



**Sigei v Arusei & another (Civil Application E041 of 2020)  
[2024] KECA 616 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 616 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION E041 OF 2020  
FA OCHIENG, LA ACHODE & WK KORIR, JJA  
MAY 24, 2024**

**BETWEEN**

**WILLIAM KIPSOI SIGEI ..... APPELLANT**

**AND**

**JOHN TUNGE ..... 1<sup>ST</sup> RESPONDENT**

**KIPKOECH ARUSEI ..... 2<sup>ND</sup> RESPONDENT**

*(An application for review of the Judgment of the Court of appeal at Eldoret (Githinji, Okwengu & J. Mohammed, JJ.A.) dated 25th July 2019 in CACA No. 54 of 2016)*

**RULING**

1. Before us is a notice of motion dated 21<sup>st</sup> November 2019. The applicant prays for orders that:
  - “a) The honourable court be pleased to review its judgment dated 25<sup>th</sup> July 2019 delivered in Eldoret CACA No. 54 of 2016 and find that the decision did not address crucial issues raised in the grounds of appeal thereby leaving the issues in the appeal unresolved.
  - b. The honourable court do write a judgment raised in Eldoret CACA No. 54 of 2016 addressing all the issues and in particular the excessive or extra acreage the 1<sup>st</sup> respondent did not purchase.
  - c. Costs of the application be provided for.”
2. The application is premised on the grounds that:
  - a. The suit resulted from the encroachment of the respondents onto 0.25 acres of the applicant’s land.



- b. The issue of encroachment remains unresolved to date.
  - c. The applicant sold 0.5 acres, however, the respondents are currently occupying 0.75 acres.
  - d. The Court erroneously proceeded on the premise that the appeal could be resolved by dealing with the issue of consent of the Land Control Board.
  - e. The constructive trust could only address the land purchased by the 1<sup>st</sup> respondent, not what was not sold.
  - f. The failure of the Court to address the issue of encroachment allowed the respondents to enrich themselves to the applicant's detriment unjustly.
  - g. The Court ought to have delved into the other grounds of appeal, and not only resolved the issue relating to constructive trust and failure to obtain consent.
  - h. The Court ought to review its decision and address the ground of appeal dealing with excessive acreage occupied by the respondents.
  - i. It is in the interest of justice to ensure that the respondents get what is rightfully theirs.
  - j. The decision of this Court has occasioned a travesty of justice.
3. In his affidavit in support of the application, the applicant stated as follows:
- a. Sometime in 1991, he sold an acre of the land described as plots 171, 172, 173, 174, and 175 to the 1<sup>st</sup> respondent.
  - b. Later, the 1<sup>st</sup> respondent encroached on 0.25 acres not sold to him and sold it to the 2<sup>nd</sup> respondent, as a result of the encroachment, a suit was filed before the trial court.
  - c. Although the Court acknowledged the issue of acreage being in dispute, the Court did not address itself on the said issue.
  - d. There was an error apparent on the decision of the Court to the extent that the Court proceeded on the premise that the Land Control Board's consent was sufficient to determine the appeal.
  - e. Owing to the erroneous approach adopted by the Court, crucial issues raised in the appeal were not resolved to the applicant's detriment.
4. In response, the 1<sup>st</sup> respondent in his replying affidavit sworn on 12<sup>th</sup> March 2021 stated that:
- a. He purchased plots 171, 172, 173, 174, and 175 from the applicant and took actual and physical possession.
  - b. He subsequently sold plot 171 to the 2<sup>nd</sup> respondent in 2003 who has been in occupation thereof since then.
  - c. The applicant was in breach of the agreement which resulted in the suit before the trial court.
  - d. The suit as well as the appeal were determined in favour of the respondents.
  - e. The judgment sought to be reviewed upheld the decision of the two courts below that the respondents are the legal owners of plots 171, 172, 173, 174, and 175.
  - f. All the issues were addressed in the appeal including the question of acreage.



- g. The applicant is calling upon the Court to sit on its own appeal. The only available avenue to the applicant is to appeal to the Supreme Court.
- h. The applicant is incompetent, brought in bad faith, and under inordinate delay.
5. When the application came up for hearing on 5<sup>th</sup> March 2024, Mr. Momanyi, learned counsel appeared for the applicant, whereas Mr. Kibii learned counsel appeared for the respondents. Counsel relied on their written submissions which they briefly highlighted.
6. Mr. Momanyi submitted that the issue of trespass onto the land that had not been sold was never addressed by the Court, as the Court held that the resolution of the issue of consent would resolve all the other issues. Counsel referred us to pages 97, 102, 109, 117, and 174 of the record; which confirmed that the five (5) plots were sold. The expert witness who was called by the applicant testified that the respondents were occupying 0.75 acres instead of 0.25 acres.
7. In his written submissions, the applicant reiterated that there was an error apparent on the record as the court failed to address itself on the issue of acreage. To buttress this submission, the applicant relied on the cases of *Benjob Amalgamated Limited v Kenya Commercial Bank* [2014] eKLR and *Ushago Diani Investments Limited v Jabeen Manan Abdulwahab* [2019] eKLR.
8. Opposing the application, Mr. Kibii submitted that the applicant sold five (5) plots measuring 0.75 acres. There was no encroachment on 0.25 acres as claimed by the applicant. In any event, all the issues raised were addressed.
9. In their written submissions, the respondents relied on the case of *Menginya Salim Murgari v Kenya Revenue Authority* [2014] eKLR to point out that the application was without legal basis as it is a general principle of law that a Court, after passing judgment on merits, cannot purport to exercise judicial power over the same matter, save as provided by law. In their view, the applicant was seeking to make a new case under the disguise of an application for review.
10. We have carefully perused the application, the affidavit in support thereof, the replying affidavit by the respondents, the rival submissions by counsel, the authorities cited, and the law. The issue for determination is whether the application meets the threshold for granting an order for review.
11. It is well settled that where a party is aggrieved by the judgment, ruling, or order of the court, such a party can either file an appeal or apply for review. However, it is trite that the *Constitution* and the law do not grant the Court of Appeal the authority to review its own decisions or orders, save in exceptional circumstances where it has an inherent power to set aside a decision that violates the principles of natural justice.
12. In this case, the respondents sued the applicant for interfering with the 1<sup>st</sup> respondent's quiet possession of the five (5) plots he had purchased from him. They sought a permanent injunction restraining the applicant from interfering with any property known as plots 171, 172, 173, 174, and 175; general damages for unlawful interference, and costs of the suit.
13. In his defence, the applicant pointed out that the five (5) plots had been amalgamated into plot No. 41 and there were no plots known as plots 171, 172, 173, 174, and 175 over which the court could exercise its jurisdiction; the 2<sup>nd</sup> respondent had no dealings with him and he could not, therefore, claim against him; at the time of the alleged sale to the 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent did not have title over the land, and as such he could not pass any title to the 2<sup>nd</sup> respondent; the transaction between the applicant and the 1<sup>st</sup> respondent was void despite there being an agreement for sale since the land was subject to the provisions of the *Land Control Act*, which had not been granted.



14. The applicant also filed a counterclaim in which he alleged that the respondents had trespassed on his land instead of confining themselves to the plots which had been sold to the 1<sup>st</sup> respondent. He sought an injunction restraining the respondents from interfering with his property; and an order of eviction of the respondents.
15. The trial court dismissed both the applicant's and the respondents' claims for reasons that neither party had title to the suit property. The title, LR No. 2691, presented in Court belonged to the members of Kesses Kelchin Farm and the applicant could not have sold to the 1<sup>st</sup> respondent what he did not own, and the 1<sup>st</sup> respondent could not have passed a better title than he had to the 2<sup>nd</sup> respondent. The Court found that both parties had failed to show that they had a cause of action against each other.
16. Aggrieved by the said decision, the applicant appealed to the Environment and Land Court. The Court held that the suit property was agricultural land, and the applicant and the 1<sup>st</sup> respondent had not obtained the consent of the Land Control Board as they were required to. However, since the applicant had received money from the 1<sup>st</sup> respondent, who had then taken possession and improved the land in question, a constructive trust had resulted in favour of the 1<sup>st</sup> respondent. This in turn created a constructive trust in favour of the 2<sup>nd</sup> respondent which could not be defeated by the applicant. The Court further held that the applicant could not rely on the lack of consent of the Land Control Board to vitiate an agreement made over 20 years before. Consequently, the applicant's appeal was dismissed.
17. Dissatisfied with the judgment, the applicant filed a 2<sup>nd</sup> appeal to this Court. The learned Judges of this Court held thus: the fact that the applicant received the full purchase price for the property, allowed the 1<sup>st</sup> respondent to take possession, and for at least 14 years let him remain on the property undisturbed, a constructive trust had been created. They held that in the circumstances, the equitable doctrines of constructive trust and proprietary estoppel were applicable and enforceable regarding land subject to the Land Control Act. Therefore, despite the lack of consent of the Land Control Board, the doctrine of constructive trust applied to the agreement between the applicant and the 1<sup>st</sup> respondent.
18. It follows, therefore, that when the respondents' suit and the applicant's counterclaim were dismissed, neither party was required to do anything. The parties remained in the same position as they were in before the suit. The issue of acreage could not be determined in the circumstances.
19. From the foregoing, we find that the applicant's claim that there was an error apparent when the Courts failed to address the issue of acreage has no basis. In the case Benjob Amalgamated Ltd v Kenya Commercial Bank Limited, (*supra*), the Court held that the residual jurisdiction of this Court to review its own decisions "should be invoked with circumspection". The Court stated thus:

"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)."
20. In the circumstances, we are not satisfied that the current situation merits the Court's limited jurisdiction to review its decision. As we have demonstrated earlier, the matters that were presented



before the trial Court, the 1<sup>st</sup> appellate court, and subsequently before this Court were conclusively settled in this Court’s judgment. In in *Menginya Salim Murgani v Kenya Revenue Authority*, (*supra*), the Supreme Court held that:

“It is a general principle of law that a Court after passing Judgment, becomes functus officio and cannot revisit the Judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law.”

21. In the result, we find that the applicant is seeking to make out a new case based on an application for review. The application lacks merit. It is hereby dismissed with costs to the respondents.

Orders accordingly.

**DATED AND DELIVERED AT NAKURU THIS 24<sup>TH</sup> DAY OF MAY 2024.**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

