



**Wesonga v Odera (Environment and Land Appeal E023 of 2023)
[2025] KEELC 3748 (KLR) (13 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3748 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E023 OF 2023**

DO OHUNGO, J

MAY 13, 2025

BETWEEN

ALEX OMONDI WESONGA APPELLANT

AND

ALFAYO JOHN MAJONI ODERA RESPONDENT

*(Being an appeal from the ruling and order of the Principal
Magistrate's Court at Butali (Hon. R S Kipngeno, Principal Magistrate)
delivered on 2nd May 2023 in Butali MCELC No. E024 of 2021)*

JUDGMENT

1. The background of this appeal is that the Respondent, who is the Appellant's uncle, filed the suit in the Subordinate Court through Plaintiff dated 2nd June 2021, against the Appellant. He averred in the Plaintiff that he transferred the parcel of land known as S/Kabras/Shamberere/4307 (the suit property) to the Appellant in the year 2020 as a gift for the purpose of safeguarding graves of family members as well as the Respondent's late parents' house. He further averred that upon becoming the registered proprietor of the suit property, the Appellant started destroying the graves and allowed members of a church to construct a church on the graves. He sought judgment against the Appellant for a permanent injunction to restrain him from selling or interfering with the suit property and an order that the suit property be deregistered from the Appellant's name so that it reverts to the Respondent.
2. Alongside the Plaintiff, the Respondent filed an application dated 2nd June 2021 seeking an injunction to restrain the Appellant "from illegal use and cultivation" of the suit property pending inter parte hearing. The application was placed before Hon. Z. J. Nyakundi SPM who granted the injunction on 2nd June 2021 and scheduled the application for inter parte hearing on 10th June 2021. Subsequently, the Respondent filed an application dated 18th July 2022, seeking punishment of the Appellant by imprisonment for a period not exceeding six months, on claims that he disobeyed the injunction order



of 2nd June 2021. The application was heard and determined by Hon. Z. J. Nyakundi (SPM) through a ruling delivered on 24th November 2022. The learned magistrate stated in the ruling as follows:

The application was duly served and on 25/8/2022, Advocate Aligula counsel for the defendant confirmed being in receipt of the application and suggested that the same be canvassed by way of written submissions. Suffice to note that none of the parties filed their submissions and neither did the defendant file a replying affidavit to the application.

Looking at the case at hand the issue for determination is whether the Respondent acted in breach of the court dated 2/6/ 2021 and issued by this court.

The court has looked at the court record and notes that indeed the court did issue an order restraining the respondent, agents, servants, personal representative from illegal use and cultivation of parcel No S/Kabras/Shambere/4307, (attached and marked FMP), it is the plaintiff's contention that the respondent has disobeyed the order and is tilling the land as exhibited in annexure FMP3.

It was confirmed by counsel for the defendant that the application was served upon them, the order was as served upon the defendant with a penal notice and a return of service filed, the defendant did not file any response to the application, the plaintiff's application dated 18/7/2021 is therefore unopposed.

Conclusion.

In light of the aforesaid I do hold that the respondent be and is hereby cited for contempt of a valid court order dated 2/6/2021.

3. Dissatisfied with that outcome, the Appellant filed Notice of Motion dated 15th December 2022, seeking stay of execution of the orders of 24th November 2022 as well as review, variation or setting aside of orders of 2nd June 2021 and those of 24th November 2022. The application dated 15th December 2022 was heard and determined by Hon. R S Kipngeno (PM) through a ruling delivered on 2nd May 2023. The learned magistrate found no merit in the application and therefore dismissed it with costs.
4. Aggrieved by the ruling delivered on 2nd May 2023, the Appellant filed this appeal on 10th May 2023, through Memorandum of Appeal of even date. He prayed that the appeal be allowed, the ruling and order of the Subordinate Court be set aside and be replaced with an order allowing his Notice of Motion dated 15th December 2022 with costs.
5. The following are the grounds of the appeal as listed on the face of the Memorandum of Appeal:
 1. The Learned trial magistrate erred in law and fact in dismissing the appellant's application dated 15th December, 2022 for review, setting aside and stay of the orders issued on 2nd June, 2021 and 24th November, 2022 when there were not only grave and glaring errors and omissions on record but also sufficient cause had been established for grant of the orders sought.
 2. That after properly finding that the appellant was condemned unheard as his replying affidavit and submissions were not considered by his predecessor, the trial magistrate erred by failing to appreciate and hold that the appellant had been condemned unheard and in breach of the basic tenets of natural justice.
 3. The learned trial magistrate fell into great error by holding that the appellant is not an immediate family member of the Odera family and was thus on the suit land as a privilege and



at the mercy of the respondent yet the appellant is an immediate member of the Odera family and is legally entitled to the suit land parcel NO. S. Kabras/Shiamberere/4307 as a right.

4. The Learned trial magistrate erred in law and fact by considering irrelevant and extraneous evidence and or factors and by ignoring relevant factors and by further holding that the appellant should surrender the suit land in exchange for another unspecified parcel of land contrary to known law and procedure.
 5. The Learned trial magistrate erred by holding that the appellant was in contempt of a court order contrary to and or in the absence of evidence to that effect and in abid (sic) to aid the respondent in his nefarious scheme to evict, disinherit and disposes the appellant of the suit land which is his inheritance.
 6. The learned trial magistrate erred in law and fact by inferring and concurring that the respondent was likely to suffer any loss or damage yet he has his own parcel of land and the appellant is the sole registered proprietor of land parcel NO. S. Kabras/Shiamberere/4307 whereon he lives and which his sole source of livelihood yet he is the one who has been enjoined from using the suit land thereby threatening his livelihood and rendering him a destitute.
 7. The learned trial magistrate erred in law and fact by totally overlooking and or ignoring the evidence that the appellant is the sole registered proprietor of land parcel NO. S. KABRAS/SHIAMBERERE/4307 which therefore confers upon him absolute ownership rights and privileges thereto and enjoining and evicting him has and continues to cause the appellant irreparable loss, damage, hardship, inconvenience and embarrassment.
 8. The learned trial magistrate erred in law and fact by overlooking and ignoring the fact that the suit parcel of land was in the use and occupation of the appellant who had also built his home thereon where he currently resides with his family and the status quo ought to have been maintained pending determination of the respondent's frivolous and vexatious suit.
 9. The learned trial magistrate erred in law and fact by granting injunctive orders sought in the application dated 2nd June, 2021, yet it is among the prayers sought in the plaint and therefore bringing the main suit to a premature end and the trial magistrate's verdict was arrived at in a cursory and perfunctory manner and was biased, erroneous and indefensible and has occasioned a miscarriage of justice.
6. The appeal was canvassed through written submissions. The Appellant filed submissions dated 30th August 2024. Relying on Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the [Civil Procedure Act](#) as well as the case of National Bank Of Kenya Limited v Ndungu Njau [1997] KECA 71 (KLR), he faulted the learned Magistrate for not appreciating that he is an heir to the estate of Francis Nyaware Orawa (deceased) who was his grandfather and who was the registered proprietor of the parcel of land known as S/Kabras/Shamberere/310 which was partitioned by the Respondent through secretive succession to result in four new parcels including the suit property. He contended that the Respondent is a brother to his late father and that as a grandchild of Francis Nyaware Orawa (deceased), he is included in the estate as a dependant pursuant to Section 29 (b) of the [Law of Succession Act](#).
7. The Appellant went on to argue that he remains the registered proprietor of the suit property and that the learned Magistrate erroneously allowed the Respondent's application 2nd June 2021 thereby enjoining a proprietor in actual possession and occupation who has the rights of quiet possession and utilization of the suit property pursuant to Sections 24, 25 and 26 of the [Land Registration Act](#). He



further argued that the learned Magistrate erred in not considering his replying affidavit and written submissions and added that he did not deliberately disobey the order since he was not personally served. He relied on the cases of Willy Kipsongok Morogo v Albert K. Morogo [2017] eKLR and Oil Fields Limited v Zahara Oil and Gas Limited [2020] eKLR and urged the Court to allow the appeal.

8. The Respondent filed submissions dated 26th August 2024. Instead of addressing the appeal, the submissions dwelt on Order 42 Rule 6 of the Civil Procedure Rules which deals with stay of execution pending hearing and determination of an appeal. In conclusion, the Respondent urged this Court to dismiss the appeal with costs.
9. This being a first appeal, the mandate of this Court is to re-consider and re-evaluate the record and to determine whether the conclusions reached by the learned Magistrate are to stand or not and to give reasons either way. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 and *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR. I further bear in mind that an appellate Court should not interfere with the exercise of discretion by an inferior Court unless it is satisfied that its decision is clearly wrong due to misdirection or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration with the result that it arrived at a wrong conclusion. See *Mombasa Cement Limited v Kitsao & 34 others (Civil Appeal E016 of 2020)* [2022] KECA 562 (KLR) (24 June 2022) (Judgment).
10. I have considered the record, the grounds of appeal and the parties' submissions. I am alive to the fact that the main suit is yet to be heard and determined by the Subordinate Court. I will therefore avoid any conclusions that may put the trial court in an awkward situation. The sole issue for determination is whether the orders of review or setting aside sought in the Appellant's Notice of Motion dated 15th December 2022 ought to have issued.
11. In his aforesaid application, the Appellant principally sought review of the orders of 2nd June 2021 and those of 24th November 2022. The application was brought under Order 45 Rule 1 of the Civil Procedure Rules which provides:

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.
12. The Court of Appeal summed up the law relating to review in *Mutisya (Suing as the personal representative of the Estate of Simon Wambua Makau (Dcd)) v Macharia t/a Three Bins Services & another* [2023] KECA 234 (KLR) thus:

Section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the Civil Procedure Rules are instructive on the principles applicable in a review application. A reading of the above provisions clearly shows that while Section 80 (f) of the *Civil Procedure Act* grants the court power to make orders for review, Order 45 sets out the jurisdiction and scope of review by



hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.

13. A perusal of the application and the Appellant's submissions before the Subordinate Court shows that he sought review of the ground of mistake or error on the face of the record. In particular, he contended that he had filed a replying affidavit and written submissions in respect of the application dated 18th July 2022, but the then trial Magistrate Hon. Z. J. Nyakundi (SPM) erroneously considered the application unopposed both in terms of a replying affidavit and submissions.
14. In *National Bank Of Kenya Limited v Ndungu Njau* [1997] KECA 71 (KLR), the Court of Appeal stated as follows regarding review on the ground of an apparent error or omission on the part of the court:

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

15. In the ruling that is the subject of this appeal, Hon. R S Kipngeno (PM) stated as follows:
 7. The parties had been given time to try resolving the matter through mediation and other ADR channels, but they could not agree. It is a fact that the land was gifted to the Applicant on terms that restricted him on what he can and cannot do in the land despite being registered the absolute proprietor. The Applicant is not among the beneficiaries of the estate of the Odera family. There was no monetary consideration informing the land acquisition from the estate, but of importance was how the Applicant would safeguard the grave yards of the deceased Odera family patriarchs and their children. A simple act of exchanging the suit land with another of equal value would have permanently freed the Applicant from the burden of the conditions placed on his absolute proprietorship, so that he could accommodate the construction of a church in his land and exercise all the rights of ownership of the land, being the right to use, abuse and dispose of the land as he wished.
 8. Having considered all the material placed before the court, I find that even if the Hon. Z. J. Nyakundi had considered the Replying Affidavit and the submissions, he may still have relied on the evidence of the team of village elders who visited the land and ascertained the goings on thereat and filed the Affidavit dated 2/1/23. Apart from what the parties have averred, the village elder's report provides an independent account of the matter and confirms the Respondent's claims that the Applicant had indeed disobeyed the court orders dated 2/6/21. I therefore find that the Application has no merit and the same is dismissed with costs.
16. A perusal of the record shows that when the parties appeared before Hon. Z. J. Nyakundi on 25th August 2022, Counsel for the Appellant told the learned Magistrate that the Appellant had filed submissions in respect of the application. Ruling was then scheduled for delivery on 24th October 2022. It is not in dispute that the learned Magistrate was then transferred to Molo Law Courts.
17. The Appellant's contention that he filed replying affidavit and written submissions in respect of the application is supported by the record of the proceedings of 25th August 2022 as far as the submissions are concerned. Further, the Appellant annexed to his affidavit in support of Notice of Motion dated



- 15th December 2022 both the submissions dated 7th October 2022 and a replying affidavit which he swore on 22nd August 2022. He deposed that in view of the transfer of Hon. Z. J. Nyakundi to Molo Law Courts, he sent both documents by courier to the said court. He annexed a copy G4S Shipment Waybill dated 14th October 2022.
18. In his replying affidavit, the Respondent did not deny that the Appellant had filed the submissions and the replying affidavit. Instead, the Respondent focused on arguing the merits of the main suit and even introduced new material in support of the application dated 18th July 2022. In the impugned ruling delivered on 2nd May 2023 by Hon. R S Kipngeno (PM), the learned Magistrate acknowledged that indeed the Appellant had filed the submissions and the replying affidavit. Consequently, the existence of mistake or error on the face of the record was confirmed.
19. The order of 24th November 2022 that the Appellant had sought review of was in respect of an application seeking to have him punished through imprisonment for an alleged contempt of court. An allegation of contempt of court is a serious matter since it puts the liberty and or property of the alleged contemnor at grave risk. It is for that reason that the standard of proof in contempt proceedings is higher than the usual one in civil proceedings of proof on a balance of probabilities. See *Mutitika vs. Baharini Farm Limited* [1985] KLR 229 and *Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others* [2018] eKLR.
20. Given the gravity, to succeed in an application for contempt, the applicant must demonstrate wilful disobedience, and the order said to have been disobeyed must be clear enough to leave no doubt as what is to be done or refrained from. See *Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others* [2018] eKLR.
21. I have perused the Respondent's application dated 18th July 2022. The order allegedly disobeyed is not identified either in the prayers or the grounds of the application. It is similarly not identified in the supporting affidavit. The closest that one comes to knowing the order allegedly disobeyed is by reading the annexed affidavit of service sworn by Charles Alumasa in which he deposed that he served an order dated 2nd June 2021 upon the Appellant's wife on 2nd June 2021. The said process server also annexed a copy of the order. A perusal of the order shows that it read in part:
- pending hearing and determination of this application interparties a temporary injunction be and is hereby issued restraining the Defendant/Respondent, his agents, servants, heirs, personal representatives from illegal use and cultivation of land parcel no. Kabras/Shamberere/4307. [Emphasis supplied]
22. The manner of disobedience alleged both in the grounds of the Respondent's application dated 18th July 2022 as well as the supporting affidavit was that the Appellant had trespassed into the suit property and was tilling it. There is no dispute that the Appellant is the registered proprietor of the suit property. In view of the rights of a registered proprietor as stipulated under Sections 24, 25 and 26 of the [Land Registration Act](#), it is unclear what is meant by "illegal use and cultivation" of the suit property. While destruction of graves of one's parents and grandparents is a serious matter both from the cultural and societal perspective, we must not lose focus of the fact that the core allegation in the application dated 18th July 2022 was that the Appellant had disobeyed the order of 2nd June 2021. Without proof of contempt of court in respect of the said order, other allegations, however serious, are of no consequence when it comes to determining whether the application dated 18th July 2022 should have been allowed.
23. In the foregoing circumstances, it cannot be said that there was clarity in the order of 2nd June 2021 on what the Appellant was to do or refrain from doing. I am alive to the fact that the Respondent is challenging the Appellant's title in the main suit. Until judgment is rendered in the matter, the



Appellant's title remains. The Respondent neither demonstrated wilful disobedience of the order nor proved the allegations of contempt to the required standard of proof which is higher than the usual one in civil proceedings of proof on a balance of probabilities.

24. In view of the foregoing, I am persuaded that the learned Magistrate (Hon. R S Kipngeno, PM) misdirected himself with the result that he arrived at a wrong conclusion. The Appellant has made a case for review of the orders of 24th November 2022.
25. I find merit in this appeal, and I therefore allow it. I set aside the ruling and order of the Subordinate Court dated 24th November 2022 and replace it with an order dismissing the Respondent's Notice of Motion dated 18th July 2022 with costs in the cause. Equally, costs of Notice of Motion dated 15th December 2022 shall be in the cause. In view of the family relationship between the parties, I order that each party shall bear own costs of this appeal. Lastly, I am concerned that the parties have been unnecessarily stuck in interlocutory issues instead of concluding the suit. The Subordinate Court to prioritise the determination of the suit. In that regard, the matter shall be mentioned before the Subordinate Court on 17th June 2025 for directions towards disposal of the suit.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 13TH DAY OF MAY 2025.

D. O. OHUNGO

JUDGE

Delivered in open Court in the presence of:

Mr Akwala for the Appellant

No appearance for the Respondent

Court Assistant: B Kerubo

