REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HIGH SUCCESSION APPEAL NO. E050 OF 2024

IN THE MATTER OF THE ESTATE OF THE LATE GORDON OBUOYO

(DECEASED)

GEORGE ERICK OMONDI OYUGI ……..... 1ST APPELLANT

INFINITY DEVELOPMENT LTD ..... 2ND APPELLANT

- VERSUS -

GEORGE OCHIENG OWITI ….....…….....…..…… 1ST RESPONDENT

DENIS ADO OLIECH ..... 2ND RESPONDENT

J U D G M E N T

1. The deceased herein died on the **12/12/1997** leaving behind a widow and seven children one of whom was the 1st respondent. The deceased's estate consisted wholly of land parcel **Kisumu/Bar/713 (“**the suit property"). The 1st respondent's other brothers subsequently died leaving him as the sole male heir of the deceased in addition to his sisters.

2. Following the deceased's demise, the 1st respondent moved the trial court and obtained Letters of Administration Intestate on the **31/5/2019** and had them confirmed on the **28/1/2020** representing himself and his sisters as the only beneficiaries of the deceased's estate.

3. Having obtained the grant and having distributed the deceased's estate to himself wholly, the 1st respondent proceeded to sub divide the suit property into **Kisumu/Bar/2985** & **2986** which he allegedly sold to the appellants

4. The 2nd respondent, being a grandson of the deceased, moved the trial court vide Summons for revocation of grant dated **29/4/2021** for the revocation of the grant. The grounds were that the 1st respondent had fraudulently obtained the said grant by fraudulently filing the same and concealing from the court the fact that there were other beneficiaries entitled to the deceased's estate. In a ruling delivered on the **24/6/2022,** the trial court agreed with the 2nd respondent and revoked the grant.

5. The 1st appellant being aggrieved with the said ruling moved the same court vide a Summons dated **19/10/2023** seeking the review and setting aside of the ruling of **24/6/2022** on the grounds that the said ruling had the effect of depriving them, the appellants, of their proprietary rights over land parcels **Kisumu/Bar/2985** & **2986**.

6. In its ruling delivered on the **6/3/2024**, the trial court, D.O. Onyango (as he then was) found the appellant's application to be without merit and dismissed the same.

7. Being aggrieved by the said ruling, the appellants filed the instant appeal vide a memorandum of appeal dated **15/3/2024** raising the following grounds of appeal: -

i) ***That the learned trial magistrate erred in law and in fact by failing to uphold that the appellants were condemned unheard.***

ii) ***That the learned trial magistrate erred in law and in fact by failing to uphold that the appellants were innocent purchasers for value.***

iii) ***That the learned trial magistrate erred in law and in fact by deviating from its role as a succession court and proceeding with cancellation of titles which falls under the purview of the Environment and Land Court.***

iv) ***That the learned trial magistrate erred in law and in fact by failing to appreciate the appellant's evidence and the submissions filed.***

v) ***That the ruling entered was against the weight of evidence tendered by the appellants.***

8. In accordance with the duty expected of a first appellate Court, I have carefully considered this appeal and re-evaluated the evidence in light of the submissions made before me. See the case of **Selles & Another vs. Associated Motor Boat Company Ltd (1968) EA.** The facts are not substantially in dispute.

9. The appellants case before the trial was basically that having issued and confirmed the grant over the deceased's estate to the 1st respondent, the 1st respondent proceeded to sub-divide the suit property into 3 portions being **Kisumu/Bar/2984, 2985** and **2986** after which he sold portions **2985** &

2986 to them for a consideration and that by revoking the grant issued to the 1st respondent, the trial court deprived them, innocent purchasers, of their constitutional property rights without giving them an opportunity to be heard.

10. The 2nd respondent swore a replying affidavit in opposition to the appellants' application stating that having secured the orders revoking the grant issued to the 1st respondent, he served the same upon the lands registrar Kisumu and as well as the appellants who ignored the same and proceeded to continue developing parcels **2985** & **2986**. That none of the deceased''s beneficiaries save for the 1st respondent were aware of the sale of the said parcels.

11. It is based on the aforementioned evidence that the trial court made its ruling which is impugned herein by the appellants. Accordingly, the issue for determination before this court is ***whether the trial court erred in failing to review and set aside its earlier decision of 24/6/2022***.

12. ***Section 80*** of the *Civil Procedure Act*, clothes a succession court with unfettered discretion to make such an order as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously, ***section 80 of the Civil Procedure Act, Cap. 21 Laws of Kenya*** 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 judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

13. Whereas ***order 45, rule 1(b) of the Civil Procedure Rules*** is clear that for the court to review its decision, certain requirements should be met. It 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

judgement to the court which passed the decree or made the order without unreasonable delay."

14. ***Order 45*** therefore provides for 3 circumstances under which an order for review can be made. These are, where there has been discovery of new and important matter or evidence, where there has been a mistake or error apparent on the face of the record and finally, for any other sufficient reason.

15. It is not clear under what ground the appellants approached the trial court for relief. Their assertion was that by revoking the grant issued to the 1st respondent, the trial court deprived them of their proprietary rights and condemned them unheard. The question therefore is whether the appellants successfully brought themselves within the review grounds.

16. On review, the Court of Appeal, in the case of **National Bank of Kenya Limited v Ndungu Njau [1997] eKLR**, guided as follows: -

> ***"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.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise, we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."

17. There is also the case of **Muyodi v Industrial and Commercial Development Corporation & Another (2006) 1 EA 243**, in which, again, the Court of Appeal stated as follows: -

"... in Nyamogo & Nyamogo -v- Kogo (2001) 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 the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal...”

18. It is therefore clear that for a Court to review its orders, the ground alleged must be one that is obvious to the eye, and self-evident. It must be one which when considered, would not yield two results and does not require elaborate arguments to be established.

19. In the present case, there was no discovery of any new evidence for a review to be ordered. There was no mistake that was apparent on the record or which was alleged or pointed out to warrant a review. Being aggrieved by the decision to revoke the grant issued to the 1st respondent, the appellants ought to have appealed against the same. The issue of revocation had been fully canvassed before the learned trial magistrate. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the 2nd respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review.

20. In any case, going through the record, I find no new evidence, mistake or error apparent on the face of the record, or any other sufficient reason presented before the trial court to warrant review or setting aside of its decision to revoke the grant issued to the 1st respondent.

21. Contrary to the appellants' pleadings, the trial court was not called upon to uphold that they were innocent purchasers for value but rather to determine whether the appellants had met the conditions for warranting review and setting aside of its previous orders.

22. As to whether the trial court, by cancelling the titles delved into jurisdiction of the Environment and Land Court, I must note that in the impugned decision, the trial court was called upon to consider review and setting aside of its orders of **24/6/2022**. In the ruling of **24/6/2022**, the trial court similarly did not cancel any title but revoked the certificate confirmed to the 1st respondent. Accordingly, this limb of the appeal fails.

23. The upshot of the above is that the Court finds no merit in the appeal and therefore dismisses the same with costs to the respondents.

It is so ordered.

DATED and **DELIVERED** at Kisumu this **30th** day of **April, 2026.**

A. MABEYA, FCI Arb

JUDGE