



**Mohamed v Duba & another (Civil Appeal (Application)
83 of 2019) [2022] KECA 1384 (KLR) (16 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1384 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL (APPLICATION) 83 OF 2019
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
DECEMBER 16, 2022**

BETWEEN

KHADIJA MOHAMED APPLICANT

AND

AMINA ABDI DUBA 1ST RESPONDENT

MOHAMED ABDUL RAHMAN 2ND RESPONDENT

*(An application for review of the Judgment and Orders of the
Court of Appeal at Malindi (Gatembu, Nyamweya & Lesiit JJA)
dated 18th March 2022 in Malindi Civil Appeal No 83 of 2019)*

RULING

1. A judgment was delivered by this court on March 18, 2022, with respect to the appellant's appeal against a judgment by the Environment and Land Court (ELC) dismissing her suit she had filed therein and allowing the respondents' counterclaim. The appellant had sought a declaration in the ELC that the titles issued to the respondents in respect of the parcels of land known as 1734/528 and 1734/459 Maisha Mapya Scheme (hereinafter the "suit properties") were null and void, and that she was the owner of the suit properties, and also sought various injunctions against the respondents. The respondents in turn also filed a counterclaim in the ELC, in which they denied that the appellant was the owner of the suit properties, which they claimed to have purchased, and also sought declarations that they were the only legally registered owners of the suit property, and any other interest that affected their rights was null and void and should be expunged from the register. The ELC in its judgment found that the respondents were innocent purchasers for value without notice of any encumbrances and were entitled to protection of the property that they had lawfully acquired.



2. This court, after hearing the appellant’s appeal, found that the main issue for determination was who, as between the appellant and respondents, was entitled to the suit properties, and we held as follows in the judgment delivered on March 18, 2022:

“We accordingly affirm the orders of the ELC dismissing the appellant’s suit, and declare the respondents the legal proprietors of, and entitled to possession of the parcels of land known as 1734/528 and 1734/459 Maisha Mapya. The orders of the ELC that the appellant executes a cross transfer for the respondents to take the vacant plots among the ten plots that were the subject matter of the suit within thirty days of the judgment, and that in default, the Deputy Registrar of the ELC to execute the same, are hereby set aside. The appellant shall bear the respondents’ costs of the suit and counterclaim in the ELC and of this appeal.”

3. This court while noting that it was not in dispute that the none of the parties in the appeal produced any registered title in respect to the suit properties in their names, was therefore of the view that a determination of the respective parties’ entitlement to the suit properties could only be made on the basis of an analysis of the various indentures and documents produced by the parties, and their evidence as regards the circumstances of their procurement, and their legal effect. After analysing the evidence adduced in the ELC, we reached the conclusion that the respondents’ evidence as regards the circumstances leading to the existence of duplicate indentures in respect to the suit properties was not only consistent, but was also collaborated, as opposed to the appellant’s, and controverted the appellant’s evidence. Therefore, that the respondents had demonstrated that the appellant’s entitlement to the suit properties was divested, and they had proprietary rights in the suit properties.
4. The appellant has now filed an application by way of a notice of motion dated June 20, 2022, seeking that leave be granted to the law firm of ASA & ASA Associates Advocates to have the conduct of this matter on behalf of the appellant in place of the law firm of Machuka & Company Advocates, and that the judgement and incidental orders issued by the court on March 18, 2022 declaring the respondents as the legal proprietors and entitled to possession of the parcels of land known as 1734/528 and 1734/459 Maisha Mapya Scheme. Lastly, that the court consequently issues orders directing a fresh hearing and or re-hearing of the matter as it thinks fit.
5. The prayer that leave be granted to the law firm of ASA & ASA Associates Advocates to have the conduct of this matter on behalf of the appellant in place of the law firm of Machuka & Company Advocates was not opposed, and we see no reason to decline the leave, and accordingly allow the firm of ASA & ASA Associates Advocates to be on record.
6. The outstanding prayer for review of our judgment was based on the ground that the judgement contained an apparent error on the facts on record that led to the erroneous declaration on the legal proprietorship and entitlement of parcels known as 1734/528 and 1734/459. The errors pointed out were that the court incorrectly found that the indentures dated February 28, 2005 relate to the parcels 1734/528 and 1734/459 and yet the same relate to parcels 10719/454 and 10719/455. The second error pointed out was that the sale agreements on record related to parcels 10719/454, 10719/455, 10719/469 and 10719/545 and not to the suit properties. It was pointed out that the respondents have issued a notice to the applicant to vacate the suit premises 1734/528 and 1734/459.
7. The prayer for review was opposed in an affidavit sworn on June 28, 2022 by the 1st respondent, wherein it was averred that this court having pronounced itself on the issues raised, lacks requisite jurisdiction to deal with them any further, and that there are no new facts upon which the court can revisit the matter. Further, that the respondents’ case was that they had purchased plots 454, 455 and 529 which were occupied by the appellant, and that this court found that there was double registration



of the said properties, and there was no need for a cross-transfer since the respondent was already in possession of the deeds duly transferred in their name. Therefore, that this court is functus officio the issue raised and that the application fails to meet the requisite threshold for review.

8. We heard the application on July 25, 2022, and learned counsel Mr Asa Omwoyo appeared for the appellant while learned counsel Mr Mouko appeared for the respondents. The two counsel highlighted their written submissions dated June 23, 2022 and June 28, 2022 respectively. Mr Omwoyo cited the case of *Manchester Outfitters & another v Standard Chartered Financial Services Ltd* Supreme Court Petition 6 of 2016 for the proposition that this court has jurisdiction to entertain the application.
9. Counsel was confident that the applicant met the grounds to warrant the orders sought as was set out in the case of *National Bank Kenya Ltd v Ndungu Njau* (1997) eKLR. According to counsel, it was an error to find that indentures were executed in respect of the parcels 1734/528 and 1734/459 and yet the indentures relate to parcels 10719/454 and 10719/455. It was pointed out that the court found that the applicant failed to provide evidence of entitlement to the suit land and yet there was evidence of a postal search, letters from the Town Clerk of Municipal Council of Malindi, memorandum of transfer of the land that is dated March 3, 2003 in favour of the applicant and the letters of administration dated March 11, 2013 to the effect that the applicant is listed as a beneficiary of the suit land 1734/528 and 1734/459.
10. Mr Mouko on his part, while citing the decisions in *Ushago Diani Limited vs Jabeen Manan Abdulwahab* (2019) eKLR and *Benjoh Amalgamated Ltd vs Kenya Commercial Bank Limited* (2014) eKLR submitted that this court has powers to review its judgments in very special circumstances but that such circumstances do not exist in the present case. Further, that the appellant is disgruntled with the judgment and therefore there is no error on the face of the record as was held in the case of *National Bank of Kenya Ltd vs Ndungu Njau* (1997) eKLR. Furthermore, that the appellant had not satisfied the prerequisites for being granted the orders sought as set out by the Supreme Court of Kenya in *Mohamed Fugicha vs Methodist Church in Kenya & 3 others* [2020]eKLR, and had not even annexed the decree arising out of the impugned judgment. Lastly, that the conduct of the appellant in the entire proceedings should be taken into account and the hardship that she has caused the respondents.
11. It is notable in this respect that the appellant's suit in the ELC and her appeal herein were premised on the double registration of the suit properties, and both the appellant and 1st respondent produced certificate of postal searches showing that they were registered proprietors of the suit properties, being 1734/528 and 1734/459 which are now registered as plots 10719/528 and 10719/459. Reference is in this regard made to pages 153 to 168 and pages 226 to 238 of the record of appeal which include the postal searches and various documents produced by the appellant and respondents respectively to show their entitlement in this regard.
12. Our conclusions that the respondents' account of events leading to the double registration was more reliable and credible were informed by the findings in the judgment that the legal effect of the documents produced in evidence was that Maisha Mapya Self Help Group, as beneficial owners of the suit properties, conveyed their interests in the properties firstly to the appellant, and later to Hussein Abubakar Erwin Berner, arising from an agreement by the appellant and Erwin Berner to relinquish her interest in five of her plots in his favour including the suit properties. The agreement between the appellant and Erwin Berner was in this respect in the record of appeal, as was the evidence by the officials of Maisha Mapya Self Help Group, which we referred to in our judgment.
13. Second, on the respondents' interests, we found that "the estate of Hussein Abubakar Erwin Berner was the beneficial owner of the suit properties as at the time of his death on May 3, 2005, having executed indentures with Maisha Mapya Self Help Group on February 28, 2005 for the conveyance



of the said properties, and at the time of sale agreement between the deceased’s beneficiaries and the respondents on December 31, 2007 and August 17, 2011.” A perusal of the proceedings in this regard at page 349 to 350 of the record of appeal reveals the explanation by the 1st respondent during her testimony that the disputed properties were initially indicated as plots 454, 455 and 529 in the sale agreements and indentures that she signed, while on the ground they were actually plots 459, 458 and 528, hence the reason why the indentures she exhibited dated February 28, 2005 as well as the sale agreements were with respect to plots 454 and 455 and which were later rectified. The evidence of the officials of Maisha Mapya Self Help Group also collaborated her evidence in this respect.

14. It was held in the case *Benjob Amalgamated Ltd vs Kenya Commercial Bank Limited* [2014] eKLR, that the residual jurisdiction of the court to review its own decisions “should be invoked with circumspection” 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).”

15. As we have demonstrated in the foregoing the issue raised by the appellant of the alleged errors in our findings that in the indentures dated February 28, 2005 relate to the parcels 1734/528 and 1734/459 was not only explained by the evidence on record but also by our analysis of the evidence adduced by the parties during trial, and our evaluation of the effect of that evidence in its totality as detailed in the judgment. It is thus our view that no error of law or any other ground has been demonstrated by the respondent to warrant a review of our judgment. We accordingly find no merit in the appellant’s application dated June 20, 2022, save for the prayer that leave be granted to the law firm of ASA & ASA Associates Advocates to have the conduct of this matter on behalf of the appellant in place of the law firm of Machuka & Company Advocates which we have allowed. The other prayers in the said notice of motion application dated June 20, 2022 are hereby dismissed with costs to the respondents.

Orders accordingly

DATED AND DELIVERED AT MOMBASA THIS 16TH DAY OF DECEMBER, 2022.

S. GATEMBU KAIRU (FCIArb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL



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

Signed

DEPUTY REGISTRAR

