



REPUBLIC OF KENYA



Otipa & another v Otipa & another; Otipa (Interested Party) (Civil Appeal E153 of 2024) [2024] KEHC 15797 (KLR) (6 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15797 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E153 OF 2024**

AC BETT, J

DECEMBER 6, 2024

BETWEEN

SELPHA MAYENDE OTIPA 1ST APPELLANT

FLORENCE MAKOKHA OUMA 2ND APPELLANT

AND

AUGUSTINE OSUNDWA OTIPA 1ST RESPONDENT

STEPHEN BARASA OTIPA 2ND RESPONDENT

AND

MARGARET AUMA OTIPA INTERESTED PARTY

(Being an appeal arising from the ruling/order of Hon. Marcella A. Onyango (SRM) in Mumias Magistrate's Court in Civil Case No. E042 of 2024 delivered on 5th September 2024)

JUDGMENT

1. The Appellants had filed an amended plaint dated May 16, 2024 seeking a permanent injunction to restrain the Respondents from burying the remains of the deceased Joseph Osundwa Otipa who died on 27th April 2024 without their consent and further that the body of the deceased be handed over to the Appellants to be buried in his ancestral home in L.R. No. East Wanga/Eluche/2286. The deceased was husband to the 1st Appellant and the Interested Party.
2. The Respondents opposed the claim and contended that the deceased ought to be buried in the land he had stayed in for 48 years which is L.R. No. East/ Wanga/Eluche /808 where he resided with his wives and not the ancestral home as claimed by the plaintiffs.
3. In a Judgement dated 24th June 2024, Hon. M.A Onyango (SRM) directed that the deceased's body be released to his wives Selpha Mayende Otipa (1st Appellant) and Margret Auma Otipa (Interested



- party) together with their children to organize for his burial and further that he be buried in the house of the 1st wife as per the customs. The court further directed that the deceased be buried in L.R. No. East/wanga/eluche/808 and not L.R. No. East Wanga/Eluche/2297 which is the land in dispute.
4. The Interested party subsequently filed another application dated 27th June 2024 seeking that the court grant her orders to bury the deceased because the 1st Appellant, who is the deceased's 1st wife and the 2nd Appellant had refused to comply with the orders issued on 24th June 2024 and further that the OCS Shianda police station to provide security during the burial process.
 5. The Interested Party also cited the Appellants for being in contempt of the court order dated 24th June 2024 despite having been duly served with the same.
 6. By an application dated 15th July 2024, the Appellants sought orders of review of the Judgement dated 24th June 2024 on the grounds that despite the court directing that the deceased be buried on L.R. No. East Wanga/Eluche/808, they in consultation with the elders decided to bury the deceased in the ancestral land comprised in L.R. No. East/Wanga/Eluche/2286 because there was an existing dispute involving L.R. No. East/Wang/Eluche/808 and L.R. No. East/Wanga/Eluche/2297. The Appellants averred that the Respondents disrupted the said plans and a violent fracas ensued necessitating the return of the remains of the deceased to the mortuary by the Appellants.
 7. The said application was successfully contested by the Interested party and on 5th September 2024, the trial court dismissed the application for review of the judgement of the court alongside the application made by the Interested Party seeking an order that the Appellants were in contempt of the order of the court by attempting to inter the remains of the deceased in L.R. No. East/Wanga/Eluche/2286.
 8. The Appellants being dissatisfied with the ruling of the trial court delivered on 5th September 2024 filed a memorandum of appeal dated 16th September 2024 where they appealed against the entire ruling on the following grounds;
 - a. That the learned magistrate erred in law and in fact by dismissing entirely the Appellant's application for review of the judgment delivered on 24th June 2024.
 - b. That the learned magistrate erred in fact and in law by failing to clearly point out with clarity the exact place upon which the remains of the deceased ought to be interred.
 - c. That the learned magistrate erred in fact and in law by failing to determine with precision which land parcel number and which portion of the land if any is undisputed.
 - d. That the learned magistrate erred in fact by failing to consider that land Parcel number East/Wnga/Eluche/808 is non-existent by virtue of a sub –division hence the resultant portions are in the names other than the deceased and as such his remains cannot be interred thereon.

Appellant's Submissions

9. According to the Appellants, the trial court had directed that the deceased be buried in the L.R. No. East/Wanga/ Eluche/808 which they claim had been subdivided on 25th June 2009 giving rise to L.R. No. East/Wanga/Eluche 2296, 2297, 2298 and 2299 and further held that L.R. No. East/Wanga/ Eluche/808 is non-existent since the parcels of land belong to other people.
10. The Appellants contend that there is still a pending case in the Court of Appeal Kisumu Civil Appeal number E 248 of 2022 where the deceased had filed an appeal after losing ownership of the land in the lower court although there was a court order issued allowing the deceased to remain in the land



parcel East/Wanga/Eluche/2297 and that it was a temporary order on which basis they cannot use as the burial place for the deceased.

11. They assert that although the trial court gave the Appellants the right to bury the deceased it did not point to the exact land that the deceased ought to be buried. They further hold that customarily although the 1st wife has the right to bury the deceased, she can bury him in his ancestral land being L.R. No. East/wanga/eluche/2286 since the deceased parents were buried on the same land as was the case with deceased's 2nd wife hence nothing bars them from burying the deceased on the same parcel of land.
12. The Appellants accuse the Respondents and Interested Party of ulterior motives as they claim that if the deceased is buried on the disputed land, it would increase their chances to win the case which is pending at the Court of Appeal and pray that this court do intervene since alternative methods of dispute resolution has failed between the Appellants and the Defendants and made reference to Article 159 (2) (d) of *the constitution* 2010. They aver that the respondent will suffer no prejudice if the deceased is buried on L.R. No. E/Wanga/Eluche/2286 while they will suffer trauma if the Court of Appeal should decide against the deceased in the ownership of the land forcing him to be exhumed.
13. In conclusion, they pray the trial court's ruling be set aside and they be allowed to bury the deceased in his ancestral land being L.R. NO. East/Wanga/ Eluche/2286.

Objector's Submissions

14. The Interested Party filed her submissions dated 8th October 2024 where she opposed the appeal claiming that it was a waste of judicial time. She contends that the learned trial magistrate did not make any mistake since it was clear from the order made on 24th June 2024 that the deceased was to be buried in the home of the 1st wife as per the customs for which it was L.R. No. East/Wanga/ Eluche/808 where the deceased's son had two parcels of land being L.R. No. East/Wanga/ Eluche/2298 and 2299 upon which the 1st Appellant has a home. She further submits that the court directed that the deceased be buried in the home of the 1st wife who is the 1st Appellant and the said home is erected on land which is not in dispute.
15. The Interested Party further contends that the trial court was guided by the evidence presented in court by the parties' witnesses and thus cannot be faulted on its finding.
16. The Interested Party asserts that the deceased ought to be buried in the land where the deceased's son has a home and at the hearing of the suit, the witnesses had made a proper clarification in court as to which portion of land the remains of the deceased should be buried in.
17. The Interested Party further submits that that the trial court adhered to the Luhya customs and traditions and made a proper finding that the deceased be buried in the home of the 1st wife where he had lived for the 48 years and not the ancestral land where he never lived.
18. They pray that the court dismiss the appeal for lack of merit and the decision of the trial court delivered on 24th June 2024 be upheld.

Legal Analysis

19. The issues for determination in the appeal are:-
 - a. Whether there is a mistake or error on the face of the record or any sufficient reason to justify review of the judgment of the trial court dated 24th June 2024



- b. Whether the learned magistrate erred in failing to consider, appreciate and apply the principles governing the application that was before her.
20. According to the Appellants the trial court erred by failing to point out the exact place where the deceased was to be buried and failed to consider that the land L.R. NO. East/Wanga/ Eluche/808 was non-existent by virtue of its subdivision and also that the said land was the subject matter of a dispute.
21. The trial court in dismissing the Appellant’s claim for review pointed out that she had made an order that the deceased be buried in the home of the 1st wife as is the custom and that she had directed that the deceased be buried in L.R. NO. East/Wanga/ Eluche/808 however and not in L.R. NO. EAst/wanga/ Eluche/2297 that was in dispute.
22. According to the trial court, the Appellant had been dissatisfied that the court had not considered their prayers that the deceased be buried in the ancestral land on L.R. NO. East/Wanga/ Eluche/2286 but rather directed the remains of the deceased be handed over to the deceased’s wives and children and for burial in L.R. NO. East/Wanga/ Eluche/808 where the deceased had stayed with his two wives for the last 48 years, subject to the caveat that the burial should not be on L.R. NO. East/Wanga/ Eluche/2297 which was in dispute.
23. Applications for review are governed by Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules which state as follows:-

“ 80. 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.”

”45

- (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.



24. For the Appellants to succeed in the application for review of the court's Judgment, they needed to demonstrate any of the following:-
- (a) That they had discovered a new and important matter or evidence which, after exercise of due diligence, was not within their knowledge or could not be produced by them at the time when the decree was passed or;
 - (b) That there was some mistake or error apparent on the face of the record.
 - (c) That there was sufficient reason to justify the review.
25. In its determination, the trial court found that the Appellants had failed to demonstrate any mistake on the Judgment. The trial court reiterated that it had made an order that the deceased be buried at the home of the 1st wife by both witness of the deceased and that both wives of the deceased had their homes on the land formerly known as L.R. No. East/Wanga/ Eluche/808. The trial court clarified that it had specified that the burial be done on the other parcels of land resultant from mutation and subdivision of L.R. No. East/Wanga/ Eluche/808 except on L.R. NO. East/Wanga/ Eluche/2297 which is the subject of a dispute that is pending hearing and determination before the Court of Appeal at Kisumu.
26. According to the trial court, the application did not meet the threshold for review of orders.
27. In the case of *Pancras T. Swai vs. Kenya Breweries Limited* [2014] eKLR the court held as follows:-
- “The appellant’s right to seek review, though unfettered, could not be successfully maintained on the basis that the decision of the Court was wrong either on account of wrong application of the law or due to failure to apply the law at all.”
29. Similarly, in the case of *National Bank of Kenya Ltd v Ndungu Njau* [1997] eKLR the Court stated thus:-
- “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.”
29. It is common ground that the High Court has a power of review, but such power must be exercised within the framework of Section 80 *Civil Procedure Act* and Order 45 Rule 1.
30. In this case, the trial court issued an order dated 24th June 2024 with clear directions as follows:-
- a. That the body of the deceased, Joseph Otipa Osundwa be released to his wives, Selpha Mayende Otipa and Margret Auma Otipa who should jointly with their children of the deceased organize for his burial
 - b. That the wives of the deceased to proceed to bury the deceased at the home of the 1st wife as per customs
 - c. That in the event they decide to have the deceased buried on the land parcel E/Wanga/ Eluche/808, they should ensure that he is not interred on the portion that has a dispute being E/Wanga/Eluche/2297.



- d. That on the issue of the funeral expenses the same will be catered for by the two houses in conjunction with the children of the deceased and relatives
 - e. That the mortuary expenses to be shared equally by the widows of the deceased
 - f. That this being a family dispute, I will proceed to direct that each party bears their own costs.
31. The court was of the opinion that its aforesaid orders were clear because the Appellant's prayer that they be allowed to bury the deceased on L.R. No. East/Wanga/ Eluche/2286 had been dismissed. The court further reiterated that no evidence was led to prove that the deceased had established a home on L.R. No. East/Wanga/ Eluche/2286 which was his ancestral land. The court stated that in the face of the dismissal of the Appellants' suit, the only avenue for their redress was an appeal which the Appellants did not pursue.
32. 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.
33. . In *Nyamogo & Nyamogo v Kogo* [2001] EA 174 discussing what constitutes an error on the face of the record, the court rendered itself as follows:-
- “An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”
34. In this case, the Appellants have not identified the mistake that the trial court had made since the learned magistrate made her decision based on the evidence that was presented to it by the witnesses who appeared before the court. The trial court went further and relied on the customs and traditions of the Luhya community which dictate that the deceased is to be buried in the 1st wife's home.
35. The Appellants had initially filed a suit praying that the deceased be buried in his ancestral land despite the fact that he had lived in L.R. NO. East/Wanga/eluche/808 with his wives for 48 years starting from 1976. The evidence was that the deceased had not established a home in the ancestral land but his parents and one of his wives was buried there.
36. According to the Appellants L.R. No. East/Wanga/ Eluche/808 was not in existence by virtue of its subdivision. This however does not negate the fact that some of the land parcels being L.R. No. East/wanga/eluche/2298 and 2299 were allocated to members of the deceased's family by the deceased himself. The trial court's directions was that the deceased be buried on any of the parcels of land resultant from subdivision of L.R. No. East/Wanga/eluche/808 provided interment did not happen in L.R. No. East/wanga/eluche/2297. The Appellants did not rebut the evidence led by the Interested



Party that the 1st wife of the deceased had a home on part of the land formerly known as L.R. No. East/wanga/eluche/808 and now subdivided into Parcels Number 2298 and 2299.

37. The trial court was guided by the information that was brought to its knowledge by the parties at the time of passing its judgement on 24th June 2024. If the Appellants were dissatisfied with the judgement seeing that the court had rejected its prayer on where the deceased was to be buried, they had an option to file an appeal.
38. In *Jameny Mudaki Asava v Brown Odengo Asava & Another* [2015] eKLR, the learned Judge made a finding that the alleged error apparent on the face of the record was not such as would warrant a review of the learned judge's findings. It would have perhaps been a point that could be taken on appeal to the Court of Appeal.
39. This is because for a party to seek review, there has to be an error on the face of the record as stated in the case of *Paul Mwaniki v NHIF Board of Management* [2020] eKLR; which in my opinion the Appellants have failed to prove the error made by the trial court.
40. On the discovery of new evidence, the principle is that the evidence should be that which the applicant as at the time of the hearing did not have or could not get despite the exercise of due diligence.
41. For material to qualify to be new and important evidence or matter, it must be of such a nature that it could not have been discovered had the applicant exercised due diligence. It must be such evidence or material that was not available to the applicant or the court as the time of making the decision. Differently stated, the material presented by the Appellants did not qualify to be new evidence.
42. The Appellants did not provide any new evidence that would warrant this court to interfere with the decision of the lower court.
43. From the foregoing, I have come to the conclusion that the grounds cited by the applicant did not qualify to be grounds for review to bring the Appellants' application within the ambit of the grounds specified in Order 45 Rule 1 of the Civil Procedure Rules, 2010.
44. The Appellants had the option to appeal the judgment which they failed to do and as such this court affirms the decision by the lower court and upholds the Order dated June 24, 2024. The upshot is that the appeal is dismissed for lack of merit. Each party shall bear their own costs, this being a family matter.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 6TH DAY OF DECEMBER 2024.

A. C. BETT

JUDGE

In the presence of:-

Mr. Nechesa Maina for the Appellants

Respondent/Interested Party in person

Court Assistant: Polycap

