



**Opande v Opondo & another (Environment and Land Miscellaneous Application E042 of 2024) [2025] KEELC 4922 (KLR) (30 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4922 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E042 OF 2024**

**E ASATI, J  
JUNE 30, 2025**

**BETWEEN**

**GEORGE TIMOTHY OPANDE ..... APPLICANT**

**AND**

**MARY OPONDO ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of Notice of Motion application dated 21<sup>st</sup> March, 2025 expressly to have been brought pursuant to the provisions of articles 50 and 159 of *Constitution* of Kenya, 2010, Section 1A and 3A of the the *Civil Procedure Act*, Order 9 Rule 9, Order 45 Rule 1, 2 and 51 of the Civil Procedure Rules and section 1, 13(7) and 19 of the *Environment and Land Court Act*.
2. The substantive prayer sought is that the honourable court be pleased to review and/or vary the decision made on 20<sup>th</sup> March, 2025.
3. The application also seeks for an order that costs of the application be provided.
4. The grounds upon which the application was brought are that the Applicant's Notice of Motion application dated 23<sup>rd</sup> August, 2024 was erroneously dismissed by the court on 20<sup>th</sup> March, 2025 hence infringing on the Applicant's rights to own and enjoy the use of his property within the Republic of Kenya. That there is an error apparent on the face of the record, that in arriving at the said ruling, the honourable court erred in dismissing the application on ground that;
  - i. The counterclaim by the Respondents vide KISUMU/MC ELC/E250/2023 is yet to be determined and that it will not be in the interest of justice to order for an eviction or the 1<sup>st</sup> Respondent from the suit land at this stage.



- ii. Let the counterclaim vide KISUMU/MC ELC/E250/2023 be heard so as to determine the rights of the parties.
5. That the counterclaim having been dismissed on 20<sup>th</sup> December, 2024, there is no counterclaim by the Respondent before the Magistrate's court that is pending hearing and determination. That it is important that the honourable court review and/or vary its decision and allow for the eviction of the 1<sup>st</sup> Respondent from KISUMU MUNICIPALITY/BLOCK 12/35 which belongs to the Applicant herein.
  6. That if the ruling is not varied, the Applicant will incur irreparable loss that cannot be monetarily compensated. That the Respondent does not stand to suffer any prejudice if the orders sought are granted since the land belongs to the Applicant. That it is only fair and just that the application be allowed in order to prevent the ends of justice from being defeated.
  7. The application was supported by the contents of the Supporting Affidavit sworn by Oscar Onyango Jonyo Advocate on 21<sup>st</sup> March, 2025.
  8. To the Supporting Affidavit, Counsel annexed a copy of this court's ruling dated 20<sup>th</sup> March, 2025 and a Ruling by Hon. K. Cheruiyot (SPM) dated 20<sup>th</sup> December, 2024 striking out the counterclaim.
  9. The application was unopposed. The Applicant contended that the Respondents were served and to prove this, filed Affidavit of Service sworn by Jonyo Oscar Onyango on 7<sup>th</sup> April, 2025 to the effect that the Respondents' Counsel (the Attorney General) were served with application dated 21<sup>st</sup> March, 2025 and order of the court dated 4<sup>th</sup> April, 2025. To the Affidavit of Service was annexed email printout showing that the documents were dispatched to the Attorney General on April, 6<sup>th</sup> 2025 at 10.38.
  10. When the application came up for hearing on 20<sup>th</sup> May, 2025 and there was no attendance for the Respondents, Counsel for the Applicant prayed that the application be allowed as the same was unopposed.
  11. I have considered the application. The substantive prayer sought is for review of the court's ruling made on 20<sup>th</sup> March, 2025.
  12. The law governing review of court orders is contained in section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, 2010. The relief lies only where an appeal is allowed from the subject order but from which no appeal has been preferred or where no appeal is allowed. Section 80 provides; -
    - “ 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 the judgment to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit”
  13. Under the provisions of section 80 of the *Civil Procedure Act* and Order 45 Civil Procedure Rules, the grounds upon which an application for review of a court order may be made granted are:
    - a) discovery of a new and important matter or evidence which after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or order made



- b) on account of some mistake or error apparent on the face of the record
  - c) any other sufficient reason
  - d) the application must be brought without unreasonable delay.
14. The present application is premised on the ground that there is error apparent on the face of the ruling sought to be reviewed. Mistake or error apparent on the face of the record has been defined in various judicial decisions. In the case of *Muyodi vs Industrial & Commercial Development Corporation & Another* [2006] 1 EA 243, the Court of Appeal described error apparent on the face of the record as follows: -
- “In *Nyamogo & Nyamogo vs Kogo* (2006) EA 174 this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is 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 long drawn process of reasoning or 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 a court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”
15. The error in the present case, according to the Applicant, is that the court found that the counterclaim by the Respondent vide KISUMU/MC ELC/250/2023 was yet to be heard and determined and that it would not be in the interest of justice to order eviction of the Respondent before the counterclaim could be heard and the rights of the parties determined.
16. The Applicant avers that the court erred in dismissing the application and thereby infringed on the Applicant’s rights to own property and that his constitutional rights to be heard and to access justice were gravely abridged by the Ruling. That the ruling was erroneous because the counterclaim had been dismissed on 20<sup>th</sup> December, 2024.
17. The court record shows that the application that resulted in the ruling sought to be reviewed was dated 23<sup>rd</sup> August, 2024. That the application was heard orally on 23<sup>rd</sup> October, 2024 and ruling in respect thereof scheduled for 27<sup>th</sup> February, 2024.
18. That on 27<sup>th</sup> February, 2025, the ruling was not ready and was deferred to 20<sup>th</sup> March, 2025 when it was delivered.
19. The court record shows that as at the time the application was heard, the counterclaim was pending hearing and determination in court. The ruling annexed to the current application vide which the counterclaim was struck out is dated 20<sup>th</sup> December, 2024, about 2 months after the application had been heard and reserved for ruling.
20. It was therefore the correct position as held in the ruling sought to be reviewed that the counterclaim which challenged the title held by the Applicant and sought for its cancellation was still pending hearing and determination.



21. The Applicant made no effort to bring to the attention of the court, before delivery of the impugned ruling, the fact that the counterclaim which had been demonstrated to exist and which the Respondent had asked the court to give a chance to be heard had been struck out.
26. While the Applicant faults the ruling of court, the correct position is that the fault is with the Applicant for failing to make the ruling dismissing the counterclaim part of his evidence in the application dated 23 august, 2024. Further in allowing the counterclaim to be heard the court was in essence giving a chance to substantive hearing of the dispute and determination of the same on the basis of evidence as the Respondents also lay claim to the suit land.
27. On the basis of the material placed before the court in respect of the application dated 23<sup>rd</sup> of August, 2024, I find no error in the ruling to warrant review of the same.
28. The application is therefore hereby dismissed. No orders as to cost.  
Orders accordingly.

**RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 30<sup>TH</sup> DAY OF JUNE, 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen - Court Assistant.

Onyango for the Applicant

Kajo for the Attorney General

