have recognised are those filed within 21 days of 26th June, 2018 and not the ones filed earlier on 2nd October 2017 by the same appellants. In support, he relied on the case of D.T Dobie & Co. (Kenya) Ltd vs. Joseph Mbaria Muchina & Another [1980] eKLR.

16. This being a first appeal, it is our duty, in addition to considering submissions by the appellants and the respondents, to analyze and re-assess the evidence on record and reach an independent conclusion. This approach was adopted in Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others [2015] eKLR, where the court cited the case of Selle vs. Associated Motor Boat Co. [1968] EA 123 and held as follows; -

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow

the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

17. This appeal arises from the High Court's refusal to review the judgement delivered on 17th February 2021, dismissing the appellants' appeal for failure to file their submissions. The application was based on the ground that the submissions were on record, having been filed on the 2nd of October 2017, and the court's finding that the appellants' submissions had not been filed was an error apparent on the face of the record. Order 45 rule 1(1) of the Civil Procedure Rules that deal with review applications provides as follows:

    1.

        (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.

18. From the High Court proceedings, it is evident the court was informed on the 19th of October 2017 that the appellants had complied with the court's directions and had filed submissions. The respondent was allowed time to respond. On the record, we have seen the appellants' submissions dated 2nd October 2017. What is obvious is that the two judges who handled the matter at various times did not consult the record and, therefore, granted directions without being aware that the appellants had already filed submissions. The counsel on both sides who were then in court or their representatives did not correct the judges. In National Bank of Kenya Ltd vs. Ndungu Njau [1997] eKLR, this Court had this to say regarding a review arising from a mistake or error apparent on the face of the record:

> " A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

19. In the case of Muyodi vs. Industrial & Commercial Development Corporation & Another [2006] 1 EA 243, held that:

> " For an application for review under Order XLV, Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important matter or evidence which, after due diligence, was not within his knowledge or could not be produced at that time.

> Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay."

20. We are satisfied that there was an obvious error on the face of the record. Both judges who interchangeably handled the matter failed to diligently study the file, and as a result, the appellants were condemned unheard. As for the judge who handled the review application, the application brought to fore the error apparent on the face of the record as the submissions were always on the record. We, therefore, fault the judge for her decision declining the review that was necessary to correct a fault on the part of the court.

21. Consequently, the appeal is allowed. The file is remitted back to the High Court for a fresh appeal hearing.

22. Each party to bear their own costs.

DATED AND DELIVERED AT NYERI THIS 30TH DAY OF MAY, 2025.

J. LESIIT

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JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR