Mberia v Mbui (Civil Appeal 102 of 2020) [2025] KECA 954 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 954 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 102 OF 2020

S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA

MAY 9, 2025

BETWEEN

DR. WILLIAM GACANI MBERIA ..... APPELLANT

AND

CHARLES KIRIMI MBUI ..... RESPONDENT

(An appeal from the decision/ruling of the Environment and Land Court at Meru (Mbugua, J.) delivered on 13th November 2019 in ELC Case No. 151 of 2016)

JUDGMENT

1. In a plaint dated 5th September 2016, the appellant sought for a declaration that land parcel No. Ntirimiti Settlement Scheme/417 measuring 9.5 Ha belongs to him; an injunction restraining the respondent from trespassing, developing, transferring, entering and/or interfering with land parcel No. Ntirimiti Settlement Scheme/417, as well as costs of the suit and interest.

2. The respondent opposed the suit in a statement of defence and a counterclaim dated 26th September 2016, wherein he asserted that he is the registered proprietor of land parcel No. Ntirimiti Settlement Scheme/484 adjacent to the appellant's property and that the appellant had unlawfully moved his boundary for land parcel No. Ntirimiti Settlement Scheme/417 onto the access road separating the two parcels and had further encroached on the respondent's land, No. Ntirimiti Settlement Scheme/484, with the clear intent of annexing and occupying part of the respondent's property.

3. The respondent further averred that upon discovering the appellant's actions, on the advice of their area Chief, he filed a boundary dispute with the Land Registrar. A government surveyor subsequently visited the disputed boundary in the presence of the parties and their respective private surveyors. After the dispute was heard, the boundary between the two parcels of land was retraced, demarcated, and fixed. Following this, the respondent fenced off his land. However, the appellant unlawfully destroyed the respondent's fence by cutting the barbed wire and removing the poles. Furthermore, the respondent affirmed that he has no interest in the appellant's land. He averred that there is no dispute

regarding the ownership, possession, occupation, or use of the said land parcel, making the orders sought by the appellant irrelevant since the respondent has no claims or interest in the appellant's property.

4. In his counterclaim, the respondent stated that he purchased his land parcel, No. Ntirimiti Settlement Scheme/484, from its previous owner, George Mugambi Gitonga. With the intent of subdividing his land, he hired a private surveyor to verify the boundaries when he discovered that the land on the ground was smaller than what was indicated on the title deed, which culminated in him registering a boundary dispute, which was heard and resolved by the Land Registrar. Further, he claimed compensation for the value of the damaged fence and a declaration that the boundary fixed by the Land Registrar during the determination of the boundary dispute was the actual and legitimate boundary for land parcel No. Ntirimiti Settlement Scheme/484. He further sought an injunction restraining the appellant from entering, invading, cultivating, occupying, constructing, fencing or interfering with the respondent's quiet and peaceful ownership, possession, occupation and use of his land.

5. In the defence and counterclaim dated 21st November 2016, the appellant denied the allegation that he had encroached on the respondent's land. He asserted that he had not acted illegally and maintained that his claim concerned the entire land parcel No. Ntirimiti Settlement Scheme/417, which measures 9.5 Ha, and which the respondent had interfered with. Furthermore,he emphasized that the matter extended beyond a mere boundary dispute and was properly before the court for consideration. In his defence against the counterclaim, the appellant stated that he was never notified, agreed upon, participated in, or involved in establishing any boundary as alleged by the respondent. He also denied causing any damage to the respondent's property.

6. On 19th April 2017, the respondent raised a preliminary objection on the grounds that the court lacked jurisdiction to resolve the boundary dispute as it fell under the authority of the Land Registrar; the suit was filed in blatant breach of due process of the law for failure to adhere to the provisions of the *Land Registration Act* No. 3 of 2012. The suit was incompetent and incurably defective.

7. The appellant opposed the preliminary objection and filed grounds of opposition dated 27th April 2017 stating that: his claim was clear and did not pertain to a boundary dispute, but rather to serious trespass and theft of his land, which had been annexed and fenced off by the respondent; there had been no violation of the *Land Registration Act*, and the preliminary objection contradicted the respondent's sworn statements; the respondent was attempting to avoid addressing the issues of financial and political influence used to seize the appellant's land unlawfully; the appellant had used the land for 26 years without any complaints from neighbours, and was now being evicted by a newcomer; and the suit was valid, as it had been defended and included a counterclaim.

8. Upon hearing the preliminary objection, the trial court, in a ruling on 11th July 2018, found that the appellant's complaint centered on a boundary between the two parcels of land, which the Land Registrar had already addressed. The court noted that the appellant did not accept the Land Registrar's decision as binding, noting that the power given to the Land Registrar to resolve boundary disputes is established by statute and cannot simply be disregarded. Agreeing with the respondent's arguments, the court concluded that it lacked jurisdiction to adjudicate on the matter and, therefore, the suit before it was incompetent. The court allowed the preliminary objection and struck out the suit with costs to the respondent.

9. Dissatisfied with the ruling above, the appellant filed an application dated 17th September 2018, seeking a review of the ruling made on 11th July 2018, on grounds that there was discovery of new documentary evidence that could not be presented at the time the order was issued; there was a mistake or error

apparent on the face of the record sufficient to warrant a review of the court's order; the respondent had misled the court by concealing relevant facts; and the fact that the court had not addressed the counterclaim, which remained on record.

10. The respondent filed a preliminary objection to the application, asserting that the court was functus officio. He argued that the application violated section 80(a) of the *Civil Procedure Act*, which provided that a review is not permissible once an appeal has been initiated. The respondent pointed out that the appellant had lodged a notice of appeal on 23rd July 2018, which was served on the respondent's counsel on 25th July 2018. Furthermore, the respondent contended that the application contravened the provisions of Order 45 rule 1(a) of the Civil Procedure Rules in light of the pending appeal, rendering the application incompetent.

11. On 13th November 2019, the court delivered a ruling noting that its analysis in the ruling of 11th July 2018 was based on the appellant's own pleadings, which indicated that the dispute concerned a boundary issue. The appellant's application did not provide any evidence to refute this characterization or demonstrate that the court had erred in its ruling; neither was any new evidence adduced. Consequently, the court concluded that the appellant had not met the necessary conditions for a review. The application was deemed unmeritorious and was dismissed. Additionally, the preliminary objection filed by the respondent on 18th October 2018 was also rejected.

12. The above ruling of the trial court of the 13th of November 2019 precipitated this appeal. The appellant being aggrieved raised four (4) grounds of appeal in his memorandum of appeal dated 28th July 2020, seeking that the appeal be allowed as prayed on grounds that the learned judge erred in law and fact in not finding that the appellant had produced enough material to make a case for review; misinterpreted the pleadings before her and the evidence produced by the appellant thus arriving at a wrong conclusion; misapplied the law and wrongly dismissed the appellant's case for review; and that the trial judge's ruling/decision is bad in law and fact.

13. In support of the appeal, learned counsel for the appellant filed submissions dated 24th October 2024. Learned counsel raised two issues for determination: whether the appellant's application meets the threshold under Order 45 of the Civil Procedure Rules and whether the High Court misapplied the law regarding the review application.

14. Learned counsel further submitted that the appellant, dissatisfied with the trial court's ruling of 11th July 2018, filed the application subject to this judgement dated 17th September 2018, brought under Order 45 rule 1 of the Civil Procedure Rules. The issue at hand should not be regarded as a boundary dispute. The Land Registrar had already established the boundaries, meaning any boundary disputes were resolved before the suit was filed. Moreover, the Land Registrar's report and the boundary dispute hearing proceedings, which are undated, could not serve as evidence for the appellant to support his claim that the boundary dispute was addressed and resolved at the time of the preliminary objection hearing. The court should have allowed both parties to present evidence during the hearing. Learned counsel cited the case of Paul Mwaniki v NHIF Board of Management [2020] eKLR, to support his argument regarding an error or mistake apparent on the face of the record. In this case, the court held that an error or mistake apparent is such an error that is self-evident and does not require extensive discussion to be recognised. Learned counsel argued that the cited case aligns with the current appeal, as it is clear that the suit was filed after the Land Registrar had already established the boundaries. However, the trial court misinterpreted the facts, assuming that the appellant moved the court in ELC No. 151 of 2016, dissatisfied with the boundary determination, although the appellant's pleadings did not indicate so. Further, learned counsel pointed out that in paragraph 4 of the plaint, the respondent was accused of fraudulently annexing the appellant's land at the time of purchase; this does not amount

to a boundary dispute. According to the counsel, this misinterpretation by the court constitutes an error.

15. Learned counsel for the respondent filed submissions dated 20th September 2024 and relied on the case of Republic Public Procurement Administrative Review Board & 2 Others [2018] eKLR, arguing that the application did not meet the threshold laid down in section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.

16. Learned counsel further contended that the appellant failed to demonstrate the new evidence. Additionally, learned counsel submitted that the appellant did not identify any mistakes or errors apparent on the face of the record that would warrant correction by the court in a review. In support, he cited the case of National Bank of Kenya v Ndungu Njau, Civil Appeal No. 2111 of 1996.

17. This being a first appeal, it is our duty, in addition to considering submissions by the appellants and the respondents, to analyse and re-assess the evidence on record and reach our independent conclusions. This approach was adopted in Arthi Highway Developers Limited v West End Butchery Limited & 6 Others [2015] eKLR, where the court cited the case of Selle v 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."

18. Having considered the pleadings, rival submissions, authorities cited by the parties and the law, we discern issues for determination to be whether the trial court misinterpreted the facts and the law and whether the appellant met the necessary threshold for a review.

19. Section 80 of the *Civil Procedure Act* states that:

> Any person who considers himself aggrieved— (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(1) 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. (Emphasis added)

20. In the case of Republic Public Procurement Administrative Review Board & 2 others (supra), this Court stated that:

> " Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds;
>
> (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 there is a requirement that the application has to be made without unreasonable delay."
>
> National Bank of Kenya v Ndungu Njau (supra):
>
> "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 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. Misconstruing a statute or other provision of law cannot be a ground for review."

21. In dismissing the application, the trial court retraced the facts of the case as pleaded by the parties, who both admitted that the issue was where each of their portions of land lay adjacent to each other. The pleadings and submissions were quite evident to the court, and the court appreciated that the suit was filed after the Land Registrar's verdict. The parties canvassed the same issues in the application subject of this judgment, each claiming the other had encroached on their land.

22. We note that in the application for review, the appellant stated that he had come across new evidence; however, this was not evident. Secondly, he claimed that there was an error apparent on the face of the record, but the averments in the supporting affidavit and the parties' submission were a replica of the earlier application whose ruling was being sought to be reviewed. In a nutshell, there was nothing new, and no mistake or error was apparent on the face of the record.

23. We agree with the ruling of 13th November 2019 and dismiss the appeal with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 9TH DAY OF MAY, 2025.

S. ole KANTAI

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR