



Apidi ((suing as the Administrator of the Estate of the Late Mariko Apido Midimo)) v Gungu (Environment and Land Appeal 7 of 2019) [2022] KEELC 2572 (KLR) (15 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2572 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL 7 OF 2019**

**A OMBWAYO, J
JULY 15, 2022**

BETWEEN

**STEPHEN OTIENO APIDI APPELLANT
(SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE MARIKO
APIDO MIDIMO)**

AND

PAUL OBIERO GUNGU RESPONDENT

RULING

Brief facts

1. This Ruling disposes two Applications namely; the Respondent's Application dated 17th January 2022 and filed on 24th January 2022 and the Appellant's Application dated 10th February 2022 which was filed on 11th February 2022.
2. The two Applications were canvassed by way of written submissions as directed by this court.

Application dated 17th January 2022

3. The Respondent herein filed a notice of Motion Application on 24th January 2022 under section 1A,1B,3A, 63 (e) and 80 of the *Civil Procedure Act*, Order 42 Rule 6 (1), Order 45 and Order 51 Rule 1 of the *Civil Procedure Rules* 2010 seeking for the following orders:
 1. That this Application be certified urgent and be heard ex parte at the 1st instance.
 2. That pending the hearing and determination of this Application, the Honourable Court be pleased to grant stay of execution of the Orders of its Judgment delivered on the 28th day of January 2021 and the subsequent decree emanating therefrom and issue an order of stay



of proceedings including the taxation of the Party and Party Bill of Costs other than the proceedings relating to the present Application.

3. That pending the Honourable Court be pleased to review and set aside its judgment delivered by this Honourable Court on the 28th Day of January 2021.
4. That the costs of this Application and the appeal be borne by the Appellant.
4. The Application was based on grounds that the suit was originated by the Plaintiff via a Plaint dated 16th October 2021 and the trial court heard the matter and thereafter dismissed the same with costs via Judgment delivered by the court on 20th February 2019. That after dismissal of the suit with costs, instead of the Appellant appealing against the said decision, the Appellant in this suit filed a Notice of Motion Application in the trial court seeking to review judgment of the court pursuant to the provisions of section 80 and order 45 of the Civil Procedure Rules and the court heard the application and dismissed the same.
5. The Respondent averred that after the dismissal of the Applicant's Notice of Motion seeking review orders, it is when the Appellant compiled the Record of Appeal, the Application seeking the review of the Judgment of the trial court and the Ruling dismissing the said application and thereafter proceeded with the Hearing of the Appeal. That the Appellant's decisions to pursue the hearing of the Appeal after the Application seeking review of the Judgment of the trial court had been dismissed is illegal as it was done in bad taste and amounts to an abuse of the court process and ought to be set aside.
6. It was stated that the prayers sought by the Appellant were incapable of being granted by this court as the prayers sought were at variance with the prayers that the Appellant was seeking in the Plaint and this runs contra to the well-established and espoused judicial precedent that parties are bound by their own pleadings. It was further stated that the primary claim by the Appellant was boundary dispute and this court lacks the jurisdiction to hear and determine claims for and or touching on boundary disputes.
7. The Respondent stated that it is fair, logical and reasonable that the Judgment of the court delivered on 28th January 2021 be set aside and substituted with an order dismissing the Appellant's Appeal with costs to the Respondent. That the Application has been brought timeously as the Applicant only learnt of the Judgment on 12th August 2021.
8. The Respondent averred that the Taxation of the Party and Party Costs scheduled for 15th January 2022 be stayed pending the hearing and determination of this Application and that if the Taxation is allowed to proceed and the Respondent pays the taxed costs and the court proceeds to grant the prayers sought in the instant Application, the orders sought in this Application would be rendered nugatory and the Taxing Master's judicial time would go to waste and it is fair and expedient in the circumstances of this case to stay further proceedings until the Application is heard and determined.
9. The Respondent further averred that the instant Application is an arguable one and has prima facie chances of success and the Respondent stands to suffer substantial loss and irreparable harm if the orders sought are not granted is the Respondent's case that the circumstances in this case constitutes sufficient reason to grant the orders of Review as provided for by section 80 of the *Civil Procedure Act* as read with Order 45 of the *Civil Procedure Act*.
10. The Application was supported by the Affidavit of Paul Obiero Gungu, the Respondent herein who relied on the grounds in the Application.
11. The Appellant herein filed Grounds of Opposition dated 26th January 2022 where he opposed the Application on grounds that the Application is fatally defective, the court is functus officio and



incapable of entertaining the Application, no grounds for review have been disclosed and that the Application is belated, mischievous and an abuse of the court process.

12. The Application came up for Hearing on 14th February 2022 where parties agreed to have the same canvassed by way of written submissions.

Respondent/Applicant's Submissions

13. I have perused the file and do confirm that the Respondent/Applicant in this Application failed to file his submissions.

Appellant/Respondent's Written Submissions

14. The Appellant herein filed his written submissions on 28th March 2022 and stated that the Respondent filed this instant application for review on grounds that when the Appellant compiled his record of appeal, the Appellant left out the Application seeking review of the judgment of the trial court had been dismissed and proceeded with the hearing of the Appeal. That the said allegations are not true as the Appellant filed his Memorandum of Appeal on 28th March 2019 while Ruling of the Application was delivered on 20th June 2019 and therefore the Appellant could not include the said Ruling in the record of Appeal as the same was pending in the trial magistrate court.
15. That the Respondent was present during the hearing and disposal of the Appeal and the issue for review before the trial court was never brought up. That the Appellant proceeded to file his Party and Party Bill of Costs on 8th November 2021 which is due for Ruling before the taxing master. It was further stated that the execution of this court's orders is ongoing and the instant Application is meant to delay and frustrate the Appellant from enjoying the fruits of his Judgment. Reliance was placed in the case of *Zacharia Somi Nganga vs Kenya Commercial Bank Limited & 3 Others* (2008) eKLR and *National Bank of Kenya Ltd vs Ndungu* (1997) eKLR.
16. It was submitted that the Respondent/ Applicant has failed to demonstrate that there is a mistake or error apparent on the face record and/or any sufficient reason to enable this court to set aside its decision, that there is no discovery of new evidence which was within his knowledge at the time the order was made. The Appellant therefore prayed that the Application be dismissed with costs.

Application dated 10th February 2022

17. The Appellant herein filed a Notice of Motion Application on 11th February 2022 under section 1A,3, 3A and 98 of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules, 2010 seeking for the following orders:
 1. That the Application be certified urgent.
 2. That the Deputy Registrar of this court be authorized to sign transfer of land forms, sign mutation forms and any other document requiring the signature of Paul Obiero Gungu.
 3. That costs of this Application be provided for.
18. The Application was based on grounds that the Appellant herein brought this suit against the Respondent in which he sought for an order directing the Siaya District Land Registrar to survey and subdivide land parcel East Alego/Olwa/1325 and extract the Appellant's portion measuring 0.25 Ha and that the extracted portion be transferred to him.
19. It was stated that the Respondent herein file his Defence and the counterclaim for the disputed portion and the trial magistrate dismissed the suit and the Appellant herein preferred an Appeal to this court.



That this court delivered its Judgment on the Appeal on 28th January 2021 where it set aside the trial magistrate's judgment in its entirety and judgment entered for the Applicant compelling the Siaya Land Registrar to extract the disputed portion of land measuring 0.19 Ha from the Respondent's land and transfer it to the Appellant.

21. It is alleged that efforts to have the Respondent transfer the disputed portion to the Applicant as ordered by the court has not been successful and the Appellant is still desirous to have land transferred to him. It was averred that the only way to have the orders effected is by authorizing the Deputy Registrar to sign all instruments of transfer of land.
22. The Application was supported by the Affidavit of Stephen Otieno Apidi who basically relied on the grounds of the Application.
23. I have perused the file and do confirm that the Respondent herein did not file a Respondent to the Application. The Application was canvassed by way of written submissions.

Appellant's Submissions

24. The Appellant herein filed his submissions on 10th March 2022 where he submitted that the Respondent herein did not appeal the decision of this court and that the refusal/neglect is calculated to defeat this court's judgment and decree. The Appellant relied in the case of *Charles Mukoma Kimaru vs Jognstone Muchomba Kaguya* (2020) eKLR.
25. It was stated that the Appellant having established that the Respondent has neglected and /or refused to comply with the decree of this suit that required him to excise portions of the suit parcel of land and have the same transferred to the Appellant, this court has powers to order the Deputy Registrar of this court to undertake all the process that would have been undertaken by the Respondent in compliance with the said decree.
26. It was submitted that the orders sought herein by the Appellant will help implement the court order as court orders are not made in vain. The Appellant therefore prayed that the Application be allowed with costs.

Respondent's Submissions

27. I have perused the file and do confirm that the Respondent failed to file his submission on the Application dated 10th February 2022.

Analysis and Determination

Application dated 17th January 2022

28. The Respondent herein being the Applicant in the Application dated 17th January 2022, sought for orders that this court be pleased to grant stay of execution of the Party and Party Bill of Costs and that the court be pleased to review and set aside its Judgment delivered on 28th January 2021.
29. It is the Respondent's case that after the Trial Magistrate dismissed the suit on 28th February 2019, the Appellant herein filed a Notice of Motion Application seeking review of the said Judgment and the said Application was dismissed on 20th June 2019. That it is after the Application for review by the Trial Magistrate was dismissed that the Appellant herein opted to file an Appeal and that in the record of Appeal, he left out the Application seeking review of the Judgment in the trial court and the ruling dismissing the same.



30. It is the Respondent's case that the prayers sought by the Appellant were incapable of being granted by this court as the prayers were at variance with the prayers sought in the Plaint and that the Judgment of the court delivered on 28th January should be set aside and substituted with an order dismissing the Appellant's Appeal.

31. Section 80 of the *Civil Procedure Act* provides as follows:

"Any person who considers 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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

32. Order 45 Rule 1(1) of the Civil Procedure Rules provides as follows:

"1 (1) 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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"

33. On whether there is discovery of new evidence, this court finds that the Respondent has not demonstrated that there is discovery of new evidence which was not within his knowledge or could not be produced at the time Judgment and Decree was being passed.

34. On whether there is apparent error or omission on the part of the court, this court is guided by the case of *National Bank of Kenya Limited vs. Njau Njau* (1995-99) 2 EA 249, where the Court of Appeal held as follows:

"A review may be granted where the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established."

35. The Court of Appeal described an error apparent on the face of the record as follows:

"...In *Nyamogo & Nyamogo -vs- Kogo* (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially



on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

36. This court has clearly established that the Respondent herein did not bring the issue of review during hearing of the Appeal and this court finds that there is no mistake on the face record of the court as the Appellant herein filed his Memorandum of Appeal on 28th March 2019 and Ruling of the Application for review was delivered on 20th June 2019. The Record of Appeal was filed on 5th September 2019 and the Appeal was canvassed by way of written submission and the Respondent did not raise any issue to do with the Record of Appeal.
37. On whether the Respondent herein has given any other sufficient reasons for grounds of review; I am guided by the case of *Sadar Mohamed v Charan Singh and Another* (1963) EA 557, it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two, that is, error apparent on the face of the record and discovery of new and important matter.
38. I do find that the Respondent herein has not given any other sufficient grounds to have the Judgment of this Court reviewed.
39. The Respondent also sought for orders that this court be pleased to stay execution of its orders issued on 28th January 2021 and the subsequent decree emanating therefrom and issue an order of stay of proceedings including the Taxation of the Party and Party Bill of Costs.
40. Order 42 Rule 6 of the Civil Procedure Rules, specifically provides that;

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”
41. The Court of Appeal declined to stay execution in the matter that it had determined with finality in the case of *Dickson Muricho Muriuki v Timothy Kangondu Muriuki & 6 Others* [2013] eKLR, when it held as follows;

“On the issue of whether this Court has jurisdiction to stay execution of its orders or stay any proceedings after the final delivery of its judgment and pending the hearing and determination of an intended appeal to the Supreme Court, we are of the view that once this Court has pronounced the final judgment, it is functus officio and must down its tools. In the absence of statutory authority, the principle of functus officio prevents this Court from re-opening a case where a final decision and judgment has been made. We bear in mind that in the new constitutional dispensation, most cases will end at the Court of



Appeal and it is inadvisable for this Court to be able to issue stay orders after delivery of its judgment. We remind ourselves that the principle of *functus officio* is grounded on public policy which favours finality of proceedings. If a court is permitted to continually revisit or reconsider final orders simply because a party intends to appeal to the Supreme Court or the Court may change its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding. The structure of the Kenyan courts is that there must be finality of proceedings at the Court of Appeal in those cases where certification to the Supreme Court has not been granted. Allowing this Court to issue stay orders after judgment would be detrimental to the concept of finality in litigation within hierarchy and structure of the Kenyan courts....

It is our considered view that subject to the Court of Appeal's jurisdiction to certify matters of appeal to the Supreme Court, the proper forum to seek and apply for stay of execution after judgment by the Court of Appeal is the Supreme Court; and only when leave or certification has been granted. The upshot of the foregoing is that we find that the application in the Notice of Motion under certificate of urgency dated 31st July, 2013 lacks merit and is hereby dismissed with costs to the respondents.”

42. Based on the above case law, I am of the view that this court is *functus officio* and cannot therefore grant orders of stay of execution. The Respondent herein ought to have filed this Application seeking orders of stay in the right forum. This court also declines to grant orders for review of its Judgment as the Respondent has not met the threshold for grant of Review orders.
43. In the upshot, this Application is hereby dismissed with costs to the Appellant.

Application dated 10th February 2022

44. For the Application dated 10th February 2022, the Appellant sought for orders that the Deputy Registrar of this court be authorized to sign transfer of land forms, sign mutation forms and any other document requiring the signature of the Respondent herein.

45. Section 98 of the *Civil Procedure Act* provides as follows: -

“Where any person neglects or refuses to comply with a decree or order directing him to execute any conveyance, contract or other document, or to endorse any negotiable instrument, the Court may, on such terms and conditions, if any, as it may determine, order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be endorsed by such person as the Court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it”.

46. In the case of *Kangara Mutugi Kamau & 4 others v Kamau Mutugi & another* [2020] eKLR Justice E.C. Cherono stated as follows:

“My understanding of the law regarding nomination of an alternative person other than the one authorized in law to execute or endorse such documents can only be done upon satisfying itself that reasonable explanation has been given why the person so authorized could not be able to do so.”

47. Pursuant to the Judgment on the Appeal delivered on 28th January 2021, this court allowed the said Appeal and set aside in its entirety Judgment of the Trial Magistrate and gave orders compelling the



Siaya Land Registrar to extract the disputed portion of land measuring 0.19 Ha from the Respondent's land and transfer it to the Appellant. The Appellant in his Supporting Affidavit stated that he has made efforts to have the Respondent herein sign the mutation forms but the same have been rendered futile. It is also clear that the Respondent herein does not want to obey orders of the court and I have established that the Appellant is desirous to have a part of the suit parcel transferred to him as he has already prepared the mutation forms.

48. In this end, I do find that the Application dated 10th February, 2022 is merited and the same is allowed with costs.

DATED AT KISUMU THIS 15TH OF JULY 2022

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

