



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NUMBER 641 of 2015

HENRY OUKO OTIENO.....PLAINTIFF

VERSUS

PETER AYUYO OMONDO.....1ST DEFENDANT

TORAS ODONGO OMONDO.....2ND DEFENDANT

HENRY OMONDO OGUTA.....3RD DEFENDANT

RULING

The Plaintiff has come to court for orders that this court does recall, review and set aside its Judgement and orders issued on 28/5/2020 on grounds that:

- **The respondents may proceed to delineate, transfer, dispose of and or otherwise interfere with the portion of land parcel UYUOMA/KATWWENGA/427 measuring about 8.5 acres claimed by the applicant.**
- **That contrary to assertions in the judgment that the plaintiff failed to prove that he is the son to the Late JORIM OTIENO OCHEING it is apparent in the face of the record that he is the administrator of his estate pursuant to a grant issued to him on the 7/07/2004 by the SIAYA SRM COURT in SUCCESSION CAUSE NO. 22/2004- THE ESTATE OF JORIM OTIENO OCHEING which was filed as further list of documents on the 30/03/2016.**
- **There exists a mistake/error apparent on the face of the record in not capturing the fact that pursuant to the letter dated 10/04/1990 by the District Officer-Rarieda to the District Land Adjudication and Settlement Officer-Siaya, the then registered owners of the suit parcel JOSEPH OGUTA, TORAS ODONGO and PETER AYUYO acceded to the inclusion of the plaintiff father's names in Land Parcel No. YUOMA KATWENGA/407 and 427.**
- **There is an apparent mistake in the judgment delivered on the 28/05/2020 in that it failed to consider the facts captured in the Land Dispute Tribunal report which was elicited from evidence from elders at the site on the 8/03/2006 and which fell within the context of the tribunal's mandate under section 3 of the repealed Land Disputes Tribunal Act especially concerning the division of and determination of boundaries to land held in common;**
- **Delay in filing this application is not inordinate and is excusable given that the applicant was bedridden and so needed time to be on his feet before giving proper instructions to his advocate on record.**

The application is supported by the affidavit of Henry Ouko Otieno who states that there are errors appeared in the face of record as well as new and important evidence on record which he is convinced are such that they would persuade the court to review its decision and arrive at a different conclusion. He states that the court erred in finding that he had not discharged the evidential burden by establishing ancestral trust in respect of the suit parcel of land. He states that the Land Tribunal report and decision contains evidence adduced by elders at the suit parcel of land. The evidence adduced at the Tribunal supported the fact that the plaintiff's father Jorim Otieno Ocheing lived and cultivated the suit portion of land for a long time before adjudication and the elders as well as Rariada Land Control Board had advised for the subdivision of the suit portion of land in favour of the plaintiff.

The applicant states that this court fell by error and that there is an error apparent on the face of record by the court finding that the applicant did not produce evidence that he was the son of the late Jorim Otieno Ochieng dispute the fact that the letters of administration intestate showed that the applicant was the administrator of the estate.

The 1st and 3rd Defendants field grounds of opposition that the application is misconceived, bad in law and abuse of court process and should be dismissed with costs.

The court does not have Jurisdiction as the issues raised amount to an appeal. There is no error apparent on the face of record to warrant a review.

I have considered the application for review, the rival submissions, and do find that the applicant intends to mislead this court by stating that this court erred by finding that there was no evidence that the plaintiff was the son of the late Jorim Otieno Ocheing when the plaintiff produced letters of administration intestate is the Estate of the late Jorim Otieno Ochieng. It is clear on record that no such letters of administration intestate were produced by the plaintiff. Infact the plaintiff did not sue as the legal representative of the estate of the late Jorim Otieno Ochieng.

The relevant provision for review is Section 80 of the Civil Procedure Act which 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 judgment 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 (1) (1) of Civil Procedure rules provides:

“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.”

The court finds that what the applicant perceives as errors apparent of the face of record are not as such errors apparent on the face of record because it appears that the applicant is dissatisfied with the analysis of the court of the evidence on record. The applicant can only appeal against the decision of the court. The application appears based on misapprehension of the law by the court and therefore this court cannot review its own decision on its alleged misapprehension of law and misapplication of facts. The upshot of the above is that the application is dismissed with costs.

DATED AT KISUMU THIS 28TH DAY OF JANUARY, 2021

ANTONY OMBWAYO

JUDGE

This Judgment 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 2019.

ANTONY OMBWAYO

JUDGE