



**Oduor v Ogoya (Environment & Land Case 139 of 2013)  
[2022] KEELC 12723 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12723 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 139 OF 2013  
A OMBWAYO, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**VINCENT SAMSON ODUOR ..... PLAINTIFF**

**AND**

**DISMAS OTIENO OGOYA ..... DEFENDANT**

**RULING**

1. Dismas Otieno Ogoya, hereinafter referred to as the defendant/applicant herein filed a notice of motion application dated July 14, 2022 pursuant to sections 3A, 63 (e) and 80 of the [Civil Procedure Act](#) cap 21 Laws of Kenya, order 45 rules 1,2 and 3(2) of the [Civil Procedure Rules](#) seeking orders that this application be and is hereby certified urgent and service thereof be dispensed with in the first instance and that leave be granted to the firm of Odhiambo BFO & Company Advocates to act for the defendant/applicant herein. That this honourable court do review the judgment and subsequent orders made by the Honourable Mr Justice SM Kibunja on February 20, 2019 since new and important evidence has been discovered by the applicant which evidence was not placed before the judge who heard the case. Moreover that pending the hearing and determination of this application, this honourable court do order a stay of execution of the judgment and consequential orders made by the learned judge and that in the alternative, this honourable court do make such other interlocutory orders as it may deem just and expedient pending the hearing and determination of this application. That the costs of this application be provided for.
2. The application was based on grounds that in a judgment delivered by this honourable court on September 20, 2019 by Honourable SM Kibunja, there is discovery of new and important matter and evidence and the judgment contains a mistake and/or error apparent on the face of the record. That substantial loss will result to the applicant unless the orders sought are granted and the application has been made without unreasonable delay.



3. It was averred that the plaintiff is justifiably apprehensive that the defendant will seek to execute the order before the application for review is heard and determined. That there is good and sufficient cause of review of the said order and it is in the interest of justice and fairness that the said orders sought are granted.
4. The application was supported by the affidavit of the defendant who stated that on February 19, 2019, judgment was entered against him where he was ordered to vacate land parcel number North/Ugenya /XXXX and being aggrieved and dissatisfied with the said judgment, he instructed his then advocates, Mwangambo & Okonjo Advocates to appeal against the same and a notice of appeal was filed on December 31, 2021.
5. He stated that his previous advocates continued to act for him diligently up to the appeal stage and on December 29, 2021 he was surprised when the police officer from Segga Police Station came to his home and ordered him to vacate his home together with his extended family and his attempt to trace the said advocate have been futile.
6. It was the defendant's case that since he was desperate, he instructed the firm of Odhiambo Bfo & Company Advocates to act for him and his advocate on record has advised him that there is need for review of the judgment as land parcel number North Ugenya/Segga /XXXX does not exist, that land parcel number North Ugenya/Segga/XXXX was a creation of the court and did not exist, that after a frantic search over the years, he stumbled on a sale agreement where one Onyango Rawaya Mutula sold part of the parcel to him on August 20, 1999 and that he lives with his family in land parcel number North Ugenya/Segga/XXXX and tiling North Ugenya/Segga/XXXX from 2004.
7. He further stated that unless the application for stay is heard on priority basis, the plaintiff threatens to levy execution against him and he stands to suffer loss and damage. That in the said judgment at paragraph 8, the judge was doubtful about the position of land parcel number North Ugenya/Segga XXXX and XXXX *vis a vis* North Ugenya/Segga/XXXX instead of using the court's discretion to order for verification of the same and therefore this was a mistake on the face of the record. It was stated that the peculiar circumstances of this case, the delay to file the application is not inordinate and was never deliberate.
8. This matter was placed before me and I directed that the same was not urgent and the respondent was to respond within 7 days of service and parties were to exchange submissions.
9. I have perused the file and do confirm that parties failed to comply with the orders of this court.

### **Analysis and Determination**

10. Judgment in this matter was delivered on February 19, 2019 by Honourable Justice SN Kibunja where the court ordered that the defendant having been found a trespasser on land parcel number North Ugenya/Segga/xxxx be ordered by himself and or all other persons claiming through him, to vacate from the said land and give vacant possession to the plaintiff within 90 days and in default, eviction order to be issued.
11. The defendant being dissatisfied with the said judgment instructed his then advocates on record Mwangambo & Okonjo Advocates to appeal against the same and the advocates proceeded to file a notice of appeal. That in December 29, 2021, a police officer from Segga Police Station came to his home and ordered him to vacate his home together with his extended family.
12. It is the defendant's case that his attempt to trace his advocates have been futile and went ahead to instruct the firm of Odhiambo BFO & Company Advocates to act for him. That his advocates have



advised him to pursue a review of the said judgment as land parcel number North/Ugenya/Sega/XXXX does not exist and land parcel number North Ugenya/Sega/XXXX was a creation of the court and did not exist and further that he has stumbled on a sale agreement where one Onyango Raway Mutula sold part of the parcel of land on August 20, 1999 to him. He also stated that he leaves with his family on land parcel number North Ugenya/Sega/XXXX and tiling North Ugenya/Sega/XXXX from 2004.

13. 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.

14. 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”

15. On whether there is discovery of new and important evidence, the defendant has stated that he found an agreement for sale between him and one Onyango Raway Mutula which agreement is dated August 20, 1999. Paragraph 4 of the judgment delivered on February 19, 2019 states that after the death of the first registered proprietor of the suit parcel, the plaintiff filed Kisumu High Court Succession Cause No 102 of 2011 and got registered with the land through transmission on September 11, 2012.

16. That the defendant had settled on two portions of land known as North Ugenya/Sega/XXXX and XXXX and the court found out that the parcels were created through fraud as no sale agreement existed between the defendant and the 1<sup>st</sup> registered proprietor of land parcel number North Ugenya/Sega / XXXX. Therefore, this court has established that the discovery that there was a sale agreement signed between the defendant and one Onyango Raway Mutula was is false as he failed to produce the said agreement.



17. The defendant has annexed an agreement for sale marked as DOO3 between him and one Onyango Rawaya Mutula dated August 20, 1999 and I have perused the same and established that it is an agreement letter, it is not signed by both parties and the same is not witnessed. This court finds that the agreement produced is a forgery and there is no new evidence discovered.
18. On whether there was a mistake apparent on the face of the record this court is guided by the following case laws:
19. 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.”
20. The defendant on paragraph 11 of the supporting affidavit stated that the learned judge on paragraph 8 (d) of the judgment was doubtful of the position of land parcel number North Ugenya/Sega XXXX and XXXX. I am convinced that there is no error on the record as the learned Judge stated that the defendant should possibly follow the surveyor who allegedly did the survey for him and the land registrar to point out to him where his parcels were positioned on the ground. The court found out that parcel XXXX were not a subdivision of North Ugenya /Sega/XXXX.
21. On whether the defendant has demonstrated sufficient reason for grant of the orders of review, I am guided by the case of *Sadar Mohamed v Charan Signh and Another (1963) EA 557*, where 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. This court finds that the defendant has not given any other sufficient reason in order for this court review its judgment.
22. In the case of *National Bank of Kenya Limited v Ndungu Njau [1997] eKLR*, Nairobi CACA No. 211 of 1996 the Court of Appeal stated that;

"The matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."
23. This court is also of the view that the application is an afterthought since judgment was delivered on February 19, 2019, his then advocates on record filed a notice of appeal on December 31, 2021 while



the instant application was filed on July 14, 2022. It is clear that the defendant was not keen on pursuing his matter.

24. In the upshot, I do find that this application lacks merit and is hereby dismissed with costs to the plaintiff.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 30<sup>th</sup> DAY OF SEPTEMBER, 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 March 15, 2020.

