



REPUBLIC OF KENYA



Orege v Gori (Appeal 22 of 2019) [2024] KEELC 1562 (KLR) (18 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1562 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII**

APPEAL 22 OF 2019

M SILA, J

MARCH 18, 2024

BETWEEN

JAMES NDEGE OREGA APPELLANT

AND

CHARLES KINGSLEY GORI RESPONDENT

RULING

Application seeking review so as to substitute the judgment which awarded refund of money paid towards purchase of land with an order for the land itself; alternative prayer for attachment of the land; principles for review not met; applicant had made an alternative prayer for the money paid which was granted so no new evidence, no error apparent, and no sufficient cause; on alternative prayer court unable to grant it as no current evidence of proprietorship of the land sought to be attached provided; application dismissed.

1. The application before me is that dated 4 December 2023 filed by the appellant. The substantive prayers are prayers (2) and (5) which are drawn as follows :
 2. That this court be pleased to recall, review and set aside part of its judgment and decree issued on 22 July 2021 in terms of payment of the decretal sum and in its place replace it with orders for delivery of the property known as Bassi/Bogetaorio/5073 to the applicant.
 5. That in the alternative the respondent's land be attached and sold in execution of the decree of this suit.
2. The other prayers are to direct the cancellation of the respondent's name in the title of the suit land and replace it with the name of the applicant, and for the Deputy Registrar to be authorized to execute the requisite documentation, and costs of the application.



3. The dispute between the appellant and respondent was commenced by the appellant vide a plaint dated 16 January 2016 filed before the Magistrates' Court, Kisii. The applicant (as plaintiff) averred that the respondent (as defendant) sold to him the land parcel Bassi/Bogetaorio/4459 for Kshs. 600,000/= and that he had paid the sum of Kshs. 500,000/= leaving a balance of Kshs. 100,000/=. In his plaint he sought orders for the cancellation of the name of the respondent (as defendant) from the suit land and for the land to be registered in the applicant's (as plaintiff) name or in the alternative that the applicant be refunded the purchase price plus interest from the time of the sale agreement. In his evidence, he testified that the respondent failed to obtain the consent of the Land Control Board nor sign the transfer documents but he admitted to not having paid the full purchase price. The respondent did not offer any evidence.
4. The trial court in a judgment delivered on 2 August 2019 held that both parties had failed to fulfill their part of the bargain. The court proceeded to dismiss the applicant's suit with costs and advised the parties to renegotiate the contract. Aggrieved, the applicant filed an appeal to this court. Inter alia the applicant urged that the trial court failed to provide any remedy to him yet he had paid a substantial portion of the purchase price. The appeal was heard by Onyango J who delivered judgment on 22 July 2021. She was of opinion that the applicant had proved payment of Kshs. 450,000/= and deserved to have judgment in his favour for refund of what he had paid. She therefore entered judgment for the applicant for the sum of Kshs. 450,000/= with interest at court rates from the time of filing suit till payment in full and also awarded the applicant the costs of the appeal. Thereafter costs of the appeal were taxed at Kshs. 118,910/= on 22 February 2022.
5. An application dated 18 October 2022 was subsequently filed by the applicant where he sought orders for the attachment and sale of the suit land so as satisfy the decree. I see that the said application went before Ong'ondo J (who was holding fort for the judge in Kisii who was away) on 25 October 2022, and he directed that the application be served and be heard inter partes before the Judge on 7 December 2022. The matter never came before the Judge and for reasons I cannot fathom, it appears to have gone before the Deputy Registrar for hearing. He made a ruling on 19 July 2023 that he has no jurisdiction to hear the prayers in that application and directed the same to be placed before 'a competent court.' The applicant did nothing towards having that application heard and instead filed this application. I have already pointed out the prayers in the said application, which are for review of judgment so that the prayer for refund is replaced with the prayer for delivery of the property, and there is an alternative prayer for attachment of the suit property for it to be sold to satisfy the decree.
6. I do not see how the applicant can succeed in the prayer for review. Review is outlined in Order 45 of which Rule 1 provides as follows :
 1. Application for review of decree or order
 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.
7. From the above, it will be seen that one can see a review on the following reasons :
 - i. Discovery of new and important matter or evidence;
 - ii. Mistake or error apparent on the face of the record, or;
 - iii. Other sufficient reasons.
8. There is nothing in this application to suggest that any of the above grounds are met. The applicant does not say that he has discovered any new and important matter or evidence. There is also no error on the face of the record. Indeed, the court allowed the applicant's appeal and gave him the alternative remedy that he had sought in the plaint. He certainly could not get the order of specific performance to have the land transferred to him as he had not paid the full purchase price. Neither am I persuaded that there is any good reason to disturb the judgment. The applicant got the alternative remedy that he had asked for. I am not in those circumstances persuaded to issue an order that in place of the monetary award the applicant be registered as proprietor of the suit land.
9. The only order the applicant can get is an order for attachment of property for purposes of it being sold in execution of the decree. This is indeed provided for under Order 22 Rule 48 which is drawn as follows :
 48. Attachment of immovable property
 - (1) Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property.
 2. A copy of the order shall be affixed on a conspicuous part of the property.
10. The applicant has not brought his application under Order 22 Rule 48 above. I could close my eyes to the technicality but I cannot issue a prohibition order when I do not have evidence of the current proprietorship of the land sought to be attached. What the applicant attached in his supporting affidavit is a search done on 11 January 2016 which is more than eight (8) years ago. Anything could have happened to that property in the course of the eight (8) years.



11. What the applicant needs to do is come with a good application founded under Order 22 Rule 48 and also comply with the provisions of Order 22 Rule 9 which requires a full description of the property sought to be attached. There may also be need to comply with Order 22 Rule 18 which requires a notice to show cause why execution should not issue given that the decree is more than one year old.
12. For the reasons above, it will be seen that the application cannot succeed in the manner drawn. It is hereby dismissed but I make no orders as to costs as the respondent did not deem it fit to oppose it.
13. Orders accordingly.

DATED AND DELIVERED THIS 18 DAY OF MARCH 2024.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

Delivered in the presence of :

Ms. Nyambeki for the applicant

N/A for respondent

Court Assistant : David Ochieng'

