



REPUBLIC OF KENYA



**Mwaura v Mukonza (Environment and Land Appeal
E009 of 2020) [2024] KEELC 4887 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4887 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E009 OF 2020
CA OCHIENG, J
JUNE 20, 2024**

BETWEEN

JULIUS NJUGUNA MWAURA APPELLANT

AND

JACKSON MUKONZA RESPONDENT

*(An appeal from the Judgment of the Honourable C. Ocharo Senior
Principal Magistrate delivered in CMCC No. 802 of 2013, Julius
Njuguna Mwaura Vs Jackson Mukonza on 9th October, 2020)*

RULING

1. What is before for determination is the Appellant's Notice of Motion Application dated the 21st November, 2023 brought pursuant to Order 45 Rule 1, 2 and 3 and Order 51 of the [Civil Procedure Rules](#) as well as Section 80 and 3A of the [Civil Procedure Act](#). The Appellant seeks the following Orders:
 1. Spent
 2. Spent
 3. That the Court does review, vary and/or set aside the Judgment delivered on the 19th of September, 2023 and does proceed to make a finding that this Appeal is merited and proceeds to allow the same.
 4. That costs of this Application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Julius Njuguna Mwaura who explains that he is the Appellant herein. He confirms the Appeal was dismissed with costs on 19th September, 2023. Further, that on 21st September, 2023, the Respondent herein filed a party and party Bill of Costs in execution of the abovementioned Judgment, which Bill was slated



for taxation on 14th February, 2024. He explains that during the trial in the subordinate court, DW1 Kavilu Kasio, testified that she was the owner of the parcel of land known as plot No. 1874 held at Katelembo Athiani Muputi Farming & Ranching Cooperative Society Limited, which she later gave to the Respondent herein who built a house thereon. Further, that DW2 Peris Mwikali Mutua alias Phylis Mwikali Mutua alleged owning the same parcel No. 1874.

3. He contends that, after delivery of the Judgment on 19th September, 2023, he visited the Katelembo Athiani Muputi Farming & Ranching Cooperative Society Limited offices on 3rd October, 2023 to establish the ownership of the parcel No. 1874 as per the records of the Society. Further, he established that Plot No. 1874 was owned by Kavilu Kasio who later sold it to DW2 Peris Mwikali Mutua alias Phylis Mwikali Mutua. He argues that this was contrary to the testimonies of the witnesses in the trial court. He reiterates that, in light of the said developments, he reported the matter to the Directorate of Criminal Investigations at Machakos on 6th October, 2023 to look into the suspicious transfer of Plot No. 1874 from its original owners to other parties. He avers that, in the course of the investigations, he instructed a surveyor messrs Arch Surveys, to look into the ownership of land known as Plot No. 1874 and suit land being Machakos Town Block 3/80 previously Plot No. 1870. Further, vide a report dated the 7th November, 2023, the said Surveyor confirmed that indeed the Respondent was in occupation of the suit land (Machakos Town Block 3/80) previously known as Plot No. 1870 which belongs to the Applicant herein and not parcel No. 1874. He hence sought a review of the impugned Judgment.
4. The Respondent Jackson Mukonza opposed the instant Application by filing a Replying Affidavit where he deposes that the said Application is incompetent and bad in law. He contends that the instant application seems to attack the proceedings in the subordinate court and is clearly re-evaluating the evidence before the court. Further, this being a first appellate court, it already rendered itself on the facts vide the impugned Judgment. He argues that the present application is a second appeal before this court and is untenable. He avers that the Applicant has sought to adduce additional evidence after the Appeal has already been determined and this is contrary to the express provisions of Section 78 (2) of the *Civil Procedure Act*.
5. Further, the Applicant has not made an application for re-opening the case and thereafter seeking leave of the court under Order 42 Rule 27 of the *Civil Procedure Rules* to adduce additional evidence. He reiterates that the application is an abuse of the court process because on 28th September, 2023, the Applicant had filed a Notice of Appeal to the Court of Appeal, hence he should not have filed the instant application.
6. The Application was canvassed by way of written submissions.

Analysis and Determination

7. Upon consideration of the instant Notice of Motion Application including the respective affidavits, annexures as well as the rivalling submissions, the only issue for determination is whether this court should review its Judgment delivered on 19th September, 2023 and allow the Appeal.
8. The grounds upon which a Judgment of the Court can be reviewed and or set aside are stipulated under Section 80 of the *Civil Procedure Act* as well as Order 45 of the Civil Procedure Rules.
9. Section 80 of the *Civil Procedure Act* stipulates that:-

“ Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or



- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

10. While Order 45 Rule 1(1) of the [Civil Procedure Rules](#) provides that:

“Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

11. In this instance, the Appellant has sought for review of the Judgment dated the 19th September, 2023 and presented fresh evidence on ownership of the suit land that he obtained after the impugned Judgment. The Respondent has vehemently opposed the application insisting that the Court is functus officio, the said application is barred in law and is an abuse of the court process. I note the Appellant had filed a Notice of Appeal dated the 28th September, 2023 prior to filing the instant application. However, he proceeded to file a Notice of Withdrawal of the Appeal on 20th February, 2024 during the pendency of the instant application. In the case of *Muyodi v Industrial and Commercial Development Corporation and Another* EALR (2006) EA 243, the Court of Appeal while dealing with issues of review held that:

“For an application for review under Order 45 Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay.”

12. I note the Judgment sought to be reviewed emanated from an Appeal from the Judgment of the Honourable C. Ocharo Senior Principal Magistrate delivered in CMCC No. 802 of 2013. *Julius Njuguna Mwaura v Jackson Mukonza* on 9th October, 2020. I further note, that the Appellant seeks to adduce additional evidence he obtained after the delivery of the Judgment which dismissed his Appeal.

13. On production of additional evidence in an appellate court, Order 42 Rule 27 of the [Civil Procedure Rules](#) stipulates that:

- “(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if—
 - (a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or



(b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission.”

14. From a reading of these legal provisions, it is clear that for a party to adduce additional evidence on Appeal, he should first seek leave before being allowed to do so. Further, the evidence can only be adduced prior to delivery of the Judgment on appeal and not after. It is trite that an Application for review should be made to the trial Court but not the Appellate Court. Further, that the grounds for review should be based on error apparent on the face of record or discovery of new matters, which were not available during the hearing. In the current scenario, this court analyzed the evidence presented in the lower court before delivering its Judgment. The Appellant never sought leave to adduce additional evidence in the appeal in accordance with Order 42 of the *Civil Procedure Rules*. I opine that this application is an afterthought and bad in law. It seems to me, the Appellant is not sure of which remedy he is seeking. In the circumstance, I decline to review the Judgment delivered on 19th September, 2023.
15. It is against the foregoing that I find the Notice of Motion Application dated the 21st November, 2023 unmerited and will disallow it.
16. Costs are awarded to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20TH DAY OF JUNE, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Ms. Mutua holding brief for Nzili for Applicant

Kiluva for Makundi for Respondent

Court Assistant – Simon/Ashley

