



**Kamunya & another v Muiru & 3 others (Civil Application
17 of 2015) [2022] KECA 945 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KECA 945 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION 17 OF 2015
HM OKWENGU, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA
JULY 22, 2022**

BETWEEN

JOHN KAMUNYA 1ST APPELLANT

ESTHER NJOKI KAMUNYA. 2ND APPELLANT

AND

JOHN NGINYI MUIRU 1ST RESPONDENT

JOB GICHURU NJOROGE 2ND RESPONDENT

STEPHEN NGUGI KARIUKI 3RD RESPONDENT

LYDIA JOB WAIRIMU 4TH RESPONDENT

((Being an application for review of the orders given by the Court of Appeal (Githinji, Nambuye & Mwilu, JJ.A) on 26th March, 2015 in Civil Appeal No. 23 of 2007))

RULING

1. On 26th March, 2015 this Court (Githinji, Nambuye & Mwilu, JJ.A) delivered a judgment in which it concluded as follows:

“...We find that the suit as amended and the proceedings were incompetent. The order that commends itself to us is that there is merit in this appeal. It is accordingly allowed. We set aside judgment and decree of the High Court made on the 28th day of April 2005 and dismiss the suit.

As a consequential order, we order that the cancelled title deeds be restored in the name of the previous registered owners. Further, the registration of the 1st respondent John Nginyi Muchiri as the proprietor of the four subdivisions in execution of the decree is cancelled.”



2. By a notice of motion filed in this Court on 23rd June, 2015, John Nginyi Muchiri (herein the applicant), who was the 1st respondent in the appeal, has moved this Court under sections 3(2) and 3A of the [Appellate Jurisdiction Act](#), Cap 9 Laws of Kenya, Rule 1(2), 35(2) and 42 of the *Court of Appeal Rules*, for orders, inter alia, that:
- (i) Spent
 - (ii) That this honourable Court do review its final findings in the suit in lieu of the Further Amended plaint (hereby availed) which ought to have formed part of the record of appeal and the supporting evidence in lieu of the Further Amended plaint.
 - (iii) That consequent upon the said review, the Honourable court do grant a stay of the Court's judgment delivered by the Court of Appeal on 26th March, 2015 in Nakuru Civil Appeal No. 123 of 2007.
 - (iv) It is in the interest of justice that the review and correction sought herein above should be made to preserve the applicant's right to justice, the subject matter being land in which the applicant lives in and cultivates the same to date.
 - (v) Article 159 of the [Constitution](#) of Kenya, section 3A of the [Appellate Jurisdiction Act](#) Cap 3 Laws of Kenya and Rule 1(2) of the Court of Appeal Rules 2010 each empower the Court to make orders prayed for which are necessary for the ends of justice and to give effect to the overriding objection (sic) of a just resolution and to prevent an abuse of the process of the Court by lack of jurisdiction and illegality arising out of the acknowledged absentee of jurisdiction.
 - (vi) The Honourable Court to review by correcting the anomalies arising from the proceedings with regards (sic) of the parties whereby the record of appeal gives 4th respondents (sic) namely John Nginyi Muchiri, Job Gichuru Njoroge, Stephen Ngugi Kariuki and Lydia Job Wairimu, while the notice of appeal on page 140 of the record gives seven names; Saul Korir Kiptalum, John Kimunya, Alex Kibore, Job Gichuru Njoroge, Esther Njoki Kamunya, Stephen Ngugi and Lydia Gichuru with the plaintiff being John Nginyi Muchiri and the memorandum of appeal having two appellants namely; John Kamunya and Esther Njoki Kamunya vs John Nginyi Muchiri, Job Gichuru Njoroge, Stephen Ngugi Kariuki and Lydia Job Wairimu in lieu of the findings and orders of the court at the last paragraph on page 49 of the Honourable Court's judgment that "the four cancelled title deeds be restored in the names of the previous registered owners" a need to identify the registered owners by names.
 - (vii) The Honourable court to review the entire evidence adduced by the applicant in its totality and the evidence adduced by the applicant that was not rebutted by the responding parties by way of evidence and set aside its findings in favour of the respondents herein, the suit having been found to have abated.
 - (viii) That this Honourable court do give such consequential, further or other orders as it may deem just.
 - (ix) That the costs of this application be provided for."
3. The motion is anchored on the affidavit of the applicant's advocate, D. N. Ikua, and on three grounds stated on the body of the motion as follows:
- (i) The record of appeal as drawn and filed is not consistent with the parties in the proceedings in the superior court and has prejudiced the interests of the applicant.



- (ii) The further amended plaint was properly in the court record but was left out of the record of appeal and should now be considered on the strength of the evidence adduced by the applicant in the superior court.
 - (iii) A stay order is necessary to enable the applicant access justice as enshrined out in Article 48 of the Constitution of Kenya 2010.
4. In his supporting affidavit, the advocate urges that, once an illegality is apparent and brought to the attention of the Court, the illegality should not be allowed to go unaddressed; and that the Court should grant orders of stay to maintain the status quo as the subject matter of the dispute is land wherein the applicant lives with his family. Attached to the affidavit is the further amended plaint dated 18th January 1999, which is subject of the orders sought in the motion.
 5. The applicant has also sworn a further affidavit to which he has annexed a valuation of the suit property. He maintains that no prejudice will be occasioned to the respondents if the orders sought are granted.
 6. The applicant's advocate has filed written submissions that we find appropriate to reproduce herein verbatim.

“By a judgment of this court delivered on 26th March, 2015, the decision of the High Court in Nakuru HCCC 58 of 1996 was reversed. The 1st respondent herein filed this application on (sic) for review.

The main complain (sic) by the applicant is that the decision of this court was erroneous in that it benefited parties who did not prefer an appeal against the High Court judgment. The worst that the court would have done was to allow the appellants, who are clearly John Kamunya and Esther Njoki Kamunya to benefit from any decision herein.

It is not in dispute that the 2nd, 3rd & 4th respondents were brought in this appeal and correctly referred to as respondents. They did not file any counter-appeal and did not anyway challenge the judgment of the High Court in favour of the 1st respondent.

However, in its judgment, this court proceeded to make findings that their titles which had been canceled be reverted back to them. This is an error and the order in as far as it effects (sic) the other parties who are not appellants should be revised, set aside and the said portions do remain with the 1st respondent. Only the title in the names of the 2nd appellant should have been affected by this Appeal.”

7. The 2nd, 3rd and 4th respondents opposed the motion through a replying affidavit that was sworn by Lydia Job Wairimu, and written submissions that were duly filed by their counsel. They contend that the applicant's motion is incompetent, bad in law, defective and ought to be struck out. They point out that the orders that were made by this Court on 26th March, 2015 are unambiguous, and that there are no good reasons given as to why the applicant should be granted the orders he seeks.
8. The 2nd, 3rd and 4th respondents submit that the applicant has not met the threshold for review of the orders that were made by the Court. They rely on Jimna Mwangi Gichanga vs Attorney General [2015] eKLR for the proposition that the residual jurisdiction of the Court can only be exercised if it is demonstrated that the decision sought to be reviewed has occasioned an injustice or a miscarriage of justice; and that the said injustice or miscarriage of justice has eroded public confidence in the administration of justice. It is submitted that the purported errors that the applicant relies upon are issues that ought to have been raised during the pendency of the appeal and that, in any case, they are errors in the special pleadings that do not affect the issue of proprietorship; and that the applicant



had the opportunity under Rule 92(1) of the Court of Appeal Rules to file a supplementary record of appeal if he felt that the record of appeal was inadequate.

9. We have considered the motion before us and the contending submissions. It is apparent that the applicant is invoking the residual jurisdiction of this Court in seeking to have the judgment that was delivered by the Court on 26th March, 2015 reviewed.
10. In *Kamau James Gitutho & 3 Others vs Multiple ICD (K) Limited & Anor [2019] eKLR*, this Court had occasion to consider a number of its decisions on the issue of the court’s residual jurisdiction to review its decision, and when that jurisdiction can be applied.
11. In *Benjo Amalgamated Limited & Anor vs Kenya Commercial Bank Limited* [2014] eKLR, which is one of the decisions referred to in *Kamau James Gitutho & 3 Others vs Multiple ICD (K) Limited & Anor* above, the Court set the threshold in reviewing its decision as follows:

“It is our finding that this Court not being the final Court has residual jurisdiction to review its decisions in which there is no appeal to correct errors of law that have occasioned real injustice or failure or miscarriage of justice, thus eroding public confidence in the administration of justice. This is a jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice.”

12. The issue is, has the applicant met this threshold? We believe not. From the grounds stated in the body of the motion, it is clear that the applicant is taking issue with the record of appeal which, in his view was not properly drawn, and some documents which he considers vital, are missing from the record. This, in our view, is not a sufficient reason for review as the applicant had the opportunity under Rule 92(1) of the Court of Appeal Rules to file a supplementary record of appeal, and introduce the missing documents, if he thought they were necessary. Having not done so, the applicant has only himself to blame. The Court cannot review its judgment due to his negligence.
13. Further, the applicant contends that the decision is erroneous because it benefited parties who did not prefer an appeal against the High Court judgment. The applicant has not denied that the said parties were defendants in the High Court, and therefore remain parties affected by the appeal even if they did not participate in the appeal. Moreover, the reason given is not exceptional, or a compelling reason that is good enough to justify this Court reviewing the previous orders made by the Court. Nor has the applicant demonstrated any injustice or miscarriage of justice that would erode public confidence in the administration of justice as a result of the previous orders.
14. For these reasons, we find no merit in this application. It is accordingly dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA



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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

