



**Isatu v Nabosu & 2 others (Environment and Land Appeal
006 of 2021) [2024] KEELC 3336 (KLR) (22 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3336 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT AND LAND APPEAL 006 OF 2021**

PM NJOROGE, J

APRIL 22, 2024

BETWEEN

PAUL HIRBO ISATU APPELLANT

AND

BAGASI NABOSU 1ST RESPONDENT

KHALATI ZACHARIA 2ND RESPONDENT

ZAIBABU ESINFECHA 3RD RESPONDENT

*(Being an Appeal against the Judgment of the Learned Hon. B. M. Ombewa
delivered on 3rd December, 2018 in Marsabit ELC Case no. 5/2017)*

JUDGMENT

1. The Memorandum of Appeal in this suit states as follows;

Memorandum of Appeal

1. The Learned Principal Magistrate erred both in law and fact by dismissing the Appellant's suit against the weight of evidence before him, hence arriving at wrong decision.
2. The Learned Principal Magistrate erred in law and fact by ruling that, the Appellant had failed to prove the case on the required standard in law.
3. The Learned Principal Magistrate erred by making a finding that failure to produce surveyors report solely affected the standard of proof on the Appellant's case and erroneously mixed up issues of boundary and ownership.
4. The Learned Principal Magistrate erred by entirely ignoring the appellants evidence on record and the exhibits and injuculiously (sic) proceeded to dismiss the appellant case.



5. The Learned Principal Magistrate grossly misconstrued the principle of burden of proof in civil matters and proceeded to reach at a wrong decision.
6. The Learned Principal Magistrate ignored the glaring straight and formidable evidence in proceedings of Marsabit Criminal Case No. 123/2017 which formed part of evidence.
7. That by all round circumstances the Learned Principal Magistrate decision was wrong erroneous and wasn't supported by evidence on record.

Reasons whereof the appellant prays that:-

- a. That this appeal be allowed and the Learned Principal Magistrates Court judgment dated and delivered on 3rd December, 2018 be set aside in its entirety.
- b. That the Learned Principal Magistrate court (sic) be substituted with an order allowing the plaintiffs case.
- c. That costs of the superior court (sic) and that of this appeal be awarded to the appellant.

Dated at Meru this 7th Day of February, 2020

M/S Leonard K. Ondari & Co.

Advocate for the Appellant

2. The suit was canvassed by way of written submissions.
3. The Appellant's Advocate has extensively made submissions in support of the 7 grounds of Appeal.
4. The 1st and 2nd Respondents' Advocate has opposed the appeal on the main ground that as the appellant had filed an application for review in the trial court, which application was dismissed; he has got no right to file this appeal.
5. I find it necessary to consider the issue raised by the Appellants Advocate. The surest and simplest way to establish the veracity of the Respondents' assertion is to go back to the proceedings of the trial court. I do find that as a fact the trial court delivered its judgment on 3rd December, 2018. I also find as a fact that the appellant filed a Notice of Motion Application dated 14th December, 2018 seeking a review of the trial court's judgment. This application was dismissed on 21st January, 2018. This being the case, what are the consequences?
6. This court does not need to reinvent the wheel. In our Judicial system lower courts are bound by the decision of higher courts. In our case, the court of Appeal is the Immediate Superior Court.
7. The Court of Appeal whose decisions unequivocally bind this court, in the case of [*Gerald Kithu Muchanjever versus Catherine Muthoni Ngari and Another*](#) [2020] eKLR held as follows;

“Under Section 80 of the [*Civil Procedure Act*](#) and Order 45 of the *Civil Procedure Rules*, where a party opts to apply for review of a judgment and decree, such a party cannot after the review application is rejected exercise the option to appeal against the same judgment and decree that he sought to review. In the instant application, the applicant exhausted the process of review proceedings and now wishes to go back and try his luck once again with an appeal against the Original Judgment. The applicant wants to have a second bite of the same



cherry and he cannot be permitted to do so. There is no doubt that this will cause prejudice to the respondents.

“Litigation must come to an end somehow and it cannot be conducted on the bases of trial and error. An appeal could only lie on the outcome of the application for review. In the case of *Wanjiru Mwangi & Another (2015) eKLR*, the court stated that “for the above provision of Section 80 of the *Civil Procedural Act* and order 45 of the *Civil Procedural Rules*, it is clear that one cannot exercise the right of appeal and for review of the same judgment/decree or order. One must elect either to file an appeal or to apply for a review.... It therefore follows that the appellant herein had an unimpeded right to either appeal against the ruling of 13/6/2014 or apply to have it reviewed. And having exercised the right to a review, she lost the right of Appeal against the same order...”

8. Do I need to say more? Respectfully I say No! That would be veritably pyrrhic and a needless otiose exercise. By electing to go for a review of the apposite Judgment, the appellant willingly lost the right to appeal.
9. In the circumstances, this court issues the following orders:
 - a. This appeal is dismissed.
 - b. Costs shall follow the event and are awarded to the respondents.

DELIVERED IN OPEN COURT AT ISIOLO THIS 22ND DAY OF APRIL, 2024 IN THE PRESENCE OF:

HON. JUSTICE P.M NJOROGE

JUDGE

