

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC NO 92 OF 2014

**COSMAS
PLAINTIFF/RESPONDENT**

OMONDI

.....

= VERSUS =

**ALFRED
DEFENDANT/APPLICANT**

ODUORI

OLEENDO

.....

R U L I N G

1. The dispute between **COSMAS OMONDI** (the Plaintiff) and **ALFRED ODUOR OLEENDO** (the Defendant) over the land parcel **NO MARACHI/KINGANDOLE/822** (the suit land), was heard and determined by **A. OMOLLO J** vide a Judgement delivered on 21st April 2022. The Judge decreed that the Plaintiff had acquired 2 acres out of the suit land by way of adverse possession and directed the Defendant to execute all the necessary documents to facilitate the transfer of the said 2 acres into the Plaintiff's names and in default thereof, the Defendant to do so on his behalf.
2. The Defendant has now approached this Court vide his Notice of Motion dated 28th November 2023 and anchored on the

provisions of **Sections 1, 1A and 3A** of the **Civil Procedure Act** and **Order 45 Rule 6** of the **Civil Procedure Rules**. He seeks the following remedies:

1) Spent

2) Spent

3) Spent

4) That this Honourable Court be pleased to review and/or vacate the judgment and decree issued on 21st April 2022 and dismiss the suit.

5) That the costs of this application be provided for.

3. The Motion is based on the grounds set out therein and is also supported by the Defendant's affidavit of even date.

4. The gist of the Motion is that although **A. OMOLLO J** delivered judgment on 21st April 2022 in favour of the Plaintiff, the Judge misdirected herself and there is an error apparent on the face of the record as she declared that the Plaintiff acquired the suit land by way of adverse possession yet the purported possession was vide a sale agreement and therefore the Plaintiff failed to prove the non-permissive aspect required in a claim for adverse possession. There is an error on the face of the record as the

Court failed to appreciate the fact that the possession arose from permission and/or sale agreement. Further, the Court misdirected itself and there is an error on the face of the record as the suit was instituted against the wrong party and the Plaintiff's right to land had been extinguished by the **Limitation of Actions Act**. That the Defendant had only owned the suit land from 2009 and not the 12 years as required by law. That the Plaintiff had pleaded fraud against the Defendant but failed to prove the same to the required standard and the Court granted an award on adverse possession yet the Plaintiff had not proved that the possession was continuous, and uninterrupted as the Plaintiff had registered a caution on the suit land on 26th April 2000. That the Defendant has been ill and unable to initiate these proceedings until recently when he regained some health. It is in the interest of justice that this Motion has been filed.

5. The following documents are annexed to the Motion:

1) Copies of medical notes and report from Kakamega Hospital.

2) Copy of title deed for the land parcel **NO**

MARACHI/KINGANDOLE/822.

- 3) Copy of the Green Card for the land parcel **NO MARACHI/KINGANDOLE/822.**
- 4) Copy of cane farming contract between one **INVIOLATA ATSIENO BUSAO** and **MUMIAS SUGAR COMPANY.**

The Plaintiff filed grounds of opposition to the Motion and raised the following issues:

- 1) The Motion is an abuse of the Court process.
 - 2) The Motion has not revealed any factual issues unbeknown to the Defendant when the judgment was delivered.
 - 3) The Motion is an appeal disguised as a review.
 - 4) The Motion is meant to deny the Plaintiff enjoyment of his rights.
6. The Motion has been canvassed by way of written submissions.
 7. I have considered the Motion, the supporting affidavit and annexures thereto, the grounds of opposition by the Defendant and the submissions by counsel.
 8. The Motion is governed by the provisions of **Order 45 Rule 1(1)** of the **Civil Procedure Rules**. It reads:

1(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 mine.

It is clear from the above that a party seeking a review of a judgment or order must establish the following:

- 1) Demonstrate that there has been a discovery of new and important matter or evidence which was not within his knowledge nor could it be produced when the decree or order was made; or
- 2) On account of some mistake or error apparent on the face of the record; or
- 3) For any other sufficient reasons; and
- 4) The application must be made without unreasonable delay.

The above has been reiterated in many cases including in the case of **FRANCIS ORIGO & ANOTHER -V- JACOB KUMALI MUNGALA 2005 KECA 356 KLR.** See also the case of **NATIONAL BANK OF KENYA LTD -V- NDUNGU NJAU C.A. CIVIL APPEAL NO 211 of 1996 [1997 eKLR].**

9. From the Motion, it is clear that the Defendant is hinging his complaint on the ground that the Court made mistakes or errors on the face of the record. The mistakes or errors alluded to by the Defendant are to be found in paragraphs 2, 3, 4, 5 and 6 of the grounds on which the Motion is predicated. These are set out as follows:

2: “That the Honourable Court misdirected itself on an error apparent on the face of record as it declared land to have been obtained by way of adverse possession while the purported possession was obtained vide a sale agreement and thus failing to prove the non-permissive aspect as required on a claim for adverse possession.”

3: “That the Honourable Court misdirected itself on an error apparent on the face of record as it failed to appreciate the fact that the possession arose from permission and/or sale agreement and no proof was brought to show when and how the possession became adverse.”

4: “That the Honourable Court misdirected itself on an error on the face of record by failing to acknowledge that the suit was instituted against the wrong party on a claim for adverse possession.”

5: “That the Court misdirected itself on an error apparent on the face of record by failing to

appreciate the fact that the Plaintiff's right to land had been extinguished by the Limitation of Actions Act as no rights could emanate from the said sale agreement between the Plaintiff and the seller."

The above pleadings were repeated in the Defendant's supporting affidavit including adding in paragraphs (i) (j) and (k) that the Court awarded the Plaintiff the land yet he had not occupied it for 12 years, that the Plaintiff pleaded fraud but did not prove it and that the Court awarded the Plaintiff the land by way of adverse possession yet there was no evidence to prove that the said possession was continuous and un-interrupted. I shall revert to all the above later in this ruling.

10. I must however first start by interrogating whether the Defendant has moved to this Court without unreasonable delay. The judgment sought to be reviewed was delivered on 21st April 2022 and this Motion was filed on 5th December 2023. That is of delay of 20 months which is clearly unreasonable. However, the Defendant has averred in paragraphs 3 of his replying affidavit that prior to and after the judgment, he became ill and has only recently recovered. He has annexed to the Motion medical

documents to prove that he has been un-well and attending treatment at the County General Hospital in Kakamega. The said hospital has stated in its report dated 19th October 2023 that the Defendant was diagnosed with stroke due to high blood pressure and diabetes and was admitted on 10th May 2022. The said Hospital adds that the Defendant was put on home based care for physiotherapy while being monitored and **“has shown good progress as from 8th October 2023 when he stabilized and walking without support and use of crutches.”** Given the above, it must be obvious that although the delay in filing this Motion is un-reasonable, it has been explained to the satisfaction of this Court. Indeed the Defendant filed this Motion shortly on 28th November 2023 after he had been declared to have shown good progress as from 8th October 2023. Given those circumstances, I am satisfied that notwithstanding the delay, the Motion is properly before me.

11. The next issue is whether the Defendant has met the criteria of satisfying this Court that there is indeed **“some mistake or error apparent on the face of the record”** to warrant a review and setting aside of the judgment delivered on 22nd April 2022. In the case of **NATIONAL BANK OF KENYA LTD -V-**

NDUNGU NJAU 1990 KLR 469 (CAK) at page 381, it was held that:

“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.”

Similarly, in the case of **MULTICHOICE (KENYA) LTD -V- WANANCHI GROUP (KENYA) LTD & 2 OTHERS 2020 eKLR**, the Court of Appeal held that:

“It bears emphasizing that the phrase ‘mistake or error apparent’ by it’s very connotation conveys the fact that the error envisaged is one which is evident per se from the record and does not require detailed

examination, scrutiny and elucidation either of the facts or the legal position. It is prima-facie visible. It must relate to an error of inadvertence, one which strikes one on merely looking at record.”

My assessment of the issues raised by the Defendant in support of his Motion is that they cannot be described as purely issues of mistakes and errors on the record. For instance, he claims that the Court declared that the Plaintiff acquired the suit land by way of adverse possession yet the same was acquired by way of a sale agreement, that the suit was instituted against the wrong party etc. Those cannot be mistakes or errors which are self-evident from the record. Rather, they are issues which require elaborate arguments. They are not, prima facie, evident per se – **NATIONAL BANK OF KENYA LTD -V- NDUNGU NJAU** and also **MULTICHOICE KENYA LTD -V- WANANCHI GROUP (KENYA) LTD & 2 OTHERS** (supra) among others. Those are not issue which are prima facie visible from the record. They require to be examined and elucidated on the facts and evidence to be adduced. They do not fall under what is described in the law as errors or mistakes. They are grounds of appeal.

12. It must also be remembered that an application for review is not synonymous with an appeal. What the Defendant is seeking by his Motion is for this Court to revisit the evidence which was before the trial Court. I say so because in his submissions, counsel for the Defendant has cited several cases including those that relate to the definition of adverse possession, issues of possession, issues of the possession being open, notorious and exclusive, definition of *animus possidendi* whether the Defendant's registration as owner of the suit land was legally done e.t.c Counsel then ends his submissions by stating as follows:

“We therefore pray for the Court to declare that the claim for adverse possession was not established to the required threshold and that the said land in question one March/Kingandole/822 belongs to the Defendant/Applicant and his name be restored as the registered owner.

Infact, the divergence of the portion of land in the different pieces of evidence makes it an unsafe judgment by the Honourable Court as assumption

cannot be relied on issues touching on land.”

Emphasis mine.

It is clear from the above that what the Defendant is prosecuting in the guise of an application for review is infact an appeal against the judgment delivered by **A. OMOLLO J** on 21st April 2022. Even if that judgment is **“unsafe”**, the forum for challenging it is in the Court of Appeal but not in this Court. To do so would be sitting on appeal against the judgment of a Court of equal jurisdiction. Further, as is now well settled a good ground for appeal is not a good ground for review.

13. The up-shot of all the above is that having considered the Defendant’s Notice of Motion dated 28th November 2023, this Court issues the following orders:

1) The Notice of Motion dated 28th November 2023 is hereby dismissed.

2) Costs to the Plaintiff.

BOAZ N. OLAO

JUDGE

26TH FEBRUARY 2026

**Ruling dated, signed and delivered by way of electronic mail
on this 26th day of February 2026 with notice to the parties.**

**BOAZ N. OLAO
JUDGE
26TH FEBRUARY 2026**

Explanatory Notes:

This ruling was due on 20th January 2026. However, that was disrupted following my transfer Iten Court w.e.f 15th January 2026 and the fact that I was prioritizing my part heard cases. The delay is regretted.

**BOAZ N. OLAO
JUDGE
26TH FEBRUARY 2026**