Joseph v Orodi (Sued through the administrator of his Estate Charles Odhiambo Gundo) & 11 others (Environment and Land Appeal E020 of 2023) [2025] KEELC 396 (KLR) (3 February 2025) (Ruling)

Neutral citation: [2025] KEELC 396 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT AND LAND APPEAL E020 OF 2023

SO OKONG'O, J

FEBRUARY 3, 2025

BETWEEN

MARTHA AYIEKO JOSEPH ..... APPELLANT

AND

EVANS GUNDO ORODI (SUED THROUGH THE ADMINISTRATOR OF HIS ESTATE CHARLES ODHIAMBO GUNDO) & 11 OTHERS & 11 OTHERS & 11 OTHERS & 11 OTHERS & 11 OTHERS ..... RESPONDENT

RULING

1. The Appellant was at all material times the registered proprietor of all those parcels of land known as Title No. Kisumu/Koru/706 and Tile No. Kisumu/Koru/1279 (hereinafter individually referred to as "Plot No. 706" and "Plot No. 1279" respectively and together as "the suit properties"). Plot No. 706 is a subdivision of Title No. Kisumu/Koru/360 (Plot No. 360) which was owned by the 1st Respondent. The subdivision of Title No. Kisumu/Koru/360 gave rise to Kisumu/Koru/705 (Plot No. 705) and Kisumu/Koru/706 (Plot No. 706). Plot No. 705 was subdivided into Title No. Kisumu/Koru/1279 (Plot No. 1279) and Title No. Kisumu/Koru/1280 (Plot No. 1280). The 1st Respondent sold Plot No. 706 and Plot No.1279 to the Appellant and Plot No. 1280 to the 2nd to 11th Respondents who shared the same amongst themselves.

2. The Appellant claimed that the 2nd to 11th Respondents had trespassed on the suit properties owned by the Appellant. The Appellant filed the lower court suit against the 1st to 11th Respondents to restrain the said acts of trespass. The 1st Respondent filed a defence and a counter-claim against the Appellant claiming that the acquisition of the suit properties by the Appellant was fraudulent, null and void. The 2nd to 11th Respondents filed a defence in which they denied the Appellant's claim and also contended that the acquisition of the suit properties by the Appellant was fraudulent.

3. In a judgment delivered on 27th April 2023, the lower court dismissed the Appellant's suit against the Respondents and allowed the 1st Respondent's counter-claim against the Appellant. The lower court ordered the Land Registrar to hive off land measuring 2.5 acres from the Appellant's parcel of land, Plot No. 706 and land measuring 3.9 acres from the Appellant's parcel of land, Plot No. 1279 and allocate the same to the 1st Respondent. The lower court also ordered the Land Registrar with the help of a surveyor to align the boundary between Plot No. 706 belonging to the Appellant and Plot No. 1280 belonging to the 1st to 11th Respondents. The Land Registrar was also ordered to rectify the registers of the affected parcels of land accordingly.

4. The Appellant was aggrieved by the said judgment of the lower court and filed the present appeal. On 24th May 2023, the Appellant filed an application for a stay of execution of the said judgment pending the hearing and determination of her present appeal to this court. The Appellant averred that her appeal had overwhelming chances of success. The Appellant averred that the Respondents had started the process of executing the lower court judgment which could result in the Appellant being dispossessed of her land that she had occupied for several years. The Appellant averred that her appeal would be rendered nugatory if the stay sought was not granted.

5. The application was opposed by the 1st to 11th Respondents (the Respondents). The Respondents averred that the Appellant "stole" Plot No. 1279 from the 1st Respondent. The Respondents averred that the suit properties were larger than what the Appellant claimed to have purchased from the 1st Respondent a fact that was confirmed by the lower court in its judgment. The Respondents averred that the Appellant was unable to explain how the suit properties increased in size. The Respondents averred that the surveyors who visited the suit properties at the request of the Appellant found that on the ground, Plot No. 706 exceeded the land which the Appellant claimed to have purchased from the 1st Respondent by 2.5 acres and Plot No. 1279 exceeded the land allegedly purchased by the Appellant by 3.6 acres. The Respondents averred that the Appellant's appeal was frivolous and had no prospects of success.

6. The Appellant's stay application was heard by this court. In a ruling delivered on 7th March 2024, the application was allowed conditionally. The court was satisfied that the Appellant stood to suffer substantial loss if the stay sought was not granted. On the issue of security, the court noted that the Appellant had stated in her application that she was willing to abide by any order on security that the court would make as a condition for granting the stay sought. The court granted the following orders in the stay application:

> The application is allowed in terms of prayer 3 thereof. There shall however be an inhibition inhibiting the registration of any other or further dealings with Title No. Kisumu/Koru/706 and its subdivisions, Kisumu/Koru/1955-1960, and Title No. Kisumu/Koru/1279 pending the hearing and determination of the appeal or further orders by the court. The Appellant shall deposit in an interest-earning bank account in the joint names of the advocates on record for the parties a sum of Kshs. 500,000/- as security within 60 days from the date hereof in default of which the stay granted herein shall stand discharged without any further reference to the court. The costs of the application shall be in the cause."

7. What is now before the court is the Appellant's application dated 17th April 2024 filed on 22nd April 2024 brought under Sections 1A, 1B, 63(e), 80 (a) and 99 of the *Civil Procedure Act* and Order 45 Rule 1(a) of the Civil Procedure Rules. In the application, the Appellant sought a review of the security that the court had imposed as a condition for granting a stay. Instead of depositing the sum of Kshs. 500,000/- in an interest-bearing bank account in the joint names of the advocates for the parties, the

Appellant sought to be allowed to deposit in court a title deed for land parcel Kisumu/Koru/1955 or any other "tangible" security as the court deems fit pending the hearing and determination of the appeal. The application was brought on the ground that the Appellant was a retiree and as such had no source of income from which to raise the security deposit of Kshs. 500,000/- ordered by the court. The Appellant averred that she was ready and willing to deposit as security her title deed for Kisumu/Koru/1955 which was valued at Kshs. 2,500,000/-. The Appellant averred that her inability to raise the said sum of Kshs. 500,000/- was sufficient reason to grant the review sought.

8. The application was opposed by the Respondents through a replying affidavit sworn by the 1st Respondent on 17th May 2024. The Respondents averred that the Appellant made a representation that she was ready, able and willing to abide by any order on security that the court could make as a condition for the stay. The Respondents averred that the issues that had been raised by the Appellant in her application were within her knowledge when she made the application for stay. The Respondents averred that the Title Deed that the Appellant wished to deposit in court was acquired fraudulently a fact that was established in and confirmed by the lower court in the judgment the subject of this appeal. The Respondent averred that the mutation creating Kisumu/Koru/1955 was not registered and as such the parcel of land exists only on paper. The Respondents averred that contrary to the Appellant's claim that she had no source of income, the Appellant was a farmer and also held a senior position in Koru Mission Hospital from where she was deriving income.

9. The Appellant filed a supplementary affidavit sworn on 15th July 2024 in response to the replying affidavit. The Appellant averred that the mutation that led to the creation of Kisumu/Koru/1955 which she was offering as security was registered contrary to the claim by the Respondents that it was not. The Appellant averred that the said parcel of land exists on the ground. The Appellant averred that she was not employed by Koru Mission Hospital. The Appellant averred that she was a volunteer at the Hospital and was not being paid a salary. The Appellant averred further that she was not engaged in extensive farming which could raise the deposit ordered by the court. The Appellant averred that if the Respondents were not comfortable with Kisumu/Koru/1955, she had another parcel of land, L.R No. 25720(I.R No. 256592) whose title she could deposit in court as security as an alternative.

10. The application was argued by way of written submissions. The Applicant filed her submissions dated 30th August 2024 while the Respondents filed submissions dated 25th October 2024. I have considered the application together with the two affidavits filed in support thereof. I have also considered the replying affidavit filed by the Respondents in opposition to the application. Finally, I have considered the submissions by the advocates for the parties and the authorities cited in support thereof. The court's power to review its orders and decrees is provided for in Section 80 of the *Civil Procedure Act* under which the Appellant's application was brought. It provides as follows:

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."

11. Order 45 Rule 1 (1) of the Civil Procedure Rules also invoked by the Appellant lists specific grounds upon which an application for review can be made as follows;

a. Where there is a new and important matter or evidence which after exercise of due diligence was not within the knowledge of an applicant at the time the decree was passed.

b. Where there is a mistake or error apparent on the face of the record.

c. For any other sufficient reason

12. In Republic v. Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR, the court stated as follows:

30. The principles which can be culled out from the above-noted authorities are:

i. court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detailed examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1."

13. In Francis Origo & another v. Jacob Kumali Mungala, Eldoret *CA No. 149 of 2001*, [2005]eKLR the Court of Appeal stated as follows on review:

> ...it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the application for review without unreasonable delay."
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> "Sufficient reason" was defined in Attorney General v. Law Society of Kenya & another [2017] eKLR as follows:
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> "Sufficient cause or good cause in law means:
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> ...the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See BLACK'S LAW DICTIONARY, 9th Edition, page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

14. The Appellant's application was brought on the ground of "sufficient reason". The burden was on the Appellant to prove this ground for review. Order 42 Rule 6 of the Civil Procedure Rules provides conditions that must be met by an applicant seeking an order for a stay of execution. One of the conditions is that the applicant must give such security as the court may order for the due performance of the decree sought to be stayed if the appeal is unsuccessful. In her affidavit in support of the application for stay, the Appellant stated that she would abide by any condition that the court could impose while granting the stay. I am of the view that since the Appellant knew that the court would impose an order for security as a condition for stay if granted, the Appellant should have proposed in her stay application the type of security she wished to give and the court would have considered the proposal in its ruling on stay. That would have avoided the application before me the kind which I strongly feel should not be encouraged as they can be avoided. An order for a stay of execution is discretionary. A party seeking the exercise of the court's discretion must make full disclosure and must act in good faith. Such a party as it is said must put all his/her cards on the table. He/she should not leave it to the court to decide on the nature of security to be given and then turn around and claim that the security is onerous or impossible to raise like in this case. I am of the view that since the Appellant had an opportunity to propose the type of security she was in a position to give and decided instead to abide by "any" condition that the court could impose, the fact that the Appellant finds the security that the court had imposed as a condition for stay not convenient or suitable for her cannot be said to be a sufficient ground to warrant a review of the condition. If that were to be the case, then every security condition imposed by the court would be subject to review to make it convenient for the parties. My point is that an applicant for an order for a stay of execution has an opportunity to propose what kind or form of security he/she is prepared to give as a condition for the stay sought for the court's consideration while considering the application. If he/she chooses not to propose the security he/she is prepared to give and leaves the matter to the discretion of the court, he/she must abide by whatever security that the court imposes.

15. What I have stated above would have been sufficient to dispose of the application. However, I may be wrong in the views I have expressed regarding the stage at which an applicant for a stay of execution should offer security. I wish therefore to add that even if I were to review my order of 7th March 2024, I would not have accepted the alternative security proposed by the Appellant which has been rejected by the Respondents. The parcel of land Kisumu/Tamu/1955 whose title the Appellant wishes to deposit

in court as security was the subject of the lower court suit whose judgment is the subject of this appeal. I agree with the Respondents that the property is not ideal as security for the due performance of the decree of the lower court if the Appellant loses the appeal. I also agree with the Respondents that the alternative property given by the Appellant as security that is, L.R No. 25720(I.R No. 256592) was an afterthought. No explanation was given as to why the Appellant did not offer it as security in the application under consideration in the first instance.

Conclusion

16. For the foregoing reasons, I find no merit in the Appellant's Notice of Motion application dated 17th April 2024. The application is dismissed with costs to the Respondents.

DELIVERED AND DATED AT KISUMU ON THIS 3RD DAY OF FEBRUARY 2025

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Odeny for the Appellant

Mr. Kapinde for the Respondents

Ms. J.Omondi-Court Assistant