Mweu v Angote (Suing as Personal Representative of the Estate of Lucas Adam Onyango) & another (Civil Appeal (Application) E093 of 2021) [2025] KECA 894 (KLR) (23 May 2025) (Ruling)

Neutral citation: [2025] KECA 894 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL (APPLICATION) E093 OF 2021

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

MAY 23, 2025

BETWEEN

MONICA NZILANI MWEU ..... APPLICANT

AND

ANNE AYAKO ANGOTE (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LUCAS ADAM ONYANGO) ..... 1ST RESPONDENT

MUNICIPAL COUNCIL OF MOMBASA ..... 2ND RESPONDENT

(Being an application for clarification of this Court's Judgment dated 21st June 2024)

RULING

1. The Applicant, Monica Nzilani Mweu, who was the 1st Respondent in the appeal, filed a Notice of Motion dated 16th October 2024 pursuant to Rules 33, 39 and 44 of the Court of Appeal Rules, 2022 praying that this Court be pleased to provide clarity on the final orders of the Court in the Judgment dated 21st June, 2024, and that the costs of this application be provided for.

2. The Applicant's Motion is brought on several grounds which are: that in the Judgment of the Court delivered on 21st June, 2024, the Court found that both parties had failed to establish their proprietary rights over House No. 210 (the suit property) in that the 1st Respondent/Appellant had failed to prove that her husband, the late Lucas Adam (deceased), had purchased the suit property, and the Applicant had failed to establish that she lawfully acquired the suit property.

3. It was contended that, due to the imprecision of the final orders of this Court, the 1st Respondent/ Appellant had commenced registration of the suit property in her name on the assumption that the Judgment set aside the entire judgment of the Environment and Land Court dated 22nd January, 2020. It was contended that, the appeal having succeeded in part, the Court should provide clarity on the

fate of the suit property in terms of the final orders of the Judgment. Finally, it was contended that the application was urgent and the Court has jurisdiction to determine it.

4. The application was supported by the affidavit of Emmanuel Mutuku Mwelu, the son of the Applicant, under limited Grant of Letters of Administration Ad Litem dated 14th October, 2021.

5. In response, the 1st Respondent/ the Appellant filed a replying affidavit in which it was deposed that, in effect, the Applicant's application was for review of the Court's Judgment; that the Rules of this Court do not permit such review; that there was sufficient evidence to prove and, as held by the Court that the suit property belongs to the 1st Respondent/Appellant, given that the Court held that the Applicant could not possibly have validly acquired any interest or title in the suit property; and that, therefore, this Court should not sit on appeal over its own Judgment. The 1st Respondent/Appellant further deponed that she was in possession of the suit property before the Applicant and her agents interrupted her occupation.

6. Both the Applicant and the 1st Respondent/Appellant filed written submissions. When the application came up for hearing on a virtual platform, learned counsel Ms. Umara for the Applicant submitted that the motion is grounded on Rules 33, 36, 39 and 44 of the Court of Appeal Rules 2022, and was wholly concerned with settling terms of this Court's decree; that the findings of this Court are not at all in question, however, what is in question is the Decree to issue and the fate of the suit property in light of the holding of the Court at page 20 of the Judgement.

7. Counsel submitted that the Decree as lodged places the litigants at the status quo ante the Environment and Land Court trial and, as such, the Applicant's allocation of the suit property remains undisturbed by both decisions; that, for these reasons, the Court should perfect its Decree. Counsel relied on the decision of this Court in the case of Attorney General vs Bala (Civil Appeal 223 of 2017) [2023] KECA 117 (KLR) where it was held that a Decree and findings did not determine the rights of parties, and therefore could not found an appeal.

8. On her part, the 1st Respondent/Appellant appeared in person and stated that she would rely on her written submissions where it was submitted that there is no difficulty in understanding the Judgment of the Court; that this Court allowed the 1st Respondent/Appellant's appeal, and that the Applicant's application is merely intended to deter the 1st Respondent/Appellant from enjoying the fruits of her judgment.

9. Counsel submitted that there is no ambiguity in the Judgment as the words used are plain and easily understood; that the Applicant's application is requesting that this Court amends its own Judgment simply because, the Court found that the Applicant' counterclaim was not merited; and that this application is an abuse of the Court process, misconceived and bad in law. It was submitted that there is neither an error sought to be corrected nor is there any clarification to be provided; that the Applicant is seeking a review of the Judgment through the backdoor, which invitation the Court should decline.

10. Learned counsel Ms. Jadi holding brief for Mr. Momanyi for the 2nd Respondent informed the Court that the 2nd Respondent would abide by the Court's directions in respect of the application.

11. As a brief background to the application, in an amended plaint filed on 8th November 2021, the 1st Respondent/Appellant sought a permanent injunction to restrain the Applicant whether by themselves, their servants or agents from demolishing the suit property, from fencing, constructing, digging or in any other manner interfering with the suit property. A further order was sought to cancel any allocation or transfer of the suit property by the 2nd Respondent to the Applicant, and a declaration that any subsequent allocation by the 2nd Respondent was unlawful. It was the 1st Respondent'/ Appellant's case that, sometime in 2001, unauthorized persons started demolishing the house on the

suit property claiming that it had been sold to a third party. Her husband, the late Lucas Adam (deceased), stopped the demolition, and it later transpired that the 2nd Respondent had purported to transfer the house to the Applicant. She stated that the Applicant's claim over the suit property had no basis since it was lawfully sold to the Mikindani Friends Club by the previous owner, and later transferred to the Late Lucas Adam upon payment of the full purchase price.

12. On her part, the Applicant denied the claim. In her defence and counter- claim, she asserted that she is the legal owner of the suit property, having purchased it for a consideration of Kshs. 550,000. She claimed that the suit property was transferred to her sometime in March 2000 after payment to the 2nd Respondent of the requisite fees, including all the land rates and outgoings.

13. In the counterclaim, she stated that she has suffered loss as a result of the interim injunction issued against her, as she had plans to develop the suit property and had assembled building material on it; and that she had been unable to obtain any income from the suit property. She prayed for mesne profits of Kshs. 15,000 per month from the date the interim injunction was issued.

14. The 2nd respondent equally denied the claim and filed two statements of defence, but did not call any witness or lead any evidence in support of the matters pleaded.

15. Upon considering the dispute, the trial Judge dismissed the 1st Respondent/Appellant's suit for reasons that the 1st Respondent/Appellant failed to prove that the Late Lucas Adam had purchased the suit property and, secondly, upheld the Applicant's counterclaim that the Applicant had purchased the suit property from Gloria Obado and Margaret Awour, the heirs of the late Obado through a sale agreement dated 24th November 1998 upon payment of the entire purchase price of Kshs 550,000 together with the Council rates; and that Gloria Obado and Margaret Awour had executed a transfer of the suit property in her favour.

16. The 1st Respondent/Appellant was aggrieved by the decision and filed an appeal to this Court on several grounds to the effect that the learned Judge was in error in law and fact in dismissing the suit and allowing the Applicant's counterclaim.

17. In determining the appeal, this Court concluded that the 1st Respondent/ Appellant's appeal succeeded in part, and that as both parties utterly failed to establish their proprietary rights over the suit property in that the 1st Respondent/Appellant failed to prove that her husband the Late Lucas Adam purchased the suit property from the late Obado, and the Applicant failed to establish that she lawfully acquired the suit property. It is this Judgment of which the Applicant seeks clarification.

18. Upon considering the motion and the parties' submissions, it becomes apparent that what the Applicant is seeking is for this Court to review its Judgment. The Applicant claims that the Judgment of the Court requires clarification on the fate of the suit property and that the Decree has reverted the litigants to the status quo ante the Environment and Land Court trial and that, as such, the Decree is incapable of enforcement by either party.

19. Turning to the issue as to whether this Court has jurisdiction to review its decision, it is to be observed right at the outset that, following the delivery of the Judgment on 21st June 2024, this Court was rendered functus officio. Our jurisdiction came to an end after the Judgment was delivered in respect of the appeal.

20. But, having said that, this Court is endowed with residual jurisdiction to reopen and review it judgments in very limited or exceptional circumstances. In the case of Benjoh Amalgamated Ltd & Another vs Kenya Commercial Bank [2014] eKLR (Civil Application No. Sup 16 of 2012), the Supreme Court opined that this Court has residual jurisdiction to review its own decisions where no

appeal lies to correct errors of law that have occasioned real injustice or miscarriage of justice. The court in setting out parameters for review rendered itself thus:

> "(57) As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court)...
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> 61. It is our finding that this Court not being the final court has residual jurisdiction to review its decisions to which there is no appeal to correct errors of law that have occasioned real injustice or failure or miscarriage of justice thus eroding public confidence in the administration of justice. This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice...
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> 61. This Court will be reluctant to invoke its residual jurisdiction of review where, as here, there is laches or where legal rights of innocent third parties have vested during the intervening period which cannot be interfered with without causing further injustice".

21. In the case of Patrick Kitamonge Leparleen vs Maralal Town Council [2020] eKLR this Court observed that:

> The above makes it clear that this Court does have a limited residual jurisdiction to review its decisions. The residual jurisdiction is to be exercised in very exceptional circumstances where the application has been brought without undue delay and only for the purpose of correcting errors of law that have occasioned substantial injustice or miscarriage of justice, and in regard to which errors there is no other alternative remedy. In addition, the Court will not invoke the residual jurisdiction to review its decision where to do so would interfere with rights of innocent third parties."

22. In the case of Taylor & another vs Lawrence & Another [2002] 2 All ER 353, the lead judgment by the Chief Justice, Lord Woolf, dealt with both the justice principle and finality principle and held that the Court of Appeal:

> ... had a residual jurisdiction to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances.
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> 'The Court had implicit powers to do that which was necessary to achieve the due objectives of an appellate Court, namely to correct wrong decisions so as to ensure justice between the litigants involved, and to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents. A Court had to have such powers in order to enforce its rules of practice, suppress any abuses of its process and defeat any attempted thwarting of its processes. The jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised. There was tension between a court having such residual jurisdiction and the need to have finality in litigation, so that it was necessary to have a procedure which would ensure that proceedings would only be reopened when there was a real requirement for that to happen. The need to maintain confidence in the administration of justice made it imperative that there should be a remedy in a case where bias had been established and that might justify

the Court of Appeal in taking the exceptional cause of reopening proceedings which it had already heard and determined. It should however, be clearly established that a significant injustice had probably occurred and that there was no alternative effective remedy..."

23. And in the case of Ndeti & another vs Matei Julius Mulili Ndeti & Nzioki Mulili Ndeti (Administrators of the Estate of Harrison Mulili Ndeti - Deceased) & 4 others (Civil Application E064 of 2019) [2023] KECA 60 (KLR), this Court clarified that:

> 45. The "residual jurisdiction" of this Court is available at a stage in which the court is normally deemed to have lost jurisdiction over the case or the subject matter involved in the appeal. The law as we understand it is that the general rule is that a Court of Appeal will not ordinarily re-open its decisions. But there are exceptions to the general rule, which as authorities suggest are reserved for rare and limited cases, where the facts justifying them can be strictly proved.
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> 46A. party is not entitled to seek a review of a judgment delivered by a Court of Appeal merely for the purpose of a rehearing and obtaining a fresh decision in the case. Ordinarily, the norm is that a judgment pronounced by the Court of Appeal is final and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so. The Court may also re-open its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice."

24. What is clear from the above cited authorities is that this Court will not disturb its decisions for unwarranted or unsubstantiated reasons. It will not reopen an appeal because a party is seeking a different outcome. A party seeking a review of this Court's decision must demonstrate that real injustice may have or will occur, or that the decision will give rise to a threat to public confidence in the administration of justice. In other words, there must be plainly compelling reasons proffered that establish a sound and unequivocal basis for such reopening or review.

25. Given the foregoing, the question before us is whether the Applicant has satisfied the above well-established criteria to warrant a review of this Court's Judgment. The Applicant's reasons for seeking a review is that the Judgment of the Court requires clarification on the fate of the suit property or the Decree as lodged. However, our consideration of the application does not disclose any grounds showing that the impugned Judgment gave rise to an injustice or a miscarriage of justice, or that it would erode public confidence in the administration of justice. In effect, we find that nothing was established to warrant a review of the Judgment dated 21st June 2024. Having said that, we can find nothing unclear or ambiguous in either the meaning or intent of the plain words of the Judgment for which clarification is sought.

26. In sum, the Notice of Motion dated 11th July 2023 is without merit and is hereby dismissed with costs to the 1st Respondent/Appellant.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MAY, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

Deputy Registrar