



**Ouko v Ogachi & 2 others (Environment and Land Appeal
E003 of 2022) [2023] KEELC 16366 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16366 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E003 OF 2022**

E ASATI, J

MARCH 23, 2023

BETWEEN

MARTIN ONYANGO OUKO APPELLANT

AND

MARY OTITA OGACHI 1ST RESPONDENT

PASTOR JOSPER MOSE 2ND RESPONDENT

DELIVERENCE CHURCH KONDELE 3RD RESPONDENT

*(Appeal from the judgement decree of Hon. H. M. Nyaberi the Chief
Magistrate at Winam in Winam CMC E&L Case No. 63 of 2018)*

RULING

1. The application before court for determination is the notice of motion dated March 9, 2022 filed by the applicant, Mary Otita Ogachi who is the 1st respondent in the appeal. It seeks for orders that the court be pleased to review, vary and/or set aside its order dated February 17, 2022 to specifically provide for security as a condition for stay of execution of the judgement dated July 21, 2021.
2. The grounds of the application are that there is an error apparent on the face of the court order dated February 17, 2023 in that the appellant ought to have been ordered to deposit security as a condition for an order of stay of execution pursuant to the provisions of order 42 rule 6(2)(b) and that equity favours granting of the orders sought. The application is supported by the averments in the supporting affidavit sworn by the applicant on March 9, 2022.
3. The application was opposed vide the averments contained in the replying affidavit sworn by the appellant on June 27, 2022 and the annexures thereto.



4. The application was argued by way of written submissions. The applicant submitted *vide* the undated written submissions filed in court on January 12, 2023 that as provided in order 42 rule 6(2)(b) the honourable court ought to have considered the mandatory aspect of directing the appellant to provide security. That the appellant ought to have deposited Kshs 1,000,000/- in a joint account pending hearing and determination of the appeal.

That order 42 rule 6(2)(b) is couched in mandatory terms and it is clear that no order for stay of execution shall be made without provision of security.

That section 80 of the [Civil Procedure Act](#) and o 45 rule 1 of the [Civil Procedure Rules](#) summarizes the conditions for grant of an order of review. That the honourable court has power to make orders of review specifically if the orders sought to be reviewed were irregularly issued. The applicant relied on the case of [Zablon Mokuva v Solomon M. Choti & 23 others](#) [2016] eKLR to submit that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court and that the error must be self-evident and should not require an elaborate argument to establish that there is an error apparent on the face of the record granting stay of execution. That the court is not *functus officio* because the trial court did not address its mind to the issue of security and thus the order of stay granted is open to review.

The applicant prayed that the order of stay be reviewed and the applicant be ordered to provide security. That the applicant incurred expenses in prosecuting the lower court case and now the appeal.

5. The appellant opposed the application. He submitted *vide* the written submissions dated February 2, 2023 that the application does not fall within the ambit of review. That error apparent on the face of the record should be distinguished from a mere erroneous decision and a decision which could be characterised as vitiated by error apparent.

That the applicant has failed to discharge the burden of demonstrating that the orders sought to be varied contain an error apparent on the face of the record. That the court has become *functus officio* because once a decision is made, the same is final and conclusive subject to any right of appeal to a superior tribunal or body.

That the application is an abuse of the court process. He prayed that the application be dismissed with costs.

6. I have carefully read and considered the application, supporting affidavit, the rival submissions made and the entire court record. The background of the application is that together with the memorandum of appeal, the appellant herein filed an application under certificate of urgency dated January 25, 2022 for stay of execution of the judgement appealed against, pending the hearing and determination of the appeal. The application was heard and allowed on February 17, 2022. There is no evidence that the application was contested though there was evidence of service of the application. The sole issue this court's determination as I gather from the present application is whether or not the remedy of review of the order for stay of execution made on February 17, 2022 is available to the applicant.

7. Review and setting aside of judgements, decrees and orders is provided for in 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 review of the judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit

order 45 rule 1 (1) provides

“ 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 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 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 judgement to the court which passed the decree or made the order without unreasonable delay.”

From the above-quoted provisions of the law, it is clear that the grounds upon which an application for review of a judgement, order or decree can be made are: -

- a) discovery of a new and important matter or evidence
- b) some mistake or error apparent on the face of the record
- c) any other sufficient reason
- d) the application must be brought without unreasonable delay.

8. In the present case, the application is based on the grounds that there is some mistake or error apparent on the face of the record and the error apparent on the face of the record is said to be failure by the court to order for provision of security as a condition for the stay of execution granted under order 42 rule 6 *Civil Procedure Rules*. In *Republic v Advocates Disciplinary Tribunal ex parte Apollo Mboya* [2019], eKLR it was held, *inter alia*, that; -

“There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out, see the decision in *Thungabhadra Industries Ltd v Govt of A.P I*.

9. The application, in my view, challenges the propriety of the orders made in the ruling. It questions whether or not the trial court was right in making an order of stay of execution of the judgement without imposing security as a condition thereof as provided for by o.42 rule 6. This is, in my view, a matter for appeal. It cannot be said to be an error apparent on the face of the record that can be remedied by way of review.



10. As none of the grounds for review has been demonstrated, I find that the application has no merit and disallow it. Costs to the respondents/appellants.

It is so ordered.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 23RD DAY OF MARCH 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen- Court Assistant.

Odhong Advocate for the Applicant.

Omondi for the Respondent/Appellant.

