



**Mbaria & another v Irungu (Civil Application 255 of 2016)  
[2024] KECA 306 (KLR) (15 March 2024) (Ruling)**

Neutral citation: [2024] KECA 306 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 255 OF 2016  
MA WARSAME, M NGUGI & JM MATIVO, JJA  
MARCH 15, 2024**

**BETWEEN**

**BENSON IRUNGU MBARIA ..... 1<sup>ST</sup> APPLICANT**

**MUCHANGI NDUATI MUGO (FOR AND ON BEHALF OF EMBAKASI  
WELFARE SOCIETY) ..... 2<sup>ND</sup> APPLICANT**

**AND**

**ENOCK IRUNGU ..... RESPONDENT**

*(Being a Notice of Motion Application under Certificate of Urgency  
seeking prayers for stay of the judgment delivered on 25th March, 2015  
(Nambuye, Mwera & Murgor JJ.A. in Civil Appeal No.167 of 2006)*

**RULING**

1. Following judgment entered by this Court (R.N. Nambuye, Mwera and Murgor JJ.A.) on 25<sup>th</sup> March 2015 in Civil Appeal No.167 of 2006 – *Enock Irungu v. Benson Irungu Mbaria & Another*, the applicants, Benson Irungu Mbaria & Muchangi Nduati Mugo (for and on behalf of Embakasi Welfare Society) filed an application, within that appeal, for review of the said judgment. This application was made on the basis that the applicants have since discovered new and sufficient evidence in form of a Certificate of Lease, receipts and new information on the survey map over the suit property registered as NAIROBI/BLOCK 83/1223, the suit property.
2. The applicants contend that the said Certificate of Lease is proof of ownership and recognition by the Nairobi City Council, as it then was, and the Ministry of Lands, that the subject property is indeed that which had been allotted to the applicants and not the respondent as was determined by the judgment delivered on 25<sup>th</sup> March 2015. In the said judgment, this Court found in favour of the appellant/respondent and revoked the title to the applicants herein. This in effect reversed the judgment of the High Court made in favour of the applicants.



3. While the application for review of the Court's judgment was pending, the applicants filed the present application by way of Notice of Motion dated 16<sup>th</sup> November 2016 substantively seeking stay of execution of the Court's judgment pending the hearing and determination of the earlier application for review of judgment.
4. By the Court's directions issued on 20<sup>th</sup> February 2017 (Alnashir Visram (as he then was), M.K. Koome (as she then was) and S. ole Kantai JJA), the two applications are to be determined together as they relate to the same subject matter by the bench of Nambuye, Murgor and Another JJA, Mwera JA having left the bench. Nambuye, JA has since also left the bench and the applications are now before us for determination.
5. The application for stay of execution is supported by an affidavit of Geoffrey Macharia Muraya, the Chairman of the applicants' Community Welfare Association, Embakasi Welfare Society. The deponent sets out the background of the dispute leading to the judgment by the Court of Appeal. He continues by stating that following the said judgment, the applicants unsuccessfully sought certification and leave to appeal to the Supreme Court on grounds that their intended appeal to the Supreme Court raised matters of general public importance. That they have since discovered new evidence already alluded to necessitating their application for review of the judgment.
6. To assert their claim for stay, the deponent states that their previous Advocates on record informed the applicants that the respondent had served them with a decree notifying the applicants of their intended eviction from the suit property within ten (10) days of service of the decree; that the applicants are apprehensive that unless the stay orders are granted, the applicants stand to substantially lose from the eviction and the members of the applicant's society will be deprived of their source of livelihood without having a chance to present their new evidence before this Court; and that unless stay is granted, the application seeking review of judgment in [Civil Appeal No.167 of 2006](#) will be rendered nugatory.
7. The deponent sums up by stating that justice must be done and seen to be done; that the applicants are ready, willing and able to comply with and observe any conditions set by the Honourable Court, and that they are entitled to invoke the rules of the Court which are meant to deliver justice and fairness to all parties without undue regard to technicalities of procedures. Annexed to the said affidavit are copies of the Agreement for Lease and letter of allocation dated 20<sup>th</sup> November 1993, photographic evidence of the developments on the suit property, judgment delivered on 16<sup>th</sup> June 2006 by the High Court, the ruling made on 19<sup>th</sup> May 2016 on certification and leave to appeal to the Supreme Court, and a copy of the title issued on 23<sup>rd</sup> November 2005.
8. The respondent opposes the application for stay of execution through his replying affidavit sworn on 16<sup>th</sup> February 2017. The gist of the grounds opposing the application are that the court lacks jurisdiction to stay execution of its orders; the application is a gross abuse of the court process since upon delivery of the judgment on 25<sup>th</sup> March 2015, the applicants filed a Notice of Appeal to the Supreme Court signaling intention to appeal to which the respondent made an application to strike out the said Notice of Appeal for being defective, which application is still pending determination before the Supreme Court, and that the applicants unsuccessfully sought certification from this Court that their intended appeal to the Supreme Court involved matters of general public importance; and that the applicants had a right to apply for review of the court's dismissal of their application for certification, which they failed to do;
9. Further, that in the event the court has jurisdiction to grant stay of execution, the respondent asserts that the said certificate of lease, whose genuineness cannot be ascertained, was available before the case was concluded at the High Court and as at 11<sup>th</sup> August 2006 when the appeal to this Court was filed



and it is therefore not a discovery of new evidence; that the respondent's case at the High Court was founded on trespass, and a trespasser does not become the owner of the property he has trespassed on by fraudulently getting a title to it; that contrary to the assertion in the affidavit of Geoffrey Macharia Muraya, the suit property, which was allocated to the respondent by the Nairobi City Council, was totally different from the property the Council purportedly allocated to the applicants; that the applicants are guilty of laches; and there being no grounds upon which the court can stay the judgment, the application be dismissed with costs.

10. With the above context, the Court is being called upon to determine two issues arising from the two applications. The first issue is whether the court should grant stay of execution pending review of judgment and secondly, whether the application for review of the judgment delivered on 25<sup>th</sup> March 2015 in [\*Civil Appeal No.167 of 2006\*](#) has merit.
11. In doing so, and taking into account the orders made on 20<sup>th</sup> February 2017 directing the joint hearing and determination of the two applications, it emerges that the application for stay of execution pending the determination of the review is rendered superfluous. This is because the said application which by its nature sought interlocutory relief, is subsumed in the substantive determination, being that of review of the judgment.
12. Under the [\*Court of Appeal Rules, 2010\*](#) applicable at the time of filing the application for review, "appellate jurisdiction", in relation to a superior court, includes the jurisdiction of the court in matters of revision, review, reference, case stated and point of law reserved. The Rules are made under section 5(2) of the [\*Appellate Jurisdiction Act\*](#) being an Act of Parliament to confer on the Court of Appeal jurisdiction to hear appeals from the High Court and for purposes incidental thereto.
13. In [\*Otieno, Ragot & Company Advocates v. National Bank of Kenya Limited\*](#) [2020] eKLR, the court held that 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. As the Court stated in [\*Benjob Amalgamated Ltd v. Kenya Commercial Bank Limited\*](#) [2014] eKLR, the residual jurisdiction of the Court to review its own decisions "should be invoked with circumspection".
14. In [\*Sanitam Services \(E.A.\) Limited v. Rentokil \(K\) Limited & Another\*](#) [2019] eKLR, the court noted that the Court of Appeal Rules, particularly Rule 35 thereof, allows for correction of errors in the same manner and in a similar situation as the provision of the [\*Supreme Court Act\*](#) discussed in [\*Fredrick Otieno Outa v. Jared Odoyo Okello & 3 Others\*](#) [2017] eKLR where it was held, inter alia, that the slip rule does not confer upon a court any jurisdiction to sit on appeal over its own judgment or to extensively review such judgment as to substantially alter it. It was further held that corrections made become part of the judgment or order as initially rendered and that the purpose of the said section was to steer a judgment, decision or order of the Supreme Court towards logical or clerical perfection.
15. Turning to the matter at hand, the gravamen of the present application is the existence of what was termed as new evidence to assert the applicants' claim over the suit property. A fundamental question that arises is whether such evidence is indeed new and was not within the reach of the applicants in the course of the hearing. From the record, we note that the applicants refer to a Certificate of Lease, receipts and new information on the survey map over the suit property registered as Nairobi/Block 83/1223. Annexed to the affidavit in support of the application are copies of the Agreement for Lease and letter of allocation dated 20<sup>th</sup> November 1993, and photograph evidence of the development on the suit property.
16. The genuineness of the documents notwithstanding, the applicants have not explained why they could not adduce these documents earlier. The affidavit only states that the Title known as Nairobi/Block



- 83/1223 has since been discovered yet the same was issued on 23<sup>rd</sup> November 2005. Of note is that the applicants concede that the same was not adduced to the Court of Appeal during the filing of the appeal in [Civil Appeal No.167 of 2006](#) since it did not form part of the record before the High Court.
17. This inevitably brings into consideration the question of additional evidence being adduced before the Court of Appeal. This evidence is not only being availed before Court at the first instance, but is also sought to be produced after the judgment, the applicants having moved the Court to review its judgment.
  18. The court has previously stated that for a party to adduce additional evidence on appeal, leave ought to be granted by the said court. This Court in the case of [Kibos Sugar & Allied Industries Limited & Another v. Benson Ambuti Adega & 6 Others](#), Civil Appeal (Application) No. 153 of 2019(unreported) quoted with approval the English case of *The National Guild of Removers & Storers Limited v. Bee Moved Limited & Others* (2018) EWCA Civ. 1302 that:

“In determining whether an appellate court can admit additional evidence, the court must seek to give effect to the overriding objective of doing justice and, in doing so, attempt to strike a fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right result.”
  19. The applicants did not seek leave to adduce additional evidence.

They proceeded to file an application for review, on which they purported to introduce new evidence. We reiterate that no additional evidence could be produced before the learned Judges unless such evidence formed part of the record before the High Court.
  20. The doubtful conduct of the applicants, as demonstrated by the path they have taken, is also not lost on us. Upon delivery of judgment by the Court of Appeal, the applicants sought leave to appeal against the judgment to the Supreme Court by way of certification of matters of general public importance. When the said action did not yield success, the applicants did not pursue their right to move the Supreme Court to review the denial of certification. Instead, they filed the present application for review of the same judgment issued by this Court.
  21. It is apparent that upon delivery of the judgment by the Court of Appeal, the applicants were faced with two options – to, either file for review of the decision to the same Court or pursue an appeal before the Supreme Court within either of the applicable jurisdictional contours. The applicants, chose the latter in seeking leave to appeal, albeit without success.
  22. As the applicants made an election to the path and procedure of resolving their cause of action by pursuing certification to the Supreme Court, it cannot abandon that route and revert to the other option. It is upon litigants to choose the correct available option and the moment the decision/election is made and undertaken, the litigants cannot, without proper explanation and reasons, terminate the earlier journey in order to restart its mission. The choice is available at the start of the journey and once a particular mode or manner is adopted, the other option is no longer available. It’s lost by the action or omission of the said litigant. That is exactly what the applicant in this case is trying to employ, an attempt to abuse the court process.
  23. Thus, allowing the applicants to take the second option at this stage, as if they never exercised the first option in the first place, would not only contribute to protracting litigation but also defeat the whole essence of finality of the litigation process. A party cannot be allowed to waste precious judicial time and resources while not seeking to settle a dispute but rather arrogating to itself the options to cherry pick and engage in trial and error at the expense of the judicial process without the attendant



consequences. In *Karani & 47 Others v. Kijana & 2 Others* [1987] KLR 557 it was held inter alia that once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal.

24. We inescapably come to the conclusion that this is not a proper case for the exercise of the Court's limited jurisdiction to review its decisions. This is an attempt to re-hear the matter, with a view to achieving a different result. As we have endeavored to demonstrate above, the issues that were before the High Court and by extension before this Court on appeal were conclusively and finally determined in the judgment of this Court delivered on 25<sup>th</sup> March 2015. Consequently, we find no merit in the application and dismiss the same with costs, which as a matter of course follow the event.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF MARCH 2024.**

**M. WARSAME**

.....

**JUDGE OF APPEAL**

**MUMBI NGUGI**

.....

**JUDGE OF APPEAL**

**J. MATIVO**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

signed

**DEPUTY REGISTRAR**

