



REPUBLIC OF KENYA



KENYA LAW
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Okiru & 4 others v Ombangai; Omukaga (Applicant) (Environment and Land Appeal E017 of 2021) [2025] KEELC 244 (KLR) (31 January 2025) (Ruling)

Neutral citation: [2025] KEELC 244 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND APPEAL E017 OF 2021
BN OLAO, J
JANUARY 31, 2025**

BETWEEN

**BONIFACE OKIRU 1ST APPELLANT
ELISEYO BARASA PAPA 2ND APPELLANT
RODGERS OKIRU 3RD APPELLANT
GREGORY OMUSE 4TH APPELLANT
SAMMY INDEKE 5TH APPELLANT**

AND

MORRIS OJUMA OMBANGAI RESPONDENT

AND

PETER PAPA OMUKAGA APPLICANT

RULING

1. Section 80 of the Civil Procedure Rules is couched 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 (1) of the Civil Procedure Rules provides for the procedure in invoking the power for review. It reads:



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.

The dispute over the ownership of the land parcel No North Teso/Moding/103 (the suit land) both in this Court, on appeal, and before the Chief Magistrates Court Busia being CMC ELC case no E6 of 2021, was between Boniface Okiru, Eliseyo Barasa Papa, Rodgers Okiru, Gregory Omuse And Sammy Indeke (the 1st to 5th Appellants respectively) and Morris Ojuma Ombangi (the Respondent). The trial Court having found in favour of the Respondent, the Appellants appealed and this Court vide a judgment delivered on 9th May 2023 found in favour of the Appellants and set aside the Judgment delivered on 28th September 2021 by the Chief Magistrate.

2. One Peter Papa Omukaga (the Applicant herein and who was not a party in those proceedings) has now moved to this Court vide his Notice of Motion dated 21st February 2024 and anchored on the provisions of Order 45 Rule 1(1) of the Civil Procedure Rules. He seeks the following substantive orders:
 1. That the Judgment delivered on 9th May 2023 be reviewed to include the Applicant herein to share L.R North Teso/Moding/103 measuring 19.2 acres to be shared equally between four families not three as it was.
 2. That costs of this application be in the cause.
3. The application is based on the grounds set out therein and is supported by the Applicant’s affidavit of even date.
4. The gravamen of the application is that the Applicant is the son and legal representative to the Estate of the late Sebastiano Omukaga Obongai the last born in the family tree and that the suit land is ancestral land. That he was not a party in the proceeding both in the trial Court and in this appeal. That this Court had no information that the suit land was to be shared between four (4) families instead of three (3) families. There is need for the Applicant to be included in the Judgment delivered on 9th May 2023 hence this application for review.
5. The following documents are annexed to the application:



1. Copy of Limited Grant of Letters of Administration Ad Litem issued to the Applicant in respect to the Estate of Sabastiano Omukaga Obangai.
 2. Copy of this Court's judgment delivered on 9th May 2023.
 3. Copy of the decree issued on 2nd October 2023.
 4. Copy of letters dated 21st December 2023 from the Deputy Registrar verifying the authenticity of the decree.
6. The application is opposed and Appellants filed grounds of opposition and a replying affidavit by the 1st Appellant.
7. In the ground of opposition, the following issues are raised:
1. The Applicant was never a party to the suit.
 2. The Applicant cannot come into a matter where he was not a party to during the hearing.
 3. That it is proper that the Applicant files his case since he never saw the importance of joining the matter during the trial.
 4. That the application is therefore devoid of any merits, is scandalous, frivolous and otherwise an abuse of the Court process and the same ought to be dismissed with costs.

In the replying affidavit dated 20th May 2024, it is deposed by the 1st Appellant on behalf of the others that, the Applicant has never been a party in this matter and this application offends the rules of procedure as it causes confusion. That he has been advised that a person cannot file an application where he was not a party in the proceedings. It is therefore in the interest of justice that this application be dismissed.

8. The application has been canvassed by way of written submissions. These have been filed by Mr Jumba instructed by the firm of Balongo & Company Advocates for the Applicant and by Mr Ouma instructed by the firm of B. M. Ouma & Company Advocates for the Appellants. The Respondent did not participate in the application.
9. I have considered the application, the rival affidavits and annexures as well as the submissions by counsel.
10. I must start by pointing out that the grounds of opposition filed by counsel for the Appellants refer to issues of facts and not issues of law. Grounds of opposition should address only issues of law and no more – Daniel Kibet Mutai & Others -v- A.g 2019 Eklr. See Also Peter & Nyakundi & Others -v- Principal Secretary State Department Of Planning Of Devolution & Planning And Another 2016 eKLR. In the circumstances, the grounds of opposition filed herein do not aid the Appellants in any way.
11. That notwithstanding, the Appellants also filed a replying affidavit deposed by the 1st Appellant which this Court will consider.
12. It is clear from the provisions of Order 45 Rule 1(1) of the Civil Procedure Rules that a party seeking orders of review of judgment or order must satisfy the following conditions:
- 1: Demonstrate that there has been discovery of new and important matter or evidence which was not within his knowledge.
 - 2: There is some mistake or error apparent on the face of the record.



- 3: Show any other sufficient reason.
- 4: File the application without unreasonable delay.

The above was reiterated by the Court of Appeal in the case of Francis Origo & Another -v- Jacob Kumali Mungala C.a. Civil Appeal No 149 of 2001 [2005 eKLR] where it said:

“... it is clear that an Applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the Applicant must make the application for review without unreasonable delay.”

13. The Judgment sought to be reviewed was delivered by this Court on 9th May 2023. This application was filed on 23rd February 2024 nine (9) months later a delay which is not only unreasonable but which the Applicant has not bothered to explain satisfactorily or at all.
14. Most importantly, the Applicant has not stated on which of the grounds set out in Order 45 Rule 1(1) of the Civil Procedure Rules he is relying on. He has not specified whether this application is premised on the ground of discovery of new and important matter or evidence which was not within his knowledge or could not be produced when the Judgment was made, or on account of some mistake or error apparent on the face of the record or that it is premised on any other sufficient reason and if so, what that other sufficient reason is. This Court does not enjoy carte blanche jurisdiction to review an order or judgment. That jurisdiction must be exercised only within the perimeters set out in the law. The Applicant has not met that threshold and on that basis again, this application is for dismissal.
15. The Applicant seeks to have the judgment reviewed so that he too can have a share of the suit land. He was not a party in the suit in the trial Court where the Respondent was the Plaintiff and the Appellants were the Defendants. To include him in the Judgment will basically amount to adding him as the 6th Defendant in the original pleadings in the Chief Magistrates Court ELC case NO E6 of 2021. The Respondent did not seek any orders against the Applicant in that case. Neither was the Applicant among the Defendants in whose favour any orders could be made in terms of the counter-claim. And ordinarily, a party cannot be added as a Defendant in any suit without the consent of the Plaintiff as to do so would be to introduce a new cause of action or to alter the nature of the suit altogether. A Plaintiff is “dominus litis” meaning he or she can sue whoever he or she thinks a remedy can be obtained from. A Plaintiff cannot be forced to sue any person as a Defendant.
16. Finally, although both Section 80 of the *Civil Procedure Act* and Order 45 Rule 1(1) of the Civil Procedure Rules refer to “any person”, it cannot be that the legislature intended that a stranger to the proceedings can approach the Court to invoke its jurisdiction and review a judgment or order under those provisions. In the case of George Peter Kaluma -v- Ngo Co-ordination Board & 4 Others (katiba Institute – Amicus Curiae) Civil Application No E011 Of 2023 [2023 Kesc 72 Klr], The Supreme Court while considering an application for review of its judgment stated as follows in paragraph 30:

“Section 21A of the *Supreme Court Act* provides for the circumstances pursuant to which this Court may review its own decision on an application filed by “a party”. The Court cannot entertain an application for review of its judgment filed by an Applicant who was not a party to the proceedings as this goes to the root of the matter and sanctity of the



already determined suit which was contested by the parties. Consequently, we find that the Applicant is not competent to seek a review of the judgment under reference.”

Although the Supreme Court was being guided by its own Act and not by the *Civil Procedure Act* on Rules, I think, without deciding, that the Applicant herein finds himself in a similar cul-de-sac in respect to his Notice of Motion.

17. The up-shot of all the above is that this Court makes the following disposal orders:
 1. The Notice of Motion dated 21st February 2024 is dismissed.
 2. Costs to the Appellants.

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 31ST DAY OF JANUARY 2025 WITH NOTICE TO PARTIES.

BOAZ N. OLAO

JUDGE

31ST JANUARY 2025

