



REPUBLIC OF KENYA



KENYA LAW
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**Okanga v Ondego & another (Environment and Land Case
225 of 2016) [2025] KEELC 5531 (KLR) (23 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5531 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND CASE 225 OF 2016**

**A NYUKURI, J
JULY 23, 2025**

BETWEEN

EMMANUEL IMBURI OKANGA PLAINTIFF

AND

ERICK ONDEGO 1ST DEFENDANT

ERNEST KOMBO MAKERO 2ND DEFENDANT

RULING

Introduction

1. Before court is a notice of motion dated 17th May 2024, filed by the 2nd defendant seeking the following orders;
 - a. That leave be granted to the firm of Omwando Mbaka & Co. Advocates to come on record on behalf of the 2nd defendant
 - b. That the honourable court be pleased to review and or set aside its orders made on the 5th day of November 2019
 - c. That the costs of this application be provided for.
2. The application is supported by the affidavit sworn by the applicant dated 17th May 2024. The applicant's case is that this court delivered its judgment on 5th November 2019 thereby nullifying the subdivision of the suit property, cancelling the resultant titles and reverting the original title to the previous owner. He complained that the 1st defendant gave the court wrong information which resulted in the court making the orders in the judgment under a wrong impression that parcel No. Butsotso/Shikoti/8221 was a subdivision of parcel Butsotso/Shikoti/8037, but that unknown to the court, the latter parcel was a subdivision of parcel No. Butsotso/Shikoti/2891 and not No. 8221. That parcel No. Butsotso/Shikoti/2891 was subdivided by the late Joseph Makero Omolo to create



parcel Nos. Butsotso/Shikoti/8036- 8054. That the late Joseph Makero Omolo transferred parcel No. Butsotso/Shikoti/8037 to the applicant during his lifetime, whereof the applicant subdivided this parcel into parcel Nos. Butsotso/Shikoti/ Butsotso/Shikoti/8218-8222. That parcel No. Butsotso/Shikoti/8218 was subdivided into parcel Nos. Butsotso/Shikoti/8474, 8475, 8544 and 8547. That reviewing the judgment herein will avert an injustice and that the application had been made without unreasonable delay. He attached title deeds for parcel Nos. Butsotso/Shikoti/8474 and 8547, judgement, mutation forms for parcel Nos. Butsotso/Shikoti/8037 and 8218 dated 2015 and 2017 respectively and certified copy of register for parcel No. Butsotso/Shikoti/2891 certified on 21st September 2022.

3. The application was opposed. Emmanuel Imburi Okanga, the plaintiff, filed replying affidavit dated 13th June 2024. He stated that he was in total agreement with the 2nd defendant that there was an error apparent on record and in the judgment. That he is the registered owner of parcel No. Butsotso/Shikoti/8221, which is a subdivision of parcel No. Butsotso/Shikoti/8037. That it was not true that parcel No. Butsotso/Shikoti/8221 was a subdivision of parcel No. Butsotso/Shikoti/2891 as indicated in the proceedings and judgment. That he bought parcel No. Butsotso/Shikoti/8221 from the 2nd defendant when the same was part of parcel No. Butsotso/Shikoti/8037, which was then registered in the 2nd defendant's name. That parcel No. Butsotso/Shikoti/8221 was not part of parcel No. Butsotso/Shikoti/2891 as the latter had been closed at the time the plaintiff was buying her parcel. That the 2nd defendant's parcel was not subject to any succession proceedings because his father had transferred the same to him during his lifetime. That title for parcel No. Butsotso/Shikoti/8221 was cancelled because of the wrong information given to the court by the 1st defendant.
4. The 1st defendant filed grounds of opposition dated 20th February 2025. He stated that this court is now functus officio having delivered its judgment on 5th November 2019. That there was no discovery of new evidence to warrant the court's intervention under Order 45 of the Civil Procedure Rules. That this application has been brought after inordinate delay and that a similar application was made and withdrawn.
5. Parties filed written submissions in support of their respective positions. On record are the 1st defendant's submissions dated 10th April 2025, which the court has duly considered.

Analysis and determination

6. The court has carefully considered the application, responses thereto and submissions filed. Two issues arise for the court's determination, namely;
 - a. Whether the applicant deserves to be granted leave to change his advocate after judgment; and
 - b. Whether the applicant has met the threshold for review.
7. Order 9 Rule 9 of the Civil Procedure Rules requires that where a party was represented by an advocate and after judgment intends to either change their advocate or act in person, they can only do so with leave of court. Legal representation and being represented by an advocate of one's choice is a Constitutional right protected under Article 50 (2) (g) of *the Constitution* of Kenya, and therefore, the applicant herein is entitled to change his advocate at this stage. In the premises I find and hold that the applicant deserves the orders for leave to be represented by the firm of Omwando Mbaka & Co. Advocates and his prayer in that regard is hereby allowed.
8. Regarding review, section 80 of the *Civil Procedure Act* grants the court jurisdiction to grant review, while the conditions upon which review can be granted are provided for in Order 45 Rule 1 of the Civil Procedure Rules.



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.”

9. Therefore, grounds upon which review can be sought are as follows;

- 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.

10. 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.”

11. 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, a clear case of error apparent on the face of the record would be made out.
12. In the instant case, the applicant sought review on the basis that the 1st defendant gave the court wrong information regarding the suit property leading to cancellation of the subdivision thereof and the resultant titles while reverting the title to the original owner. The applicant attached mutations done in 2015 and 2017 as well as title deeds for parcels Butso/8474 and 8747 both issued in 2022, about three years after delivery of the judgment herein. The applicant and the plaintiff have agreed that there is an error apparent on the face of the record because according to them, the 1st defendant gave the court wrong information. While the record shows that the three parties herein participated in these proceedings, the plaintiff and the 2nd defendant have not told this court what information they gave the court at the time when the 1st defendant was giving wrong information or what stopped the two of them from giving the court right information to counter the information given by the 2nd defendant. The applicant has not alleged that some of the documents presented could not be availed after exercise of due diligence. For instance, the mutations attached to the applicant’s instant application, are dated 2015 and 2017 respectively, which means that they were available before judgment was entered herein in 2019. As for documents procured three years after the judgment like the title deeds, this court cannot allow a party to obtain documents three years after the judgment to have them produced. That will amount to granting the applicant a second bite at the cherry, which the law frowns upon.
13. For a party to rely on an error apparent on the face of the record, the error must be clear that it stares one in the face. A purported error that needs to be excavated from a heap of facts through a long and winding explanation, like the one given in this case by the applicant and the plaintiff, cannot be termed as an error apparent on the face of the record. If there had been an apparent error on the face of the record, I am sure, it would not take the 2nd defendant over four years to see the error. In this case, the judgment was delivered on 5th November 2019, while the application herein was filed on 18th June 2024, a period of four and a half years. It is obvious that that period in itself is an inordinate delay for the court to allow review.
14. Save that the firm of Omwando Mbaka & Co. Advocates is granted leave to come on record for the 2nd defendant in this matter, I find no merit in the application dated 17th May 2024 seeking review of the judgment delivered on 5th November 2019, which I dismiss with costs to the 1st defendant.
15. It is do ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT/VIRTUALLY AT KAKAMEGA THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM ON 23RD DAY OF JULY, 2025

A. NYUKURI



JUDGE

In the presence of;

Mr. Orute for the plaintiff

Ms. Adeya for the 1st defendant

No appearance for the 2nd defendant

Court Assistant: M. Nguyai

