



Awinja & 2 others v Awinja & 2 others (Environment and Land Appeal E008 of 2022) [2024] KEELC 6218 (KLR) (19 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6218 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL E008 OF 2022**

**E ASATI, J
SEPTEMBER 19, 2024**

BETWEEN

**WYCLIFFE MUHUNYI AWINJA 1ST APPELLANT
WILBERFORCE MULAMBA AWINJA 2ND APPELLANT
JASS NYAMWANDA 3RD APPELLANT**

AND

**KENNEDY NEHEMIAH AWINJA 1ST RESPONDENT
VIHIGA COUNTY LAND REGISTRY 2ND RESPONDENT
THE HON. ATTORNEY GENERAL 3RD RESPONDENT**

((Being an appeal from the Judgement of the Senior Resident Magistrate's court at Vihiga and delivered on the 21st day of July 2022 by honourable R. M. Ndombi SRM in Vihiga Senior Principal Magistrate's Court ELC Case No. 50 of 2020.))

RULING

1. This Ruling is in respect of the Notice of Motion application dated 14th March 2023 brought on behalf of the applicants pursuant to the provisions of order 9 Rule 9(a) and Orders 45 and 22 of the [Civil Procedure Rules](#). The substantive order sought in the application is that the court be pleaded to review its judgment since there is an error apparent on the face of the record, that the honourable court be pleased to grant leave to the appellants/applicants to file a proper record of appeal upon review of the Judgment and that the costs of the application be provided for.
2. The application was based on the grounds that the appeal proceeded to hearing upon the filing of a record of appeal by the Counsel for the 1st Respondent. That the Appellant s/Applicants Counsel on record then for them didn't file a Record of Appeal since he had secured employment with the



- Government and hence was unable to continue to represent the appellants/applicants. That Counsel for the 1st Respondent filed an incomplete record of appeal which left out crucial documents produced by the appellants/applicants as part of their evidence in the subordinate court. That the appellants/applicants were prejudiced by the filing of an incomplete record of appeal since the honourable court didn't get an opportunity to see all the evidence that was adduced by the Appellants/Applicants in the subordinate court. That there is an error apparent on the face of the records hence the judgment should be reviewed so as to allow the appellants to file proper Record of Appeal.
3. That the Respondents will not suffer any loss if the orders sought are granted. That the appellant will suffer irreparable loss if the orders are not granted and that it is in the interest of justice that the orders sought be granted. The application was supported by the contents of the Supporting Affidavit sworn by Wycliffe Muhunyi Awinja on 14th March 2023.
 4. The application was opposed vide the contents of the Replying Affidavit sworn by Kennedy Nehemiah Awinja on 30th May 2024. The Respondent's case is that the application is brought in bad faith, that it lacks merit and that the same is a waste of judicial time. That the same is frivolous, vexatious and premised on falsehoods. That during the hearing of the appeal the issue that the Record of Appeal was incomplete was not raised.
 5. The substantive prayer in the application is for an order for review of the judgement of this court delivered herein on 18th January 2024 on the grounds that there is an error apparent on the face of the record. The error apparent on the face of the record is stated to be that the Record of Appeal filed (by Counsel for the Respondent) was incomplete as it omitted certain crucial documents produced as exhibits by the appellant in the suit.
 6. The power for courts to review their judgements is provided for under Section 80 of the [Civil Procedure Act](#) and Order 45 of the [Civil Procedure Rules 2010](#). Section 80 provides 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 judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
 7. Order 45 [Civil Procedure Rules 2010](#) provides for the grounds for review to be: -Discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or order made, on account of some mistake or error apparent on the face of the record, or for any sufficient reason. the application must be made without unreasonable delay.
 8. The applicant claims that certain crucial documents were omitted from the Record of Appeal hence the applicant suffered prejudice. Neither the omitted documents/exhibits nor their significance to the appeal were pointed out by the applicant in the application and Supporting Affidavit. The applicant filed no submissions in accordance with the directions given on 8/5/2024. Error apparent on the face of the record is an error that is obvious, self-evident and does not require an elaborate argument to be established, as was held in Civil Case No. 2236 of 1988 [Njoroge & 104 Others \(suing in representative](#)



capacity for Kariobangi South Civil Servants Estate tenant purchasers) v Savings & Loan Kenya Ltd (1988) eKLR relying on 13th Edition of Mulla on Indian Code of Civil Procedure that;

“A mere error of law is not a ground for review under this rule. It must further be an error on the face of the record. The line of demarcation between an error a simpliciter and an error apparent on the face of the record may sometimes be thin. It can be said of an error that is apparent on the face of the record when it is obvious and self –evident and does not require an elaborate argument to be established.”

9. No such error has been pointed out in the application. Under Order 42 Rule (4) Civil Procedure Rules, the law lists the documents that must be on record before an appeal is allowed to go for hearing. It provides as follows: -

Order 42 Rule 13 (4) of the Civil Procedure Rules reads;

"Before allowing the appeal to go for hearing, the Judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say;

- a. The memorandum of appeal
- b. The pleadings
- c. The note of the trial magistrate made at the hearing.
- d. The transcript of any official shorthand, typist note electronic recording or palantypist notes made at the hearing.
- e. All affidavits, maps and other documents whatsoever put in evidence before the magistrate.
- f. The judgement, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.

Provided that –

- i. Translation into English shall be provided of any document not in that language.
- ii. The judge may dispense with the production of any document which is not relevant other than those specified in paragraph (a) (b) and (f).

10. The mandatory documents are those listed as (a), (b) and (f) and these are the Memorandum of Appeal, Pleadings and the Judgement, Order or Decree appealed from and, where appropriate, the order, if any, giving leave to appeal.
11. Perusal of the Record of Appeal dated 30th January 2024 herein shows that the same contained: -Memorandum of Appeal dated 19/8/2022The pleadings namely; the Plaint dated 12th August 2020, Verifying Affidavit, Memorandum of Appearance dated 24/1/2021, 1st, 2nd and 3rd Defendants' Defence dated 24/2/2021, Amended 1st, 2nd and 3rd Defendants' defence and Counter- Claim dated 16/4/2021, Verifying Affidavit and Witness Statements.The notes of the trial Magistrate made at the hearing (proceedings)The exhibits produced by both partiesThe judgement, decree and certificate of costs by the trial court.



12. The record was confirmed to be complete before the appeal was admitted to hearing. For the foregoing reasons, I find that the application lacks merit and hereby dismisses it. Costs to the 1st Respondent.

Orders accordingly.

RULING, DATED AND SIGNED AT VIHIGA AND READ VIRTUALLY THIS 19TH DAY OF SEPTEMBER 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Ajevi Court Assistant.

Manyoni for the Appellants/Applicants.

1st Respondent present in person virtually.

