Tormoi v Koros & 3 others (Civil Application E012 of 2022)
[2025] KECA 844 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KECA 844 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPLICATION E012 OF 2022

JM MATIVO, GV ODUNGA & PM GACHOKA, JJA

MAY 9, 2025

BETWEEN

VALERIAN KIPNGETICH TORMOI ..... APPLICANT

AND

GREGORY KIPCHUMBA KOROS ..... 1ST RESPONDENT

LINUS KIPKEMBOI KOROS ..... 2ND RESPONDENT

ANDREW KIRWA ROTICH ..... 3RD RESPONDENT

PAULINE ROTICH ..... 4TH RESPONDENT

(An application for review from the judgment and decree of this Court (Kiage, Mumbi Ngugi & Tuiyott, JJ.A) delivered on 13th May, 2022 in Eldoret Civil Appeal No. 36 of 2018)

RULING

1. Before us is an application by way of Notice of Motion expressed to be brought under Articles 50 of *the Constitution*, sections 3, 3A and 3B of the *Appellate Jurisdiction Act* and rules 35 & 47 of the Court of Appeal Rules. In it, the applicant seeks to review and or set aside the judgment of this Court delivered on 13th May, 2022 in the following terms:

    1. Spent;

    2. The Honourable Court be pleased to issue orders of stay of execution of the Judgment and/or decree of the Court dated and delivered on 13.5.2022 pending the hearing and final determination of this Application;

    3. The Honourable Court be pleased to review its decision/ judgment dated and delivered on 13.5.2022 and/or Decree and all other consequential orders emanating therefrom.

2. On the face of it, it is clear that prayer number one is spent and therefore the only question for determination is whether the applicant has laid a good basis for the review of the judgement.

3. The grounds on the body of the Motion and the supporting affidavit of the applicant support the application. The facts giving rise to the application are that the applicant is dissatisfied with the judgment of this Court in Civil Appeal No. 36 of 2018 delivered on 13th May, 2022. In it, this Court set aside the findings of the Environment & Land Court (Odeny, J.) in Eldoret No. 571 of 2012. Resultantly, the findings of the learned judge that the applicant had acquired land parcels No. Nandi/ Chepterwai/850, 852, 853, 854, 855, 857 and 858 measuring 14 acres by way of adverse possession were set aside and substituted with an order that the applicant had only acquired a portion of land measuring 0.3 acres by way of adverse possession.

4. The applicant argued that the impugned judgment ought to be reviewed because there is an apparent error on the face of the record. The applicant's contention is that whereas the judgment was favourable to her, the Court erroneously misstated that the applicant is entitled to 0.3 acres instead of 14 acres. As will become clear later in the ruling, the grounds and the supporting affidavit are scant in detail. To demonstrate how shallow the supporting affidavit is, we shall set out the salient paragraphs as follows:

> " 7. That at the Appeal hearing, this matter proceeded to full hearing and whereas this Honourable Court made a finding that I had proved my claim for Adverse Possession it mispronounced itself by misstating that I be awarded 0.3 Acres from the suit subject of land instead of 14 Acres as claimed in my pleadings and testimony (see annexture marked VKT 6(a) and 6(b) Judgment and decree).
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> 8. That there is apparent error on the face of the record in particular the proceeding and the Judgment in that I clearly stated in court that I am claiming 14 Acres from the suit subject of land by way of adverse possession (Refer to page 11 of the said Judgment dated 13.5.2022 and page 23 of the Proceedings).
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> 9. That I seek this Honourable Court's indulgence to review its Judgment dated 13.5.2022 and correct the said error so as to accurately reflect the statements I made in court as captured in the said Court proceedings."

5. The grounds in the body of the application are even more brief.

   The only relevant one states as follows:

> "(ii) THAT there is apparent error on the face of the judgment and/or the record whereby the Honourable court mispronounced itself such that whilst it made judgment in favour of the Respondent/ Applicant herein nevertheless it erroneously misstated in the said judgment that the Respondent/Applicant herein was entitled to 3 Acres rather than 14 Acres of that parcel of land known as NAND I /CHEPTERWAI/ 8X8."

6. The application was opposed. The 2nd respondent, in a replying affidavit sworn on 23rd February 2024, on behalf of himself and the other respondents, stated as follows: that the respondents have been in occupation of the suit land as upheld by this Court; that the holding by this Court that the applicant was only entitled to a parcel of land measuring 0.3 acres was clear, unambiguous and based on sound reasoning; that no reasonable or logical grounds had been raised by the applicant; and that the application is frivolous, vexing scandalous and an abuse of the court process.

7. The application was virtually heard on 12th March, 2025 with learned counsel Mr. Kemboi for the applicant and learned counsel M/s Nasongo holding brief for Mr. Yego for the respondents. Mr.

Kemboi referred this Court to paragraph 23 of the impugned judgment arguing that there were errors on the acreage of the property apparent on the face of it calling for review of that judgment. He added that the Court narrowed down to award of the homestead but failed to consider the utilization of the entire land. He concluded by stating that this Court was vested with jurisdiction to review the subject judgment and change the acreage from 0.3 acres to 14 acres by dint of rules 35 and 47 of the Court of Appeal Rules.

8. On the part of the respondent, learned counsel M/s Nasongo took note of the fact that the application had invoked rule 35 of this Court's rules yet there was no error apparent on the face of the judgment, the subject of the application. She continued that a review from 0.3 acres to 14 acres is not a clerical or mathematical error. For those reasons, learned counsel prayed that the application be dismissed with costs.

9. We have extensively considered the application, the rival affidavits and the elaborate rival submissions thereto. The applicant seeks leave of this Court to invoke its residual jurisdiction and disturb the findings of this Court (Kiage, Mumbi Ngugi & Tuiyott, JJ.A.) delivered on 13th May 2022. One of the leading decisions on this issue is the often-quoted case of Benjoh Amalgamated Ltd vs. Kenya Commercial Bank Limited [2014] eKLR, where after reviewing decisions from different jurisdictions on the question of review this Court stated as follows:

> "The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. 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)."

10. Flowing from this, the Supreme Court in *Parliamentary Service Commission vs. Martin Nyaga Wambora & others* [2018] eKLR, established the following principles:

> " Consequently, drawing from the case law above, particularly Mbogo and Another vs. Shah, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:
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> i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court;
>
> SUBPARA ii.
>
> Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
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> iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
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> iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically;

v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review;

vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and as a result, a wrong decision was arrived at; or it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice."

11. Finally, the Court of Appeal in *National Bank of Kenya vs Ndungu Njau* [1997] eKLR observed as follows in respect of reviews applications:

> "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."

12. From the above decisions, the general principle is that after passing judgment, a Court becomes functus officio. The effect of this position in law is that in the circumstances, a Court cannot purport to revisit its own judgment on its merits or exercise a judicial power over the same matter unless provided by law.

13. In précis, the applicant's application justifying the application of the residual jurisdiction of this Court can be summarized as follows: that the Court delivered a judgement that was in her favour; that the Court erroneously stated that she was entitled to 0.3 acres instead of 14 acres; and that therefore there was an error on the face of the record.

14. With due respect to the applicant, there is nothing that has been placed before us to show that the judgement has an error on the face of it. What is clear from the grounds and the supporting affidavit is that the applicant still insists that she is entitled to 14 acres instead of the 0.3 acres as per the unanimous judgement of the three judges. We have carefully read the lead judgment of Tuiyott JA. The Judge carefully analyzed the facts, the supporting documents and the law. His findings are clear and emphatic and he states as follows:

> "[26] Having considered this evidence carefully, I am able to deduce the following. The respondent resides on 0.3 to 0.4 acres of land to which he had exclusive possession. Regarding the remainder of the land, which forms the substantial part of the claim, possession was neither peaceful, exclusive or uninterrupted because the appellants also had their livestock and crops on it. As to when the appellants had begun the interference and as to whether it persisted, the respondent's own words during cross-examination are instructive;
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> "They have livestock, cows and plant maize. They have been doing this since I occupied the suit land in 1982."
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> 27. From the evidence of no less the respondent, his occupation of the 14 acres (other than on 3 acres) has not been exclusive from the time he set foot there in 1982. The evidence of his two witnesses did not take the respondent's case any further. PW2 stated;
>
> "I do not know the exact acreage of the parcels of land. The plaintiff is the one staying on the suit parcel of land. I do not know how many acres the defendants are using."

Later;

> "The house was built by the plaintiff's father. The plaintiff is the one (sic) stays on the 13 house. He is cultivating the suit land and keeping cattle. He is using about 10 acres."

28. PW3 fares even worse, he stated;

"The plaintiff has ¾ acres."

He makes no mention of the remainder of the land.

27. The totality of the evidence by the respondent and his witnesses vindicated the evidence of the appellants' witness that;

> "The plaintiff stays is on 858, grazes on the built land. He occupies 0.3 acres."

28. On my re-evaluation of the evidence before the trial court, I cannot find a justification to hold that the respondent established a claim for adverse possession of more than 0.3 acres. I come to a different outcome from the trial court."

15. The applicant may be unhappy that the learned judges held that she was only entitled to 0.3 acres instead of 14 acres as held by the trial judge. The finding of the Court on this issue is stated in clear and emphatic terms. It is no wonder that the applicant is only lamenting in vague terms that the judgment has an error on the face of the record. We wish to remind the applicant that an application for review of a judgment of this Court is one that a party must take seriously, as this residual jurisdiction can only be invoked in the clearest of cases. Lamentations or a feeble cry that a judgment is erroneous remain just that: a cry by a dissatisfied litigant and in an adversarial system, such tears are expected.

16. We say so because none of the grounds by the applicant speak to the correction of an apparent error or omission on the part of the Court. An application for review is not a further appeal where a party tries to take a second bite at the cherry. This is exactly what the applicant is advancing. The mere fact that they do not agree with the judgment of the Court does not, as of right qualify her to apply for review of the said decision. If this approach is entertained, parties would fight until the end of times. Litigation must come to end and the losing party should pick up the pieces and move on with life. The applicant has not satisfied us that there is any apparent error on the face of the record. On the contrary the finding that the applicant is only entitled to 0.3 acres by way of adverse possession is clear and unambiguous.

17. Our conclusion is that the application is unmeritorious.

18. Consequently, it is hereby dismissed with costs to the respondents.

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

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.ARB, FCIARB.

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR