REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC APPEAL NO. E012 OF 2025

MARY OYENDE……

APPELLANT

VERSUS

JOSEPH OMONDI ODERA……

RESPONDENT

(Being an appeal against the ruling of Hon. Z.J Nyakundi, (SPM) delivered on 29th January 2025 in Kakamega ELC Case No. 104 of 2018)

JUDGMENT

Introduction

1. This appeal arises from the ruling of Hon. Z.J. Nyakundi (Senior Principal Magistrate) delivered on 29th January 2025 in Kakamega ELC Case No. 104 of 2018. In the impugned ruling, the learned Magistrate dismissed the appellant's application dated 21st August 2024, which sought to set aside, review and vacate the orders made by the trial court on 10th July 2024 and

the judgment thereof dated 30th July 2024. In the impugned ruling, the trial court held that, having delivered its judgment on 30th July 2024, it was *functus officio* and therefore lacked jurisdiction to entertain the application. That the only recourse available to the appellant was to file appeal. Consequently, the trial court dismissed the application dated 21st August 2024 with costs while confirming its judgement dated 30th July 2024. Aggrieved by that decision, the appellant lodged the present appeal seeking to have the ruling of the trial court set aside.

Background

2. By a plaint dated 7th June 2017, the plaintiff (now the respondent) instituted a suit against the defendant (Paul Oyende Ger - deceased) seeking declaratory and eviction orders in respect of land parcel **No. S/WANGA/BUNGASI/182**. The plaintiff pleaded that he and his mother were the registered proprietors of the said parcel, the same being ancestral land inherited from his deceased father, with a portion held in trust for a mentally ill beneficiary. He averred that the defendant, without any colour of right or lawful justification, unlawfully encroached onto the suit property by extending the boundary

and occupying a portion thereof measuring approximately three and a half acres.

3. In response to the plaint, the defendant filed a statement of defence dated 30th June 2017 wherein he denied the plaintiff's substantive claims of ownership and encroachment on his part. He contended that the suit property originally belonged to his father, who had, on humanitarian grounds, allowed the plaintiff's father to occupy approximately one acre on the upper portion thereof. The defendant alleged that the plaintiff's father subsequently took advantage of his father's illiteracy and ill health to cause himself to be registered as the sole proprietor of land parcel **No. S/WANGA/BUNGASI/182**. He further asserted that the dispute had previously been subjected to arbitration before clan elders and adjudication before a tribunal, whose decisions were allegedly rendered in his favor. He maintained that the suit was premature, misconceived and disclosed no reasonable cause of action.

4. The suit proceeded to hearing through *viva voce* evidence. The plaintiff called three witnesses in support of his case whereas the defendant called two witnesses. The matter was then reserved for judgment on 27th May 2024.

5. However, on 15th May 2024, the defendant died and the plaintiff filed application dated 21st May 2024 seeking to join one Mary Oyende to the suit as 2nd defendant and also for orders to restrain the said party from burying the remains of the deceased 1st defendant on the suit property. Both prayers were granted vide the ruling of 10th July 2024. Subsequently, on 30th July 2024, the court delivered its judgment, which was in favour of the plaintiff. In its judgment, the trial court held that the plaintiff was the lawful proprietor of the suit property, directed that the deceased defendant could not be buried on the suit property, and ordered that the plaintiff may engage a surveyor to ascertain any encroachment, with eviction to issue if encroachment was established, and that each party should bear their own costs.

6. Aggrieved with the ruling of 10th July 2024 and the judgment of 30th July 2024, the appellant herein filed application dated 21st August 2024 seeking for review and or setting aside of the orders of 10th July 2024 and judgment dated 30th July 2024.

7. In the notice of motion dated 21st August 2024, the appellant herein sought review and setting aside of the trial court's orders of 10th July 2024 and judgment of 30th July 2024 on the grounds that the trial court had delivered judgment against the 1st

defendant, Paul Oyende Ger, who had already died on 15th May 2024, without substitution by a legal representative, rendering the proceedings and resultant orders a nullity.

8. Further that the appellant, not being a party to the suit, was erroneously included in the proceedings, and that the orders made were in violation of her right to fair hearing, in contravention of Article 50 of the Constitution. That she had never been served with application seeking to join her to the suit. That the case stops at the point of death of the sole defendant and subsequent orders can only issue upon substitution in accordance with provisions of orders 24 Rule 4 of the Civil Procedure Rules.

9. Having considered the application and rival submissions filed by the parties, the trial court in its ruling delivered on 29th January 2025, held that its judgment dated 30th July 2024 was final and that the court was *functus officio*, having already delivered a decision in the matter. The court observed that the only remedy available to the appellant was to prefer an appeal. Accordingly, the trial court dismissed the application with costs and confirmed the judgment dated 30th July 2024.

10. Being dissatisfied with the trial court's decision of 29th January 2025, the appellant lodged the present appeal vide a Memorandum of appeal dated 12th February 2025, citing the following five grounds of appeal:

a) **THAT the learned trial magistrate erred in law and fact in holding that the court was functus officio in as far as an application for review was concerned, contrary to the clear law and judicial precedent.**

b) **THAT the learned trial magistrate erred in law in failing to write a ruling that addresses all the prayers in the application before the court, thereby leading to an incomplete finding on the issues before the court.**

c) **THAT the learned trial magistrate erred in law and fact in failing to write a reasoned and comprehensive ruling, thereby failing to resolve the subject matter of the application.**

d) **THAT the learned trial magistrate erred in law in construing the law on review and the jurisdiction of the court.**

e) **THAT the learned trial magistrate erred in law in failing to allow the application dated 21st August 2024.**

11. Consequently, the appellant prayed that the ruling and order of 29th January 2025 be set aside and the notice of motion dated 21st August 2024 be allowed as prayed.

12. The appeal was canvassed by way of written submissions. On record are submissions filed by the appellant dated 27th June 2025 and submissions dated 16th June 2025 filed by the respondent; both of which this court has carefully considered.

Appellant's submissions.

13. Counsel for the appellant submitted, on the first ground of appeal, that the learned trial magistrate erred in holding that the court was *functus officio* and therefore lacked jurisdiction to entertain the application for review. It was argued that **Section 80 of the Civil Procedure Act** and **Order 45 Rule 1 of the Civil Procedure Rules** expressly provided for a court's jurisdiction to review its own decree or order where grounds such as error apparent on the face of the record are established. Reliance was placed on **M'Barine & 2 others v Marine Power Generation Limited [2023] KEHC 25540 (KLR)** for the proposition that an application for review or setting aside may properly be entertained notwithstanding the doctrine of *functus*

officio. Further reliance was placed on **Menginya Salim Murgani v Kenya Revenue Authority [2014] e KLR**, in which the Supreme Court affirmed that a court becomes functus officio after judgment save as provided by law. Counsel contended that the trial court misapplied the doctrine of *functus officio* and thereby abdicated a jurisdiction expressly conferred by statute.

14. On the second and third grounds of appeal, counsel submitted that the ruling dated 29th January 2025 was brief, unreasoned and failed to address the substantive prayers and issues raised in the application dated 21st August 2024. It was contended that the learned magistrate did not frame issues for determination nor provide reasons for dismissing the application, contrary to the mandatory requirements of **Order 21 Rule 4 of the Civil Procedure Rules**. In that regard, counsel relied on **Trustees, Nzoia Sugar Co Ltd Staff Retirement Benefits Scheme 2007 v Makhanu t/a Architects N Systems [2024] KEHC 9923 (KLR)** and **Ngugi v Nduta [2024] KEELC 540 (KLR)**, where the courts underscored the obligation of a judicial officer to address all pertinent issues raised by the parties and to render a reasoned and comprehensive decision. It was therefore

submitted that the impugned ruling fell short of the legal standard required of a defended matter.

15. With regard to the fourth and fifth grounds, counsel argued that the trial court misconstrued the law on review and failed to appreciate that there was an error apparent on the face of the record. It was submitted that judgment was entered against a deceased defendant without substitution of a legal representative, and that injunctive orders were issued against the appellant, who was not a party to the suit. Counsel contended that such proceedings are a nullity in law. Reliance was placed on **Manyange (Deceased) v TG (Minor suing through her mother and next friend WMG), [2024] KEHC 1084 (KLR) (7th February 2024) (Ruling)** where the court held that proceedings instituted or continued against a deceased person are void. On that basis, the appellant prayed for this court to find that sufficient grounds for review had been demonstrated and to allow the application dated 21st August 2024 as prayed.

Respondent's submissions

16. Counsel for the respondent submitted that at the time the appellant moved the lower court, there existed no valid or subsisting orders affecting her. Counsel outlined the sequence of events before the trial court, stating that the main suit had been fully heard inter partes, both parties having closed their respective cases, and the matter was thereafter slated for judgment.

17. It was contended for the respondent that although the defendant passed away before delivery of judgment, the court had already concluded the hearing. It was further submitted that the ex parte orders issued on 21st May 2024 were, by operation of law, temporary in nature and lapsed after fourteen (14) days pursuant to **Order 39 Rule 4(2) of the Civil Procedure Rules**, there being no evidence that they were extended. Consequently, counsel argued that by the time the appellant filed her application, there were no subsisting orders capable of being reviewed or set aside.

18. They argued that the application giving rise to the appeal was incompetent and properly dismissed. According to counsel, the appellant sought to enjoin herself in a matter that had already been finalized and in which judgment had been delivered,

without demonstrating sufficient cause. Counsel contended that the appellant lacked *locus standi*, having not taken out letters of administration, and was therefore incapacitated from seeking relief either in the lower court or on appeal.

19. It was also argued that the trial court was correct in holding that it was *functus officio*, the issues in the plaint and defence having been conclusively determined. In counsel's view, once the court found that it lacked jurisdiction on account of *functus officio*, it was not obligated to render a detailed ruling. The respondent maintained that the appeal is devoid of merit and should be dismissed with costs.

Analysis and determination

20. This court has carefully considered the appeal, parties' rival submissions and the entire record. This being a first appeal, the duty of this court is to reanalyze and re-evaluate the conclusions arrived at by the trial court in view of the facts and the applicable law and make its own independent conclusions and decide whether or not to interfere with the trial court's findings and give reasons either way.

21. The issue before this court therefore is whether the trial court was right in dismissing the application dated 21st August 2025 for reasons that the court was *functus officio.*

22. In the instant case, the trial court held that having delivered a judgment, it was *functus officio* and could not review its orders of 10th July 2024 or its judgment and that the only recourse available to the appellant was to lodge an appeal.

23. The doctrine of *functus officio* requires that once a court has made its final decision in a matter, it is deemed to have fully executed its mandate on the matter and hence lacks jurisdiction over such matter, save where it is allowed in law to review or correct clerical or arithmetic matters.

24. The power of the court to grant review is provided for in section 80 of the Civil Procedure Act and the conditions upon which review can be granted are provided in Order 45 Rule 1.

Section 80 of the Civil Procedure Act provides as follows;

> **"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."

Order 45 rule 1(b) of the Civil Procedure Rules, provides as follows:

"(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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

25. Therefore, while Section 80 gives the jurisdiction for review, Order 45 restricts the grounds for review by limiting review to the following grounds;

a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

b) On account of some mistake or error apparent on the face of the record, or

c) For any other sufficient reason; and whatever the ground of the application, there is a requirement that the same has to be made without un reasonable delay.

26. In the case of **Nyamogo & Nyamogo v Kogo [2001] EA 170,** the court discussed what constitutes an error apparent on the face of the record, and stated as follows:-

> **"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness 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."**

27. In the case of **Republic v Advocates Disciplinary Tribunal Ex parte Appollo Mboya (2019) e KLR** the court was of the view that a review is by no means an appeal in disguise whereby

an erroneous decision is reheard and corrected. Further, it was held that review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it.

28. In view of the provisions of section 80 of the Civil Procedure Act that grants court the jurisdiction to grant review, the finding by the trial court that it is functus officio is erroneous and lacks justification. A court has jurisdiction to exercise its power of review.

29. On whether the application for review was merited in respect of both the ruling of 10th July 2024 and the judgment dated 30th July 2024, the basis for review as stated in the application of 21st August 2024, was that the judgment dated 30th July 2024 was entered against the deceased 1st defendant and the appellant when the former was already dead and there was no personal representative to represent his estate.

30. Further, that the defendant died on 15th May 2024 and the matter could only proceed upon a substitution of the deceased defendant. That the appellant was neither party to the suit nor a

legal representative of the estate of the deceased defendant and she could not be joined or included in the suit without proper procedures. That by entering judgment against a deceased person and against the appellant who was not party to the suit there was a glaring error apparent on the face of the record. That the orders made on 10th July 2024 were made without hearing both parties which is a denial of fair hearing.

31. Regarding the orders of 10th July 2024, there is no dispute that the defendant, Paul Oyende Ger died on 15th May 2024 before judgment was delivered in the matter. The respondent filed application dated 21st May 2024 where he sought two orders, namely; to join Mary Oyende to the suit as the 2nd defendant and an order of temporary injunction to restrain the 2nd defendant from burying or interring the remains of Paul Oyende Ger on land parcel number S/ Wanga/ Bungasi/182 pending hearing and determination of the suit. The said 2nd defendant filed grounds of opposition dated 31st May 2024 opposing the application dated 21st May 2024.

32. In the ruling of 10th July 2024, both prayers for joinder and injunction were granted. In that regard, the trial court held that as Mary Oyende herein was the person who wants to bury the

deceased on the suit property, “therefore she becomes automatically a party to suit.” Therefore, the appellant’s argument that she could not be joined to the suit without proper procedures and without being heard are without justification. Her joinder to the suit was not a substitution of the deceased defendant but an addition to the suit as a second defendant thus, making her a separate and independent entity from the deceased’s estate. The trial court made orders in the ruling of 10th July 2024, giving reasons and justification for the same. The appellant did not demonstrate any error apparent on the face of the record or any other sufficient cause to warrant orders of review in regard to orders of 10th July 2024. If she was unhappy with the same, having not met the threshold for review in that regard, she could only appeal. In the premises, I find no basis for review of the orders of 10th July 2024, hence the orders of injunction granted in that ruling to stop her from burying the deceased 1st defendant on the suit property remains in force.

33. Regarding whether there was an error apparent on the face of the record in the judgment, it is clear that the joinder made the appellant the 2nd defendant. No substitution of the deceased 1st defendant was done. It is not disputed that the 2nd defendant/

appellant herein is not the legal representative of the estate of the deceased 1st defendant and therefore at the point of delivery of judgment, the estate of Paul Oyende Ger was not represented and judgment could not be made against the deceased 1st defendant. Therefore, in so far as the trial court entered judgment against a deceased defendant before substitution, there was an error apparent on the face of the judgment.

34. Besides, in the judgment of 30th July 2024 the trial court framed two issues for determination being whether the plaintiff was the registered owner of the suit property and whether the 1st defendant should be buried. Subsequently the trial court held that the plaintiff was the registered owner and that the 1st defendant be buried elsewhere but not on the suit property. The court further held that the plaintiff should avail the services of a surveyor and should there be any encroachment on the suit property, the defendants to be evicted from the suit property.

35. The appellant herein had argued that the issue of burial was not an issue raised in the pleadings between the plaintiff and 1st defendant and therefore in determining an issue that never arose, there was an error on the face of the record. I agree with the appellant that the issue of burial of the deceased defendant

was not an issue raised in the pleadings making it an issue in the judgment was clearly an error on the face of the record. In addition, the court was obligated to ascertain whether the defendant had encroached on the suit property and in asking the surveyor to do it and issuing eviction orders on anticipated survey, that in my view is an error on the face of the record. The court failed to determine whether or not there was encroachment.

36. In the premises I find and hold that there was an error apparent on the face of the Judgment delivered in the lower court on 30th July 2024. I therefore partially allow the appeal. The trial court's judgment of 30th July 2024 is hereby set aside. For avoidance of doubt, the lower court judgment having been set aside, the orders dated 10th July 2024 by the trial court, remain in force, pending the hearing and determination of Kakamega MCELC CASE NO. 104 OF 2018. The lower court matter, being Kakamega MCELC CASE NO. 104 OF 2018, shall be placed before another judicial officer other than the Honourable Magistrate who made the judgment of 30th July 2024, for determination.

37. In view of the circumstances obtaining in this matter, I order that each party shall bear its own costs.

38. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 11TH DAY OF MARCH, 2026

A. NYUKURI
JUDGE

In the presence of;

Ms. Akinyi holding brief for Mr. Kuloba for the appellant
No appearance for the respondent
Court Assistant: Delphine.