Mjanaheri Farm Liminted v China Road & Bridge Corporation & another (Civil Appeal E038 of 2022) [2025] KECA 771 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 771 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E038 OF 2022

KI LAIBUTA, LA ACHODE & GWN MACHARIA, JJA

MAY 9, 2025

BETWEEN

MJANAHERI FARM LIMINTED ..... APPELLANT

AND

CHINA ROAD & BRIDGE CORPORATION ..... 1ST RESPONDENT

HOLA-GARSEN-MALINDI ROAD PROJECT ..... 2ND RESPONDENT

(Being an appeal against the Ruling and Orders of the Environment and Land Court of Kenya at Malindi (Odeny, J.) dated 3rd March 2022 in ELC Case No. 85 of 2006 Formerly Mombasa HCCC No. 424 of 2000)

JUDGMENT

1. In this appeal, Mjanaheri Farm Limited (the appellant) is challenging the ruling of the Environment and Land Court at Malindi (Odeny, J.) delivered on 3rd March 2022. The resultant ruling arose from the appellant's Notice of Motion dated 13th November 2020 in which it was seeking a review of the court's (Angote, J.) judgement delivered on 8th May 2015. We shall revisit the contents of the appellant's Motion later on in this judgment.

2. A precis of facts of the main suit filed by the appellant is that it leased a portion of Mjanaheri Farm/M9/ Malindi (the suit land) to the 1st respondent for excavating quarrying murram for the construction of a road christened Hola-Garsen- Malindi Road Project (the second respondent), together with two water sewerage tanks. It was the appellant's case that, in contravention of the law and the lease agreement, the 1st respondent did not restore the suit land upon completion of excavation and occupation to its original state. It claimed special damages of Kshs.506,000, general damages and an order compelling the 1st respondent to restore its land to the condition in which it was as per the provisions of the *Land Acquisition Act*.

3. Opposing the suit, the 1st respondent filed a defence and counterclaim in which it averred that it was the appellant who allowed it to use the two water tanks for free in exchange of it (the 1st respondent) providing a bulldozer to work for it (the appellant) for four days; and that the suit land was compulsorily acquired by the Government of Kenya, and that it was the Government's duty to restore it as per the agreement.

4. In its counterclaim, the 1st respondent averred that the appellant refused it to access the land, and that, consequently, it suffered loss amounting to Kshs.1,330,550.

5. The learned Judge (Angote, J.) considered the question as to whether the appellant was entitled to special and general damages on account of the 1st respondent's failure to honour the lease agreement. The Judge noted that the Government compulsorily acquired 2.88 hectares of the land known as M9, for purposes of being a material site vide a Notice of Taking Possession dated 4th September 1995, and that it was registered against the title on 1st April 1996; and that the appellant was compensated accordingly.

6. The Judge held that, in its letter dated 16th April 1988, the 1st respondent admitted that it bore the duty to rehabilitate and restore all the three quarry sites; and that the quarry sites were to be restored to a slip flatter than 1 inch after completion of work notwithstanding the fact that the land was compulsorily acquired by the Government.

7. On the issue of the claim of Kshs.506,000, being the cost incurred by the 1st respondent and owed to the appellant for renting the water tanks at the rate of Kshs.11,500 per month, the learned Judge held that there was no formal agreement signed by the parties, and that the appellant was not under any obligation to rent the tanks. Further, that the appellant was not entitled to any monetary compensation for excavation of its land because the land was compulsorily acquired by the Government. The 1st respondent's defence and counterclaim were therefore dismissed.

8. Based on the above findings, the appellant's suit was allowed in terms that the 1st respondent restores the suit property, including replacement of the soil, replanting of trees or in any other manner that shall be acceptable by the National Environmental Management Authority (NEMA) within 90 days from the date of service of the judgement and orders. The appellant was awarded costs of the suit.

9. No appeal arose from the decision of Angote, J. Instead, the appellant filed an application dated 13th November 2020 seeking review of the trial court's judgement. The order sought was to direct China Road & Bridge Corporation & Hola Garsen Malindi Road Project (the respondents) to pay the appellant Kshs.9,200,000 as costs of restoration of the suit land, including the replacement of soil, replanting of trees or in any other manner acceptable by NEMA.

10. The application was supported by the affidavit of Mansour Najin Said, the appellant's director, sworn on even date, and a further affidavit dated 7th December 2021. He deposed that, despite the judgement entered in favour of the appellant, the 1st respondent had failed to comply with the orders issued; that the appellant undertook a valuation of the costs required to restore the suit property; and that it is proper in the circumstances that the trial court reviews its judgement for the reasons that it was not within its knowledge that the 1st respondent would not comply with the court's order.

11. Mr. Mansour contended that the failure of the 1st respondent to comply with the judgement falls under the arm of 'any other sufficient reason', which is a ground on which a party can seek review of a judgment or order of the court; and that, the fact that in the judgment the Judge did not foresee a failure on the 1st respondent's part to comply with the judgment, it can be interpreted as 'an error on the face of the record' which also justified a review of the judgment.

12. After considering the appellant's application, the learned Judge (Odeny, J.) found no merit in the appellant's application for review. In so finding, she held that:

> "I find that the applicant's view that the court should have included an alternative order for restoration costs in the event of failure to restore the land as untenable as this is not an error on the face of the record. The court only grants prayers sought by the litigants and not what it thinks should have been pleaded. Parties are bound by their pleadings...the applicant did not also file the application for review timeously and no explanation has been offered to show why they took five years to file the application. The application lacks merit and is dismissed with each party bearing their own costs."

13. Aggrieved, the appellant lodged the instant appeal which is hinged on seven grounds of appeal. It faulted the learned Judge for: failing to appreciate that there were sufficient reasons to order review of the impugned judgement; failing to have due regard to the overriding objective of the Court; failing to appreciate that restoration of the suit property may either be physically on the part of the Respondent subject to the National Environmental Management Authority's Regulations or monetary compensation upon exhaustive valuation; failing to embrace the fact that the review application as brought was in the alternative in lieu of the applicant being punitive by way of contempt of court; failing to appreciate that land reclamation requires adequate time to restore hence there was no urgent need to apply for review of the judgement out rightly and thus the alleged delay was excusable; failing to appreciate the salient tenets of the Oxygen Principle; and for misdirecting herself in arriving at such a determination and (sic) the subsequent ruling.

14. The appellant asked this Court to allow the appeal, set aside the entire ruling of Odeny, J. delivered on 3rd March 2022 and all its consequential orders, and that costs be provided for.

15. We heard this appeal virtually on 13th November 2024. Learned counsel Ms. Mwandilo was present for the appellant. Ms. Mwandilo informed us that the firm of M/s. E. W. Njeru & Co. Advocates represents the 1st respondent while the 2nd respondent no longer exists. We confirmed that the 1st respondent's law firm had been duly served with a hearing notice on 28th October 2024. They had not filed their submissions which we have neither seen as at the time of writing this judgment. Our Rules obligate us to proceed with a hearing notwithstanding failure by a party to file submissions as long as we are satisfied that a party, as was the case here, was notified of the hearing date. Ms. Mwandilo entirely relied on the appellant's written submissions dated 8th May 2024.

16. The appellant submitted that every person has a right to a clean and health environment as envisaged under Article 42 of *the Constitution*; that *the Constitution* provides for enforcement of environmental rights where a person alleges that his/her right to a clean and healthy environment has been violated or threatened; and that the Court can enforce environmental rights without a victim demonstrating loss or injury as per Article 70(1), (2)(a), (b), (c) and (3) of *the Constitution*.

17. The appellant contended that the unrestored suit land has been left with massive hazardous open quarries, thus, rendering it incapable of being of any use; that this constitutes a continuing nuisance or state of affairs which gives rise to a fresh cause of action; that the failure to comply with the decision of the court necessitated the appellant to assess the costs of restoration at Kshs.9,200,000; and that, consequently, a review of the superior court's judgement was necessary.

18. In the appellant's view, the restoration order, which is futuristic in nature, implies that the claim of compensation or indemnification can also be determined at a future date, upon a tortfeasor's default;

and that the orders sought in the Notice of Motion dated 13th November 2020 ought to be granted so as to enforce the respondents' liability for environmental degradation that it caused and failed to restore.

19. As a first appellate court, our mandate is to re-appraise and re-evaluate the entire record of the trial court and come up with our own findings. This mandate is aptly stated under rule 31 (1) (a) of this Court's Rules, 2022 as follows:

> 31 (1) On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power-
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> a. to re-appraise the evidence and to draw inferences of fact;

20. In the case of Selle vs. Associated Motor Boat Co. Ltd [1968] EA 123, it was stated 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 (Abdul Hameed Saif -v - Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."

21. Our role as a first appellate court was further expounded in Makube vs. Nyamuro (1983) KECA 29 (KLR) thus:

> "However, a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."

22. Having considered the record of appeal, the appellant's submissions and the law, we have concluded that the only issue for consideration is whether the learned Judge erred in dismissing the appellant's application for review of the judgement delivered by Angote, J on 8th March 2015.

23. The ruling from which this appeal stems is in respect to a review application filed by the appellant. Section 80 of the *Civil Procedure Act* provides that:

> " Any person who considers himself aggrieved-
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> a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> b. by a decree or order from which no appeal 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."

24. Further, Order 45 of the Civil Procedure Rules allows application for review of a decree or order by a 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.

25. A court's power to review a judgement as set out in Order 45 of the Civil Procedure Rules arises from the following grounds:

a. there must be discovery of new and important evidence which, after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

b. there was a mistake or error apparent on the face of the record; or

c. there were other sufficient reasons; and

d. the application must have been made without undue delay.

26. The appellant's application for review was premised on the fact that the 1st respondent failed and/or neglected to comply with the orders issued in the judgement of 8th March 2015, namely to restore the suit land after excavation of murram in accordance with the parties' lease agreement. Upon realizing that the 1st respondent was not willing to comply, the appellant took it upon itself to assess the costs of the damage and used the resultant report as a ground for review of the judgement. The appellant's contention is that the findings of the report constitute 'any other sufficient reason' to warrant review of the judgement. In other words, the appellant wished the trial court to use the review process to offer an alternative judgement.

27. This Court in the case of Mahinda vs. Kenya Power & Lighting Co. Ltd (2005) 2 KLR 418 laid down the general principle which a court should consider when reviewing its decision as follows:

> "The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made."

28. In Singh t/a Trilok Construction vs. Sucham Investment Limited (2024) KECA 568 (KLR), this Court referred to the writings in The Code of Civil Procedure, Volume III Pages 3652-3653 by Sir Dinshaw Fardunji Mulla which we find relevant to the parameters under which a review can be done in that:

> "The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure...The review court cannot sit as an Appellate Court. Mere possibility of

two views is not a ground of review. Thus, re- assessing evidence and pointing out defects in the order of the court is not proper."

29. Having set the tone, and guided by the afore-cited decisions, it is our view that failure of the 1st respondent to satisfy the trial court's judgment and the subsequent valuation of the alleged damage that the appellant suffered, is not tantamount to a discovery of new material evidence, or an error apparent on the face of the court record, or any other sufficient reason that warranted the learned Judge to review the judgment of Angote, J. In other words, the grounds advanced by the appellant for review of the judgment in the impugned Notice of Motion were unmerited.

30. We further observe that the alternative prayer in the Motion of presenting a valuation report was not pleaded by the appellant; neither was it a subject of consideration before the trial court. Allowing the valuation report into the record without affording the respondents an opportunity to respond to it is a breach of respondents' right to a fair hearing contrary to the letter and spirit of Article 50 of *the Constitution*. We say so because, by introducing the valuation report at the review stage was one and the same thing as introducing a new cause of action after conclusion of the trial which, for all intent and purposes, is untenable.

31. In the circumstances, the best recourse the appellant had was to institute a separate claim for special damages, being the costs anticipated to be incurred to restore the suit land to its original position.

32. We do not hesitate to add that the application in the superior court was filed approximately 5 years after the judgement was delivered. We have not found any reason advanced by the appellant on why it approached the court belatedly at sun-set with its review application. We can only guess that its action was actuated by a second thought for reasons best known to it.

33. In view of the foregoing, we find no reason upon which we can fault the ruling of the learned Judge. We therefore find that the learned Judge did not err when she declined to allow the review of the judgement dated 8th May 2015.

34. Accordingly, this appeal is devoid of merit and it is hereby dismissed with no orders as to costs.

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

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

Deputy Registrar