



**Okwach (-Suing as the Administrator of the Estate of George Okwach
Aboge - Deceased) v Othiwo & another (Environment and Land Case
Civil Suit 522 of 2015) [2024] KEELC 5076 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5076 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 522 OF 2015
SO OKONG'O, J
JULY 4, 2024**

BETWEEN

**PHELGONA AKINYI OKWACH PLAINTIFF
-SUING AS THE ADMINISTRATOR OF THE ESTATE OF GEORGE OKWACH
ABOGE - DECEASED**

AND

**MAURICE OURU OTHIWO ALIAS OWAK OTHIWO 1ST DEFENDANT
JOHN ODIYO ADERO 2ND DEFENDANT**

RULING

1. The Plaintiff brought this suit in her capacity as the administrator of the estate of George Okwach Aboge, deceased (hereinafter referred to only as “the deceased”). The Plaintiff averred that at all material times, all that parcel of land known as East Kisumu/Dago/250 (hereinafter referred to as “the suit property” was registered in the name of the deceased as the proprietor thereof having purchased the same from the 1st Defendant. The Plaintiff averred that the 1st Defendant gave the deceased vacant possession of the suit property and that after the death of the deceased in 2002, the 2nd Defendant entered the suit property sometime in 2002 and erected a mud thatched house thereon. The Plaintiff averred that the 2nd Defendant claimed to have purchased the property from one, Pius Oloo Okello. The Plaintiff sought an order for the eviction of the Defendants from the suit property and a permanent injunction restraining the Defendants from entering, using or interfering with the Plaintiff’s peaceful and quiet possession of the suit property.
2. The Defendants filed a joint defence and counter-claim on 27th August 2012 in which the 1st Defendant averred that he had never executed a transfer document in favour of the deceased in respect of the suit property and that the consent of the Land Control Board was not obtained in respect of the sale



transaction that he had with the deceased. The Defendants averred that the alleged registration of the suit property in the name of the deceased was obtained through fraud and false representation. The 1st Defendant averred that he did not also surrender the original title deed for the suit property for cancellation before the property was allegedly registered in the name of the deceased. The 1st Defendant averred that the deceased attempted to purchase the suit property but did not complete the transaction having failed to pay the balance of the purchase price. The 1st Defendant averred that after the Land Registrar discovered the deceased's fraud, he declined to issue the deceased with a title deed for the suit property.

3. The 1st Defendant averred further that he had lawfully sold the suit property to Pius Oloo Okelo and that the 2nd Defendant entered the suit property with the consent of the 1st Defendant and the said Pius Oloo Okelo. In his counter-claim against the Plaintiff, the 1st Defendant sought a declaration that the name of the deceased was inserted in the register of the suit property as the registered proprietor thereof fraudulently and illegally and an order for the rectification of the register of the suit property by the cancellation of the name of the deceased from the register of the suit property and substituting it with the name of the 1st Defendant.
4. At the trial, the parties testified and produced several documents in support of their respective cases. None of the parties called the Land Registrar as a witness. Among the documents produced by the Plaintiff in evidence in support of her claim were; a copy of the Limited Grant of Letters of administration in respect of the estate of the deceased dated 26th September 2011, copies of certificates of official search on the suit property dated 6th May 2010 and 8th January 2011 which showed that the suit property was registered in the name of the deceased on 3rd March 1994, the proceedings of the Kisumu Land Disputes Tribunal, and a copy of the extract of the register of the suit property certified on 27th April 2011.
5. The court (Ombwayo J.) considered the evidence and delivered a judgment in the matter on 7th October 2022 in which he allowed the Plaintiff's claim with costs. In the judgment, the court stated as follows in part:

The plaintiff further argues that the defendant did not demonstrate that the plaintiff's husband fraudulently registered the suit land in his name as the 1st defendant did not produce any evidence from the Land Registrar concerning his allegation that the consent of the Land Control Board and transfer forms were not obtained and duly registered in favour of the deceased at the time of the deceased's registration as proprietor by way of transfer. The Land Registrar was not called to testify and has not made a report."

6. In the court's analysis and determination of the case, the court stated as follows in part:

On the allegations of fraud, this court finds that the allegations of fraud were made and particularized but not proved by the defendants. There was no evidence of forgery or false documents presented to the officials at the lands office...The 1st defendant alleged that the deceased obtained the title fraudulently as there was no consent obtained from the Land Control Board and that the transfer was not executed by the 1st defendant. The plaintiff stated that she was aware that her husband was to (sic) registered proprietor and that she found the transfer documents in the deceased husband's documents. It was the 1st defendant's duty to prove fraud as he is the one who alleged fraud. The 1st defendant did not enjoin the Land Registrar who is the custodian of the land transaction documents and the person in charge of the registration in the lands office. Moreover, the 1st defendant did not call for any evidence from the lands office to challenge the title. This court observes



that the properly executed transfer form that is duly registered can only be found in the parcel file hence calling for the parcel file was the duty of the 1st defendant hence failing to do so rendered the allegations by the 1st Defendant baseless. The green card in reference to East Kisumu/Dago/250 indicate that George Okwech(sic) Oboge (sic) was the registered proprietor. I agree with the counsel for the plaintiff that there is a presumption of regularity that the instrument of transfer was executed and registered before the entry was made in the register of the suit parcel of land.”

7. Soon after the said judgment, the Defendants applied for an order for a stay of execution pending appeal to the Court of Appeal. The stay application was dismissed on 22nd November 2023. What is now before the court is the Defendants’ application brought by way of Notice of Motion dated 27th November 2023. In the application which was brought under Sections 80, 63(e) and 3A of the [Civil Procedure Act](#) and Order 40 Rule 1, 2, 3 and 4, Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, the Defendants sought; an order directing the District Land Registrar, Kisumu to appear in court as an expert witness to produce the report dated 2nd October 2023 during the hearing of the application inter-partes, an order that the judgment delivered by Ombwayo J. in favour of the Plaintiff be reviewed and/or varied, and an order directing the District Land Registrar, Kisumu to rectify the register for Kisumu/Dago/250 (the suit property) by cancelling the name of the Plaintiff as the proprietor of the property and reverting the same to the name of the 1st Defendant who was the original proprietor thereof.
8. The application that was supported by the affidavit of the 2nd Defendant John Odiyo Odero was brought on the grounds that the Defendants had discovered crucial evidence that was not available at the time of the hearing and determination of the suit. The Defendants contended that the extract of the register which the Plaintiff produced at the trial in support of her case was a forgery and was not supported by the records at the Land office. The Defendants contended that the Plaintiff and the deceased never owned the suit property. The Defendants averred that the Plaintiff produced the extract of the register dated 27th April 2011 at the hearing of this suit to prove that the deceased had acquired the suit property which was not the case. The Defendants averred that the Plaintiff used the same extract of the register to undertake the succession of the estate of the deceased and succeeded in having the property registered in her name while the deceased never owned the suit property in the first place. The Defendants contended that the consent of the Land Control Board was not given for the transaction neither was the property transferred to the deceased by the 1st Defendant. The Defendants contended that the extract of the register produced by the Plaintiff at the trial which she also used to undertake succession in respect of the suit property did not reflect the true position of the records at the Land Office. The Defendants termed the said extract of the register as “a fake green card”.
9. The Defendants averred that upon “recently” discovering that the Plaintiff held the “fake green card” after they obtained another green Card from the Land Office that was different from the one held by the Plaintiff, they wrote to the Land Office through the firm of advocates now on record for them seeking an explanation for the differences in the two sets of the extract of the register (Green Card) for the suit property and how the suit property was transferred to the Plaintiff. The Defendants averred that the Land Registrar provided them with a report dated 2nd December 2023 in which the Land Registrar highlighted the irregularities and fraud in the registration of the suit property in the name of the Plaintiff. The Defendants averred that it was after the discovery of these irregularities and fraud that they decided to move the court for the orders sought. The Defendants averred that at the time of the hearing of the suit, they were not aware that the extract of the register that was produced by the Plaintiff in court was a forgery and did not reflect the true position of the records at the Land Office. The Defendants averred that the court’s judgment sought to be reviewed was based on a forged extract



- of the register. The 2nd Defendant annexed to his affidavit in support of the application among others; Summons for Confirmation of Grant filed in Nairobi High Court Succession Cause No. 2032 of 2011, In the Matter of the Estate of George Okwach Aboge together with the annexures thereto, Grant of Letters of Administration Intestate in respect of the same estate, an extract of the register of the suit property certified on 2nd August 2023, a letter to the District Land Registrar, Kisumu District by Sala & Mudany Advocates and a letter to Sala & Mudany Advocates dated 2nd October 2023 by the Land Registrar, Kisumu Central/East/West/Seme.
10. In the letter dated 2nd October 2023 by the Land Registrar with a heading “Information regarding the transfer of Land Parcel Kisumu/ Dago/250”, the Land Registrar stated that the parcel of land, Kisumu/ Dago/250 (the suit property) was not successfully transferred to the deceased, George Okwach Aboge. The Land Registrar stated that there was an unsuccessful attempt to transfer the property to the deceased on 3rd March 1993. The Land Registrar stated that an entry of the transfer was made in the register but the same was never signed. The Land Registrar stated further that from their deed file, it appeared that the 1st Defendant never consented to the transfer as there was no duly executed instrument of transfer and consent of the Land Control Board. The Land Registrar stated that in the succession proceedings relating to the estate of the deceased, the Plaintiff misrepresented to the court that the suit property belonged to the deceased and had the property irregularly included among the assets of the deceased in the Certificate of Confirmation on the strength of which the suit property was registered in the name of the Plaintiff on 13th July 2015.
 11. The application was opposed by the Plaintiff through a replying affidavit sworn by Jude Ragot on 6th March 2024. The Plaintiff contended that the application had no basis as there was nothing new presented to the court by the Defendants which was not within their knowledge at the trial of the suit. The Plaintiff contended that the issues whether the 1st Defendant had executed a transfer of the suit property in favour of the deceased, whether the consent of the Land Control Board was obtained in respect of the transaction and whether the deceased acquired the suit property fraudulently were pleaded by the Defendants in their defence and counter-claim, denied by the Plaintiff, tried and determined by the court. The Plaintiff averred that the Defendants had the opportunity to call the Land Registrar as a witness and failed to do so. The Plaintiff averred that it was an abuse of the process of the court for the Defendants to call upon the court to re-open a concluded suit in which a judgment has been delivered for rehearing to accommodate a witness who was available but was not called by the Defendants. The Plaintiff averred that in the absence of a Presentation Book on which documents presented to the Land Registry were recorded, there was no basis for the conclusions reached by the Land Registrar because the possibility of the instrument of transfer of land and consent of the Land Control Board having been presented at the Land Office at the time of registration of the deceased as the owner of the suit property could not be ruled out.
 12. The 2nd Defendant filed a further affidavit sworn on 18th March 2024 in which he denied that the Defendants were trying to conduct a re-hearing of the Defence case through the present application. The 2nd Defendant reiterated that the Defendants had obtained new evidence that was not available at the time of the hearing of the suit.
 13. At the hearing of the application, the parties relied entirely on their affidavits in support of and in opposition to the application. I have considered the Defendants’ application together with the supporting affidavits. I have also considered the replying affidavit filed by the Plaintiff in opposition to the application.
 14. The court’s power to review its orders and decrees is provided for in Section 80 of the *Civil Procedure Act* under which the Defendants’ 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.

15. Order 45 of the Civil Procedure Rules also invoked by the Defendants 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

16. 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. A 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.”

17. 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.”

18. Similarly, in Kenya Power & Lighting Company Limited v. Benzene Holdings Limited t/a Wyco Paints, Nairobi C.A 132 of 2014, [2016] eKLR, the court set the conditions for review as follows:

To qualify for a review there are stringent requirements to be met. For instance the applicant must demonstrate that as a matter of right he can appeal but has not exercised that option; that no appeal lies from the decree with which he is dissatisfied; or that he has discovered a new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced when the order was made; or that there is a mistake or error apparent on the face of the record; or that there are sufficient reasons to warrant the review. It is also a requirement that the application for review must be brought without unreasonable delay.”

“Sufficient reason” was defined in Attorney General v. Law Society of Kenya & another [2017] eKLR as follows:

“Sufficient cause or good cause in law means:

...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.”

19. In John Kamau Ruhangi v. Kenya Reinsurance Corporation, Civil Appeal No. 208 of 2006, [2012]eKLR the court stated as follows:

It is important to bear in mind that Order 44 Rule 1 of the Civil Procedure Rules sets out the purview of the review jurisdiction. A point outside that purview is not a ground for review. A point which may be a good ground of appeal like an erroneous view of law or evidence is also not a ground for review. That a court reached an erroneous conclusion because it



proceeded on an incorrect exposition of the law or misconstrued a statute or other provision of law is no ground for review. All these are grounds of appeal.”

20. The Defendants’ application was brought on the ground of discovery of new and important matter or evidence. The burden was on the Defendants to prove this ground for review. I have taken time at the beginning of this ruling to highlight each party’s case as pleaded before the trial court, the evidence adduced and the findings by the trial court on the contentious issues that arose from the pleadings. The Defendants have not persuaded me that they have discovered some new and important matter or evidence that was not available or that they could not produce at the trial of this suit. At the trial, the Plaintiff produced as exhibit 7 a copy of the extract of the register (Green Card) of the suit property certified by the Land Registrar on 27th April 2011. The said Green Card had entries on the register as at 29th May 1997. The last entry was the withdrawal of the Caution that had been registered against the title by Pius Oloo Okelo. A perusal of the said Green Card shows that the entry made on 3rd March 1994 relating to the transfer of the suit property to the deceased, George Okwach Aboge was not signed by the Land Registrar. The Plaintiff also produced in evidence as exhibits 6(a) and 6(b), certificates of official search signed by the Land Registrar on 6th May 2010 and 18th January 2011 showing that the suit property was registered in the name of the deceased on 3rd March 1994. In the application before me, the Defendants have claimed that they have recently discovered that the Green Card that was produced by the Plaintiff in evidence as exhibit 7 was fake. According to the Defendants, this discovery came about when they made an application for a copy of the Green Card and were issued with a Green Card on 2nd August 2023 which had different entries from those in the Plaintiff’s exhibit 7. I have perused this new Green Card that was annexed to the 2nd Defendant’s affidavit as annexure “JOA5”. I find completely nothing new in this Green Card. The entries in the Green Card are the same as the entries in the Plaintiff’s exhibit 7 up to 22nd May 1997. The only new entry is the registration of the Plaintiff as the owner of the suit property on 13th July 2015 which entry was not material at the trial of the suit since the Plaintiff brought the suit as an administrator of the estate of the deceased and not in her capacity as the owner of the suit property. The fact that the entry made in the register regarding the transfer of the suit property to the deceased was not signed by the Land Registrar as mentioned in the Land Registrar’s letter dated 2nd October 2023 produced as annexure “JAO6” in the present application is not new evidence. That fact was before the court when it delivered the judgment on 7th October 2022. The Defendants have also not persuaded me that this Green Card of 27th November 2011 was fraudulently obtained. The Land Registrar who has claimed that the deceased “never had any land in his name” by 28th June 1994 did not explain the two certificates of search on the suit property issued by the Land Registrar on 6th May 2010 and 18th November 2011 (Plaintiff’s exhibits 6(a) and 6(b)) which indicated that the suit property was registered in the name of the deceased on 3rd March 1994. It is not clear to the court why the Defendants have come to believe that the Plaintiff used the Green Card dated 27th November 2011 (Plaintiff’s exhibit 7) in the Succession Cause rather than the two certificates of official search that I have referred to.
21. Due to the foregoing, it is my finding that the Defendants have not established the ground upon which their review application has been brought. What has been presented before me as new evidence was before the court. It was the duty of the Defendants to challenge that evidence by the Plaintiff. The Defendants have not explained why they did not call the Land Registrar as a witness at the trial. I have noted from the Defendants’ list of witnesses that the Land Registrar was supposed to be one of the Defendants’ witnesses. If the Land Registrar was called as a witness, he would have explained the discrepancies in the Green Card (Plaintiff’s exhibit 7) and the searches (Plaintiff’s exhibits 6(a) and 6(b)). The Defendants have not convinced me that they were unable to get the attendance of the Land Registrar as a witness. From the nature of the orders sought, I agree with the Plaintiff that the



application before the court is an attempt by the Defendants to call additional evidence in support of their defence and counter-claim after judgment.

Conclusion

22. I find no merit in the Defendants' Notice of Motion application dated 27th November 2023. The application is dismissed with costs to the Plaintiff.

DELIVERED AND DATED AT KISUMU ON THIS 4TH DAY OF JULY 2024

S. OKONG'O

JUDGE

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

Mr. Ragot for the Plaintiff

Mr. Sala for the Defendants

Ms. J. Omondi-Court Assistant

