



REPUBLIC OF KENYA



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**In re Estate of Silvanus Oduori Oulula (Deceased) (Succession Cause
60 of 2008) [2025] KEHC 8478 (KLR) (18 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8478 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

SUCCESSION CAUSE 60 OF 2008

WM MUSYOKA, J

JUNE 18, 2025

IN THE MATTER OF THE ESTATE OF SILVANUS ODUORI

OULULA (DECEASED)

RULING

1. I am called upon to determine a review application, dated 5th February 2025. It essentially seeks review or setting aside of a ruling and orders, delivered and made herein on 27th October 2023, pending determination of the review application.
2. The applicant expresses dissatisfaction with my ruling of 27th October 2023, and seeks its review, on grounds of mistake or error apparent on the face of the record. It is argued that the court failed to consider the property in question, Marachi/Kingandole/X6, was held in customary trust for the husband of the applicant. It is further argued that it was a mistake not to rely on the testaments of the elders of the Marachi community. It is further argued that the court failed to consider the steps the applicant had taken to file appeal at the Supreme Court, as articulated in the submissions. It is claimed that the court granted orders despite the matter pending before another court.
3. There is a reply to the application. It is pointed out, by the respondent, that the matter, giving rise to these proceedings, was determined at the Busia Environment and Land Court, in Busia ELC No. 27 of 2012 (OS), where the claim by the applicant, for adverse possession, was dismissed. The applicant filed an appeal at the Court of Appeal, which was also dismissed. It is argued that the applicant should have moved to the Court of Appeal, once orders were made herein on 27th October 2023, instead of seeking review herein. On the Supreme Court matter, it is submitted that there is no evidence that any appeal has been lodged there.
4. The applicant filed written submissions, which Mr. Chawla highlighted orally, on 8th May 2025. He mentioned that he had filed an appeal at the Supreme Court, being Petition No. E0029 of 2023. He also mentioned Applications Nos. E036 and E037 of 2023, allegedly for extension of time and certification, pointing out that the applications were filed before the ruling sought to be reviewed was delivered.



5. This is essentially an application for review, as it is premised on section 80 of the [Civil Procedure Act](#), Cap 21, Laws of Kenya, and Order 45 rule 1 of the [Civil Procedure Rules](#), both of which provide for review.
6. Review is sought herein on the ground of an error or mistake on the face of the record. The error or mistake that I am said to have made relates to three things. The first is that I failed to find and hold that the property in question was held under customary trust. The second is that I failed to consider evidence by elders from the Marachi community, presumably on the alleged customary trust. The third is that I failed to consider the steps that the applicant had taken towards filing appeal at the Supreme Court.
7. Is there an error on the face of the record, in the ruling of 27th October 2023? None has been demonstrated. I think the applicant misapprehends what review is about. It is not about a merit review of the decision of the court. It does not target the decision of the court on merits. Rather, it is about correcting a superficial error on the face of the decision, relating to either arithmetic, or misspelling, or citation of a wrong figure or name. That would mean that where a court considers that the facts do not establish a customary trust; or is not persuaded by testimonies from certain witnesses; or is not convinced that steps have been taken towards challenging a decision on appeal, would not be mistakes.
8. It could be that the conclusions, that the court arrives at, are mistaken. That, however, would not bring the said conclusions under the realm of review. Conclusions, by a court, are usually based on a merit review of the material before the court, and any challenge, to the conclusions, ought to be by way of appeal to a higher court. Unless it can be demonstrated that the court made a mistake, on basing the conclusions on consideration of the wrong documents filings or material, in which case such conclusions could be subjected to a review application, for the challenge would not be based on the merits of the decision, but the fact that the conclusions of the court would have been based on the wrong materials.
9. The issues raised, in this review application, relate to the court not finding that property was held under customary trust, not properly evaluating evidence given by elders of a given community, and not considering steps taken towards moving the Supreme Court.
10. Let me start with the customary trust issue. That customary trust issue was not before me. It was raised in Busia ELC No. 27 of 2012 (OS). That court was not persuaded that such a customary law trust existed, and the suit was dismissed. The applicant moved to the Court of Appeal, in Kisumu CACA No. 46 of 2017, on appeal. The Court of Appeal agreed with the Environment and Land Court; and dismissed the appeal. The issue was res judicata, as of 27th October 2023. It was not available for me to consider, in the summons for revocation of grant, dated 31st October 2022. The applicant, no doubt, mischievously seeks to have that issue re-litigated in that summons, yet it had been exhaustively dealt with in Busia No. 27 of 2012 (OS) and Kisumu CACA No. 46 of 2017. Sitting as High Court, I have no jurisdiction to declare a customary trust over property, by dint of Articles 162(2) and 165(5) of the [Constitution](#). That jurisdiction is with the Environment and Land Court, and that court declined to exercise it, as indicated above.
11. On the second issue, the testaments of the Marachi elders not being considered, there would be two things to say. The first is that no Marachi elders testified before me. I did not take oral or viva voce evidence, for the purpose of determining the summons, dated 31st October 2022. The ruling of 27th October 2023, the subject of this review application, was not based on any oral testimonies of anyone, leave alone Marachi elders. I did not have, before me, any such evidence, which I could be said to have not considered, or which I could have misapprehended. Mr. Chawla, for the applicant, and Mr.



- Wanyama, for the respondent, agreed amongst themselves, without any prompting from the court, on 17th July 2023, to canvass that application, of 31st October 2022, by way of written submissions, and it was canvassed by those means. So, I do not quite understand where the issue of testaments by Marachi elders is coming from.
12. Secondly, even if the said summons, of 31st October 2022, were to be canvassed viva voce, and Marachi elders testified before me, I would still have not considered their testimonies. I say so for two reasons. First, because the issue of the customary trust was decided in Busia ELC No. 27 of 2012 (OS) and Kisumu CACA No. 46 of 2017. It was *res judicata*. The horse had bolted. I could not revisit the issue as a result. Second, I have no jurisdiction over the issue, by dint of Articles 162(2) and 165(5) of the Constitution. Even if I had that evidence before me, it would have been of no use to me. I would simply have declared that I had no jurisdiction, and that, in any event, the issue was *res judicata*, in view of Busia ELC No. 27 of 2012 (OS) and Kisumu CACA No. 46 of 2017.
 13. On the issue of not considering the steps that the applicant had taken towards moving to the Supreme Court, I addressed that in the ruling of 27th October 2023. I did not find any evidence that an appeal or petition or some other paper had been filed at the Supreme Court, for no papers were attached or annexed to the summons, to demonstrate any such filing. I dealt with that comprehensively, in paragraph 18 of the impugned ruling.
 14. I note, in the instant application for review, that the applicant does not annex any documents as proof of any filing at the Supreme Court. Mr. Chawla informed me, from the Bar, when he addressed me, on 8th May 2025, that there was a petition in Supreme Court Petition No. E0029 of 2023, an application for extension of time in Supreme Court Application No. E036 of 2023, and an application for certification in Supreme Court Application No. E037 of 2023. No documentation was placed before me, as proof of the existence of those processes. Mr. Chawla expected me to believe his word of mouth, which I am, regrettably, unable to. What would have been so difficult about annexing copies of these filings to the affidavits filed by the applicant. I was informed that these filings pre-dated my ruling of 27th October 2023. That could very well be so. However, I am no angel or spirit. I would have no way of knowing of their existence, unless they are brought to my attention, by way of being annexed to the affidavit of the applicant.
 15. In any case, the mere filing of something at the Supreme Court is not sufficient ground for me to review my orders or to grant injunctions. For me to grant injunctive relief, based on Supreme Court filings, it would have to be demonstrated that whatever is being sought at the Supreme Court, if the party succeeds there, would have a bearing on what is before me. The mere filing of papers at the Supreme Court does not provide basis for stay of proceedings, a case must be made out. Such a case cannot be made out, where the party moving the High Court, does not share, with the High Court, the material that it has filed in the matter pending at the Supreme Court, for the High Court to assess whether the filings at the Supreme Court have any relevance to what is before the High Court. I should not be expected to blindly grant injunctive relief, just because a party claims, by word of mouth, that they have filed something or other at the Supreme Court. Such orders can only be on merit. Merit can only be based on evaluation of the filings at the Supreme Court, and not speeches made at the High Court, from the Bar, without more.
 16. It is the Supreme Court, which is seized of these processes, that I am orally being informed have been filed there. The Supreme Court has jurisdiction to order stay of the High Court proceedings. It is seized of the alleged matters. It can vouch for the existence of the processes filed before it. It can evaluate the weight of the same. Nothing stops the applicant from moving the Supreme Court appropriately.



17. There is no merit, whatsoever, in the Motion, dated 5th March 2025, and I hereby dismiss it with costs. Orders accordingly.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 18TH DAY OF JUNE 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Kuldeep Chawla, instructed by Chawla & Company, Advocates for the appellant.

Mr. Moses Wanyama, instructed by Wanyama & Company, Advocates for the respondent.

