Ongaga v Orieri & 2 others (Civil Appeal 93 of 2019)
[2025] KECA 1162 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KECA 1162 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 93 OF 2019

HA OMONDI, LK KIMARU & JM NGUGI, JJA

JUNE 20, 2025

BETWEEN

WIFRED MORARA ONGAGA ..... APPELLANT

AND

SAMWEL ONGAGA ORIERI ..... 1ST RESPONDENT

JOSEPH MIRAMBO ..... 2ND RESPONDENT

COUNTY LAND REGISTRAR, NYAMIRA ..... 3RD RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya at Kisii (J.M. Mutungi, J.) delivered on 9th April, 2019 in Misc. Civil Application No. 60 of 2016)

JUDGMENT

1. This appeal arises from a ruling of Mutungi, J. on an application purporting to review the court orders dated 13th November, 2018 dismissing the appellant's application dated 20th September, 2016 and, the reinstatement of the caution on the parcel of land be removed.

2. By a notice of motion dated 20th September, 2016, Wilfred Morara Ongaga, the appellant moved the Environment and Land Court at Kisii Court seeking the reinstatement of a caution registered on land titles West Mugirango/Siamani/8276 and 8277[suit land] that were removed by the Land Registrar, for fear that Samuel Ongaga Orieri and Joseph Mirambo, the 1st and 2nd respondents herein, might dispose of the suit property.

3. On 9th March, 2017 when the application came up for hearing, the learned judge (Mutungi, J.) sustained the inhibition registered against the suit parcels to enable the applicant to take necessary action to establish the interest he had over the suit parcels.

4. The appellant's motion dated 20th September, 2016 was then fixed for hearing on 13th November, 2018; and the appellant was duly served. On the said date, the appellant did not appear to prosecute the application and the court dismissed it for want of prosecution. The learned judge ordered the inhibition against land titles West Mugirango/Siamani/8276 and 8277 to be lifted; and marked the file closed.

5. Disgruntled by the orders, the appellant filed an application dated 18th March, 2019 seeking to review the court orders dismissing his application dated 20th September, 2016 and the reinstatement of the inhibition dated 9th March, 2017. The application was opposed by the respondent who sought the dismissal of the application.

6. In his determination, the learned judge found no basis for reviewing the order dismissing the application. The learned judge noted that the appellant was accorded time to take action to establish his interest in the properties which the appellant did not do. The Judge was of the view that a person cannot just lodge a caution on another person's land, and do nothing about it. The judge observed that a caution is an encumbrance on the title and that unless there is a reason to sustain the same, it should be removed. That the appellant never showed any reason why the caution should be sustained. The appellant's application was dismissed with costs to the respondents.

7. Being aggrieved with the decision, the appellant preferred the present appeal faulting the learned judge for instantly dismissing the application without considering the grounds stated, delivering contradictory decisions, and in failing to consider the appellants' submissions.

8. The appeal was canvased by way of written submissions fully adopted by the appellant in person without highlighting. The respondents neither appeared at the plenary hearing nor filed their submissions though properly served.

9. In support of his appeal, the appellant contended that since the respondents had never responded to his suit, he deserves the orders of inhibition placed against them until the suit filed before the Chief Magistrate's Court at Nyamira is heard and determined.

10. This being a first appeal, the mandate of this Court is to re-appraise the evidence and draw its own inferences of fact. In Sumaria and another vs. Allied Industries Limited [2007] 2 KLR1, this Court stated inter alia, that; "being a first appeal the court was obligated to reconsider the evidence, re-evaluate it and make its own conclusion."

11. In Mujere vs. Mwechelesi & Another [2007] 2 KLR159, the Court stated that:

> "As an appellate Court, the Court had to be very slow to interfere with the trial Judge's findings unless it was satisfied that either there was absolutely no evidence to support the finding or that the trial Judge had misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupported conclusion."

12. Having considered the record, the appellant's submissions and the law, the only issue that presents itself for determination is whether there was a mistake or error on the face of the record or any sufficient reason to justify review of the impugned ruling.

13. An application for review essentially involves the exercise of the Judge's discretion. Therefore, before this Court can interfere with the learned Judge's discretion in declining to review the ruling, it must be satisfied that the principles outlined in Mbogo & Another vs. Shah [1968] EA 93 are met. In a nutshell, it must be demonstrated that the Judge misdirected himself in some matter and as a result arrived at a wrong decision or, that he misapprehended the law or failed to take into account a relevant matter.

14. Section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the Civil Procedure rules granted the court unfettered discretion to make such order as it deemed fit on sufficient reason being given for review of its decision. However, as it has been constantly stated this discretion should be exercised judiciously and not capriciously. In National Bank of Kenya Limited vs. Ndungu Njau (1997) eKLR this Court held that:

> "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".

15. The applicable law for grant of review in the trial court is Section 80 of the *Civil Procedure Act* which provides inter alia:

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.

16. Whereas Order 45 rule 1 of the Civil Procure Rules provides as follows:

1. Any person considering himself aggrieved; by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

    a. 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.

17. The Supreme Court of India in the case of Aribam Tuleshwar Sharma vs. Ariban Pishak Sharma (1979) 45CC 389, 1979(11) UJ 300 SC, held that:

> "The power of review may be exercised on the discovery of new and important matter or evidence which, after exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made, it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercise on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court."

18. The main grounds for review are therefore; discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.

19. The appeal herein is against an order by the learned judge refusing to review and set aside an earlier order dismissing the appellants' application for non-attendance. Under Order 12 of the Civil Procedure Rules, the consequences of non-attendance by a party to a suit are stated. Rule 13 is specific that when only the defendant attends and admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.

20. The record proceedings of 13th November, 2018 is as follows:

> " Mr. Omwega: Matter coming for hearing of notice of motion dated 20th September, 2016. The applicant was served with a hearing notice and has not appeared. I seek the dismissal of the application.
>
> Court: The applicant has not appeared to prosecute his application dated 20th September, 2016. The application is hereby ordered dismissed for want of prosecution. The inhibition ordered to be placed against Title No. West Mugirango/Siamani 8276 and 9277 of 9.3.2017 is hereby ordered to be lifted. There will be no order for costs of the application. The file is marked as closed."

21. In the instant appeal, the learned Judge in dismissing the application for review observed that:

> " ...I see no basis to review the order dismissing the application. The applicant was accorded time to take action to establish his interests in the properties which he did not do. A person cannot just lodge a caution on another's land and do nothing about it. A caution is an encumbrance on the title and unless there is no reason to sustain the same it should be removed. The applicant never showed any reason why the caution should be sustained."

22. The order by the learned judge issued on 9th April, 2015 dismissing the appellants' application for review was an exercise of discretion. The Supreme Court in Kibira vs. Independent Electoral & Boundaries Commission & 2 others [2019] KESC 62 (KLR), held that an appellate court will rarely entertain an appeal emanating from the exercise of discretion unless it is exercised whimsically. (See also Mureithi vs. Babu & 2 others (Petition 15 of 2018) [2019] KESC 63 (KLR) (Election Petitions) (18 January 2019) (Judgment). In Deynes Muriithi & 4 others vs. Law Society of Kenya & another [2016] eKLR, the Supreme Court stated inter alia that the Court may only interfere with the exercise of discretion by another Court where there is plain and clear misapplication of the law.

23. It is clear that this appeal is, substantially, focused on the findings of the learned Judge. 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.

24. In the instant matter, there is no new fact that was discovered by the appellants that could justify the learned judge to review and set aside the order dismissing the appellants' application for non-attendance. The appellant has not demonstrated to the Court's satisfaction that in declining to reinstate the application, the judge misapprehended or misapplied the law or indeed exercised his discretion injudiciously. The learned judge made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review; we say so because any other approach means that the learned Judge would be sitting on appeal in his own judgment which is not permissible in law. The upshot is that this appeal lacks merit and is dismissed.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF JUNE, 2025.

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR