

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY**

**ELCA NO. E003 OF 2023**

**ELIZABETH WANJIRO OGOLA (Donee Suing on Behalf  
of Oliver Owuor Tambo-Donor)**

**.....APPELLANT/APPLICANT**

**VERSUS**

**LAWRENCE OCHIENG OLOO.....1<sup>ST</sup>**

**RESPONDENT**

**OGADA OSUTA.....2<sup>ND</sup>**

**RESPONDENT**

**AUMA ADEK OKECH.....3<sup>RD</sup>**

**RESPONDENT**

**JIM OTIENO.....4<sup>TH</sup>**

**RESPONDENT**

**RULING**

***(On whether time should be enlarged to allow the court to  
review of its judgment dated 14<sup>th</sup> February 2025)***

**The Application**

**1.** The Applicant filed a Notice of Motion application dated 8<sup>th</sup> November 2024 brought under a certificate of urgency. It sought seeking ORDERS THAT:

1. ...Spent
2. The honorable court be pleased to extend the time to review its judgment and to enable this application to be heard on its merit.
3. Further, the court be pleased to allow the application in the interest of justice to introduce new and compelling evidence so as to help the court to reconsider its finding
4. Upon allowing the above prayers, the honorable court be pleased to review its judgment and make a finding that:
  - i) There are no records to support the fact that Amollo Omari Obondo ever owned the suit parcel.
  - ii) The land in question was originally owned by Auma Simbiri as per the land records.
  - iii) Valid succession was done with regard to the land in question.

- iv) The title to Oliver Tambo was procured appropriately in accordance with requirements of the land registration Act
- v) The purported purchase of the land in question by the Respondent were not based on any lawful transactions and in any event the same are barred by the land Act and the Limitation of Actions Act.
- vi) Costs of the application be provided for in favor of the Applicant/Appellant

**2.** The application is premised on the grounds set out on the face of the application as well as the affidavit in support of the application and sworn by Elizabeth Wanjiro Ogutu, the appellant/Applicant herein. In a nutshell, the Applicant stated that the time for filing a review had expired hence need to extend the same. She also maintained that the judgment of the trial court as well the one rendered by this court were based on the existence or non-existence of a set of facts, and which evidence is now available to the Applicant.

**3.** The Applicant further deponed that it would be in the interest of justice that this court allows the application and that none of the parties would be prejudiced should the court allow the application.

- 4.** Lastly, the Applicant deponed that there was need to stay further proceedings on costs since there is a warrant of arrest in force against the impugned judgment.
- 5.** The Applicant, in her Supporting Affidavit, deponed that she had filed the application in her capacity as a donee of a Power of Attorney, the same having been granted to her by Oliver Owour, the donor. However, no power of attorney was annexed to the affidavit.
- 6.** The Applicant further deponed that from the time the court rendered its judgment, she has been following up on some documents that are necessary for her application to extend time for purposes of review at the land's office. She added that she is now in possession of the said documents which numbered ten, which include AR Records, Green card, Succession documents, transfer by transmission documents, copies of titles, application to land control board, consent, transfer forms, KRA payment records and a bank slip.
- 7.** Further, the Applicant maintained that the aforesaid documents will be necessary to prove that Amollo Omari has never been registered as the owner of the suit property. She added that the proceedings records in the subordinate court neither

mentioned the name of Amollo Omari Obondo nor was the said person ever registered as the owner of the suit land.

- 8.** On the basis of the foregoing the Applicant prayed that this court re-looks its judgment, bearing in mind the centrality of the above stated documents in determining the validity of the title to the suit property.

### **The Response**

- 9.** The Respondents filed a Replying Affidavit sworn on 25<sup>th</sup> February 2025. They vehemently opposed the application and argued that the application was a mere afterthought aimed at delaying their case as well as denying them the fruits of the judgment.
- 10.** The Respondents also deponed that their advocate was never served with the application dated 8<sup>th</sup> November 2024 and that the documents the Applicant seeks to introduce at this stage could have been easily obtained with ease and in time. This latter position, the Respondents argued, was supported by the fact that the Applicant was aware of the documents but failed to mention the same before the trial court. Secondly, the Respondents deponed that the introduction of new evidence would amount to a second hearing as opposed to a review. As

such, they contended that the application sought an appeal butt disguised the same as a review.

**11.** In addition to the above stated, Respondents deponed that the matter was on the basis of the exhibits on record and the Applicant had partial remitted payment to the Respondents following a decree and maintained the warrant of arrest dated 23<sup>rd</sup> October was still in effect.

**12.** Finally, the Respondents deponed that the documents annexed to the Applicant's affidavit do not set out some special circumstances that warrant the exercise of this court's discretion to allow the application. To this end, the Respondents urged this court to dismiss the application and allow them to enjoy the fruits of their judgment. In any event, the Respondents deponed that the Applicant did not demonstrate that she would suffer substantial loss should the stay of execution no be granted.

### **Submissions**

**13.** The application was canvased by way of written submissions. The Applicant filed her submissions dated 30<sup>th</sup> July 2025 in support of the application. She framed two issues for determination, namely; whether the application has merit; and, who should bear the cost of the application.

- 14.** As to whether the application was meritorious, the Applicant relied on the Supreme Court decision in **Nicholas Kiptoo Korir Arap Salat v IEBC [2014] eKLR** to outline the principles that govern extension of time. She argued that she had spent time looking for the documents that she now asks the court to consider hence the delay in filing her application.
- 15.** The Applicant also relied on the supreme court decision in **Mohamed Abdi Mahamud v Ahmed Abdulahi Mohamed** to highlight the principles that guide the admission of additional evidence.
- 16.** In conclusion, the Applicant argued that this court, being a court of justice should allow the application in the interest of justice and added that no party would be prejudiced should the application be allowed.
- 17.** The Respondents filed their submissions dated 31<sup>st</sup> October 2025. They set out three issues for determination, being, whether there was an inordinate delay by the Applicants; Whether the application is an afterthought aimed at delaying the case.; Whether the Respondents will be prejudiced if orders are granted and, who bears the costs of the suit?
- 18.** On whether the there was inordinate delay in bringing the application, the Respondents submitted that the application

had been unreasonably delayed, was brought in bad faith and does not meet the basis upon which a court can extend time for review its judgment

**19.** The Respondents argued that the Applicant took nine months to file the instant application, since the impugned judgment was rendered on 14<sup>th</sup> February 2024 and the instant application was filed on 8<sup>th</sup> November 2024. They maintained that the documents that the Applicants purport to have discovered later and now seeks to introduce could not have taken 9 months to obtain since the said documents are readily available.

**20.** The Respondents relied on **Mwaura Karuga v Embakasi Ranching Company Limited & 2 others; Walter Otiso Osoro (Intended Interested Party) [2019] eKLR** as well as **Kamongo Farmers' Co-operative Society Ltd v Chief Land Registrar & 9 others [2018] eKLR** to argue that that there was inordinate delay in filing the application. in the latter case of **Kamongo Farmers' Co-operative Society**, the court found that a 2-month delay in filing the application constituted inordinate delay and that the same had not been properly explained to the court. In Mwaura Karuga, the court found that there had been inordinate delay in filing the review application,

the judgment of the court being contested having been executed and the plaintiff registered as the owner of the land in question.

**21.** Further to the above, the Respondents submitted that the Applicants were only wasting the court's time in making this application, and that the same issue could have been raised during the trial. Equally, the Respondents maintained that the case had been closed and judgment rendered. To this end, they submitted that there should be an end to litigation. In the same breadth, the Respondents submitted that re-opening the case as intended by the Applicant would highly prejudice them as they had already begun the execution process. The Respondents thus prayed that this court finds that there was unexplained inordinate delay in filing the instant application.

**22.** As to whether the application is an afterthought meant to delay the case, the Respondent submitted in that the Applicant had delayed the application for a period which was long enough as to have the judgment of the court the court fully executed. They reiterated that the documents the Applicant seeks to introduce are public documents that could be obtained with relative ease and placed reliance on **Board of Directors New Victory School & 7 others v Ndegwa; Chief Lands**

**Registrar (Interested Party) [2025] eKLR** to argue that the court must be satisfied that the Applicant had acted diligently and the information he seeks to introduce was not within his knowledge when the decree was made.

**23.** The Respondents concluded that the Applicant had not proved that the documents he seeks to introduce were not within his knowledge and s prayed that this court find that the application is not meritorious as the same is but a mere tactic resorted to by the Applicant to delay the execution of the court's decree.

**24.** As to whether the Respondents would be prejudiced if the application is allowed, the Respondents argued that 1st and 3rd Respondents stand to suffer in case the application is allowed since execution had already began and the application is only meant to delay completion of payment.

**25.** The Respondents also argued that the court ought to balance the interests of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents as against those of the Applicant, bearing in mind the inordinate date delay in filing the application. They argued that there are no exceptional circumstances as warrant this court to depart from the precedent set out in **Outa v Okello & 3 others (Petition 6 of 2014) [2017] eKLR** where the court stated that *where* the

court established that an application for review, is never meant meant to grant the losing party an opportunity to re-litigate or re-open a matter merely because such party is unhappy with the outcome.

**26.** Moreover, the Respondents submitted that the what the Applicant is seeking amounts to tasking the court to sit as an appellate court over its won judgment and prayed that the instant application be dismissed and the costs thereof be awarded to them.

### **Issues, Analysis and Determination**

**27.** The instant application raises two issues for determination by this court: whether the application is meritorious and, who should bear the costs of the application.

**28.** The court has analyzed the application in its entirety, the response thereto and the submissions tendered by both sides and the law. The application, although expressed to be brought “pursuant to all the enabling provisions of he laws the inherent powers of the court”, this court notes that the Applicant is seeking the court’s discretion to enlarge time for purposes of reviewing this court’s judgment dated 14<sup>th</sup> February 2024. The enabling provisions of the law ought to be particularized, although their absence does not render the application

incurably defective. The court notes that the Applicant merely stated that the time for filing an application for review had lapsed without mentioning the specific time when the judgment she intends to review was rendered.

**29.** Be that as it may, Order 45 Rule 1 of civil procedure Rules, 2010 is very critical in this matter as it provides guidance on the subject of reviews. The said Order provides that:

*(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. (emphasis added)*

**30.** The basis for the application herein is that the Applicant discovered some new evidence that is relevant to her case hence the prayer that this court re-looks its own judgment. The judgment in question was delivered in on 14<sup>th</sup> February 2024 and the instant application is dated 8<sup>th</sup> November 2024. In determining whether the application is merited, the court will foremost consider the time frame within which the application was made and then determine whether the evidence the Applicant seeks to introduce is actually new.

**31.** Timely litigation is essential party's access to justice, hence the maxim "justice delayed is justice denied". In **Nicholas Kiptoo arap Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**, the Supreme Court emphasized that:

*Time is crucial component in dispensation of justice, hence the maxim: justice delayed is justice denied. It is litigant's legitimate expectation that where they seek justice that the same would be dispensed timeously. Hence the various constitutional and statutory provisions on timeframes within which matters have to be heard and determined."*

**32.** As earlier stated, Applicant acknowledges that the time for filing a review had expired hence her prayer seeking enlargement of time. Whereas Order 45 rule 1 of the civil procedure rules does not specify the exact timeline for filing applications for review, it contemplates that the application should be made without unreasonable delay. Although the what constitutes inordinate delay is not defined in the Constitution or the statutes, the Court of Appeal in **Simon Wachira Nyaga v Patricia Wamwirwa** citing **Cecilia Wanja Wanjiru v Jackson Wainaina Muiruri & another [2014] eKLR** held as follows:

*“6 There is no rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned judge in considering the application should have looked at the appellant’s conduct from the time was filed up to the time the application for reinstatement was filed.*

*We have to ask ourselves whether the failure to prosecute the appeal in the high court and/or the delay in filing the application for reinstatement constitute an excusable mistake or it was meant to delay the cause of justice ...why didn’t she set the appeal down for*

*hearing for almost 14 years/ the reasonable explanation would be that the appellant had been indolent and had slept on her rights. She was only awakened from her slumber by the dismissal of the appeal.*

**33.** The reason given by the Applicant for taking about nine (9) months to file her application is that she spent a long period of time seeking to obtain the documents she has listed in her application from the land's office. This court is not convinced or satisfied that the reasons advanced are plausible since all the documents were or ought to have been in her possession as donee of a power of attorney by the time the judgment entered. Again, the applicant ought to have given in detail when she sought the documents from the relevant offices and why, if there was delay by the offices to give them to her, the officers in the offices gave for failure to give the documents in time.

**34.** To permit the applicant to file the documents would be reopen the case and give the applicant a second bit at the cherry, to the prejudice of the Respondents. Equally, the time taken to obtain the public documents at the Lands Office is not as long as the Applicant would want this court to believe. If anything, the Applicant has not annexed any evidence from the

alleged lands office particularizing the alleged difficulties in obtaining the alleged documents.

**35.** As to whether the material the Applicant intends to place before this court qualifies to be new evidence within the ambit of the test established under Order 45 Rule 1 of the Civil Procedure Rules. The evidence must be one that could not be obtained by the Applicant even with due diligence and the same should not have been within the knowledge of the Applicant at the time the decree was passed.

**36.** The court has looked at the evidence the Applicant wishes to introduce. Without a doubt, and as argued by the Respondents, this court finds that there that the evidence does not meet the threshold of “new evidence” as contemplated under Order 45 Rule 1 of the Civil Procedure Rules.

**37.** The alleged “new evidence” was necessary at the time filing the suit and the applicant would have presented or filed them but she chose not to do so. These were documents readily available before and at the time of filing her pleadings. The Applicant should have contemplated obtaining the same and acted diligently in filing them at that point in time or before filing her pleadings, or so soon after but before the suit was concluded. Even if she could not have obtained it as alleged,

she should could have easily obtained them from the land registry and other relevant sources with minimal effort and with due diligence. Notably, some of the documents that the Applicant seeks to bring up must have been in the custody of the Applicant, or at the very least, ought to have been accessible to her. These include: succession documents, the bank slip, the application to the Land Control Board and KRA payment records. More importantly, the documents listed in the Applicant's application were, or ought to have been within the Applicant's knowledge at the time the court's judgment and decree was passed.

**38.** The court having considered the inordinate delay in filing the application coupled with the absence of new compelling evidence declines the invitation to enlarge time to allow the review of its judgment delivered 14<sup>th</sup> February 2024. As was held by the Supreme Court **Mohamed v Diamond Trust Bank Kenya Limited & another (Application E035 of 2024) [2025] KESC 17 (KLR) (11 April 2025) (Ruling)**, enlargement of time is a discretionary remedy that should only be granted in appropriate cases. The court held that:

*We have considered the application, the affidavit in support, the responses and submissions filed, and now opine as follows:*

*This court set the guiding principles for the grant of extension of time in the Nicholas Salat case as follows: extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court; whether there will be any prejudice suffered by the Respondents if the extension is granted; whether the application has been brought without undue delay; and whether in certain cases, like election petitions, public interest should be a consideration for extending time.*

**39.** Regarding the deposition that the applicant was a donee of a power of attorney, this court is of the humble view that in

absence of the filing of the said power of attorney so that the court peruses it and forms an opinion as to whether or not the same is valid or not, the court cannot agree with the applicant that she has made a valid deposition. As much as the absence of the same is not the basis for dismissing the instant application, this court finds that if, indeed, the applicant was required to be given the power of attorney to plead on behalf of the party but she has none, then all that she says is inadmissible hearsay which would make her application incurably defective. But for now the court has made the determination basing it on the merits of the entire application which is lost.

**40.** The import of the foregoing is that prayers 2, 3 and 4 of the Applicant's application are declined: the entire application is not merited. The Applicant shall have the costs of the application pursuant the provisions of section 27 of the Civil Procedure Act.

**41.** Orders accordingly.

Ruling **dated, signed** and **delivered** virtually via the **Teams Platform this 19<sup>th</sup> day of January 2026.**

**HON. DR. IUR NYAGAKA**

**JUDGE**

**In the presence of,**

Ms. Odera Advocate for the Applicant

Mr. Ngani Advocate for the Respondent