



**Orachi v Oridi (Environment and Land Appeal E001 of 2023)
[2025] KEELC 626 (KLR) (18 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 626 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

BN OLAO, J

FEBRUARY 18, 2025

BETWEEN

FRED OMAMUKIROR ORACHI APPELLANT

AND

HERBERT OCHODI ORIDI RESPONDENT

RULING

1. Vide a ruling delivered on 25th July 2024, this Court vacated its ruling and orders issued on 28th September 2023. Those orders had been issued to stay the proceedings in Busia CM ELC Case No 82 of 2020 but as it turned out, judgment in that case had already been delivered by the trial Court on 6th September 2023 and therefore my orders issued on 28th September 2023 served no purposes since they had already been over-taken by events. Indeed in paragraph 17 of my ruling and orders delivered on 25th July 2024, I said:

“The judgment in Busia CMC ELC No 82 of 2020 having been delivered on 6th September 2023, it follows that this Court’s orders issued on 28th September 2023 staying the proceedings and arresting the judgment in the subordinate Court are spent and of no effect. Indeed, in my view, the orders issued on 28th September 2023 are only of nuisance value simply adding to the statistics but not addressing any issue. They should not be an impediment to the execution of the judgment in Busia CMC ELC No 82 of 2020. However, for the avoidance of doubt, I shall be issuing appropriate orders shortly.”

I have proceeded to issue the following orders in paragraph 18 of that ruling:

- 1: “The orders issued on 28th September 2023 are hereby vacated.”
- 2: “The Applicant is at liberty to proceed and execute his judgment in Busia CMC ELC No 82 of 2020.”



3: “The Respondent shall meet the costs of this application.”

I now have a Notice of Motion dated 7th August 2024 by Fred Omamukoror Orachi (the Applicant herein and who was the Respondent in the ruling delivered on 25th July 2024). He has cited the provisions of Order 1, 1A, 1B, 3, 3A and 63 (e) of the *Civil Procedure Act*, Order 45 Rule 1(1) (a), (b), (2) and Order 41 Rule 10 (1) and (2) of the Civil Procedure Rules and seeks the following order:

- 1: That this Honourable Court be pleased to review and/or set aside its ruling of 25.7.2024.
- 2: That Costs of this application be provided for.

The application is premised on the grounds set out therein and supported by the Applicant’s affidavit of even date.

2. The gravamen of the application is that in the ruling delivered on 25th July 2024, this Court missed out the fact that the order issued in the judicial review case had been served upon the Trial Magistrate. This Court therefore arrived at its decision on the assumption that the order had not been served and blamed the Applicant for the perceived failure to serve the order upon the Respondent. That this application has been made without inordinate delay and if the order sought is not granted, the Applicant and his siblings will miss out on their ancestral land. It is therefore in the interest of justice that this application be allowed.
3. The following documents one annexed to the Motion:
 - 1: Copy of the ruling delivered on 25th July 2024.
 - 2: Copy of the order dated 12th September 2023.

The application is opposed and Herbert Ochodi Oridi (the Respondent herein) filed a replying affidavit dated 16th September 2024 in which he has deposed, inter alia, that this application is vexatious, frivolous and an abuse of the process of this Court. That the Applicant is being economical with the truth and has not disclosed to this Court that soon after the Trial Court had reserved the date for the judgment, the Applicant obtained orders to arrest the judgment but he did not serve them upon the Trial Magistrate and so the trial Court proceeded to deliver the same. The Applicant has not annexed any proof of service of the stay order upon the Trial Magistrate or Executive Officer of this Court and has instead been engaged in forum shopping in order to frustrate the Respondent from enjoying the fruits of his judgment. He has embarked on reviving Busia CMC ELC Case No 82 of 2020 which was concluded some 18 months ago and his mission is to inordinately delay and frustrate him from realizing the fruits of his judgment. That applying for review of the ruling delivered on 25th July 2024 following a full trial and judgment is an impediment to justice and should be dismissed with costs.

4. The following documents are annexed to the Replying affidavit:
 1. Copy of the order issued on 25th July 2024.
 2. Copy of the Originating Summons filed in Busia ELC Case No E003 of 2023.
 3. Copy of the Notice of Motion dated 13th August 2024 and filed in Busia CMC ELC Case No 82 of 2020.
5. The Applicant filed a supplementary affidavit dated 9th October 2024, in which he deposed, inter alia, that it is not true that he failed to serve this Court’s order staying the proceedings in Busia CMC ELC Case No 82 of 2020 upon the Trial Magistrate. That since the Court system had changed and documents were being filed digitally through emails before the CTS system had been established, the



orders was served upon by the Executive Officer Busia Law Courts through the email address xxxx.com, xxxxl.com and was also served upon the Respondent's advocates vide xxxx.com. Therefore, he served both the Magistrate and Executive Officer at the Busia Law Courts yet he is being faulted for not obtaining the stay order and serving it.

6. Annexed to the supplementary affidavit are the following documents:

1. Copy of the letter dated 5th May 2023 addressed to the Executive Officer Busia Law Courts by the Applicant's counsel forwarding this Court's order staying the delivery of the judgment in Busia ELC Case No 82 of 2020.
2. Copy of this Court's order issued on 23rd February 2023 staying proceedings in Busia Cmc Elc Case No 82 of 2020.
3. Copy of email addressed to xxxx.com from Oyeashioya – xxxx.com.

When the Motion was placed before me, I directed that it be canvassed by way of written submissions. However, while the Applicant's counsel Mr Ashioya did file his submissions dated 12th November 2024, the Respondent's counsel Mr Otsiula elected not to file any and relied only on the replying affidavit of the Respondent.

7. I have considered the application, the rival affidavits and annexures as well as the submissions by Mr Ashioya.

8. The substantive order sought by the Applicant is for this Court to review and set aside the ruling delivered on 25th July 2024. The law on review of judgments and orders is found in Section 80 of the [Civil Procedure Act](#) which reads:

80: "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."

The procedure for review is provided for in Order 45 Rule 1(1) of the Civil Procedure Rules 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." Emphasis mine.



A party seeking the remedy of review of a decree or order must therefore satisfy the following requirements:

- 1: Show that there has been discovery of new and important matter or evidence which was not within his knowledge and could not be produced even after the exercise of due diligence.
- 2: Demonstrate that there is some mistake or error apparent on the face of the record.
- 3: Provide any other sufficient reason.
- 4: File the application without unreasonable delay.

The order sought to be reviewed was made on 27th July 2024 and this application was filed on 8th August 2024 though dated 7th August 2025. There has been no unreasonable delay in approaching this Court.

9. The Applicant has based his application on the ground of mistake or error apparent on the face of the record. I say so because, in grounds (a), (b), and (c) on which the Motion is based, the Applicant has pleaded thus:
 - a. That the Honourable Court in its ruling of 25.2.2024 missed out the fact that the order issued in judicial review case had been served upon the Trial Magistrate.
 - b. That the reason why the Court arrived at its decision was on the resumption that the order had not been served.
 - c. That the Court blamed the Appellant/Applicant for the perceived failure to serve the order upon the Respondent.

The above grounds have been repeated in paragraphs 2, 3 and 4 of the Applicant's affidavit.

10. The Applicant's counsel takes the view that this application should be allowed on the basis of both discovery of new and important matters or evidence and also on the basis of an error on the face of the record. He has made the following submission in the penultimate and the last paragraphs:

“We also invite this Honourable Court to look at the lower Court file for confirmation of the service we speak about. Under Order 45 Rule 2 an application for review would and should be allowed if the Applicant discovered a new matter which fact would not have been in the Applicant's knowledge at the time when the matter was heard and or upon discovery of new facts.

Equally the discretion of the Court would be invoked where there is an error on the face of the record. We believe that in the present case we have laid out that basis and therefore plead with the Court for its discretion.”

This Court is being invited by the Applicant to look at the record of the trial Court which will confirm that indeed the Trial Magistrate was served with the orders of this Court dated 28th September 2023 and which stayed the proceedings of the Trial Magistrate in Busia CMC ELC Case No 82 of 2020. I do not see how that can be considered as “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” as set out in Order 45 Rule 1(1) of the Civil Procedure Rules. The order of stay having been obtained by the Applicant himself, it was, from the



time it was issued, within his knowledge and could, with due diligence, have been produced by him when he moved to this Court. It would be stretching the provisions of Order 45 Rule 1(1) of the Civil Procedure Rules too far to suggest that that qualifies as a discovery of new and important matter or evidence. I do not think that ground aids the Applicant.

11. On the ground of “some mistake or error apparent on the face of the record,” it is the Applicant’s case that this Court missed out the fact that the stay order had been served upon the Trial Magistrate and proceeded on the presumption that the order had not been served and blamed the Applicant for not serving the same. That is not what this Court said in the ruling sought to be reviewed and I clearly did not apportion blame to any of the parties even though I had been invited to do so. In the said ruling at paragraph 10, I stated as follows after citing the stay order:

“That order should have been served promptly upon the trial magistrate Hon. P. Olengo Senior Principal Magistrate who was seized of the suit in the trial Court. It is not clear why that was not done...

The fact of the matter is that the moment this Court issued its ex-parte orders staying the proceedings in Busia CMC ELC No 82 of 2020 which orders were confirmed by my subsequent ruling dated 28th September 2023 staying the proceedings and arresting the judgment in that case, it was really the duty of either of the parties herein to have the said order served upon the trial magistrate. It was not the sole responsibility of the Respondent to do so. Secondly, the order of stay of proceedings affected not only the Respondent’s claim but also the Applicant’s counter-claim”.

It is clear from the above that I did not ascribe blame for failure to serve the stay order on the trial magistrate to any of the parties herein. In any event, if the order of stay was served on the trial magistrate, that was not brought to the attention of the Court when it was considering the Notice of Motion dated 20th November 2023 and which gave rise to the ruling delivered on 25th July 2024 and which the Applicant now seeks to be reviewed on the ground of mistake or error apparent on the face of the record. The law guiding a Court considering what amounts to an error or mistake on the face of the record was considered by the Court of Appeal in the case of *Muyodi -v- Industrial And Commercial Development Corporation & Another* 2006 1 E.A 243 where it said:

“In *Nyamogo And 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 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 options, a clear case of error apparent on the face of the record would be made up. An error which has to be established by a long-drawn process of reasoning or on points where there may conceivably be two options can hardly be said to be an error 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 also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.” Emphasis mine.



There is also a useful passage in the 13th Edition Of Mulla On The Indian Code Of Civil Procedure on the issue of review. It reads:

“A mere error of law is not a ground for review under this rule. It must further be an error on the face of the record. The line of demarcation between an error simpliciter and an error apparent on the face of the record may sometimes be thin. It can be said of an error that it is apparent on the face of the record when it is obvious and self-evident and does not require and elaborate argument to be established.” *Emphasis mine.*

12. It must be obvious therefore that in a situation such as obtains in this case, where the Applicant is inviting this Court to look at proceedings in another file to prove his case, that does not amount to a “mistake or error apparent on the face of the record” as envisaged under the relevant Rules.
13. Finally, even if the Applicant had availed the evidence that the order of stay had been served upon the Trial Magistrate who nonetheless proceeded to deliver the judgment in Busia ELC Case No 82 of 2020, I do not think this Court would have delivered any other ruling other than the ruling delivered on 25th July 2024. This is because, by the time this Court delivered its ruling on 28th September 2023 arresting the judgment in Busia ELC Case No 82 of 2020, that judgment had already been delivered as far back as 6th September 2023 by Hon. P. Olengo Senior Principal Magistrate. This is how I addressed that issue in my ruling delivered on 25th July 2024 at paragraph 12:

“However, it is now common ground that the Applicant has a judgment delivered on 6th September 2023 in his favour with respect to the counter-claim in Busia CMC ELC No 82 of 2020. Therefore, by the time this Court was delivering its ruling on 28th September 2023 arresting the judgment in the subordinate Court, that judgment had already been delivered three (3) weeks earlier. That means there was really nothing left to be stayed on 28th September 2023 by this Court.”

Therefore, even if it had been demonstrated that Hon. P. Olengo Senior Principal Magistrate had been duly served with the orders of this Court staying the proceedings “Busia ELC Case No 82 of 2020” but he had ignored it and proceeded with the trial and subsequent judgment, there would really be nothing else which this Court would have done. That would have been a matter to be addressed in a different forum. For purposes of this Court, once it was demonstrated that the judgment sought to be stayed had already been delivered long before the stay orders were issued, that was the end of the matter in so far as the application before this Court was concerned. There can be no basis really upon which this Court can purport to review its ruling delivered on 25th July 2024. The invitation to do so must therefore be declined.

14. The up-shot of all the above is that the Notice of Motion dated 7th August 2024 is devoid of merit. It is accordingly dismissed with costs.

BOAZ N. OLAO

JUDGE

18TH FEBRUARY 2025

Ruling dated, signed and delivered on this 18th day of February 2025 by way of electronic mail.

BOAZ N. OLAO

JUDGE



18TH FEBRUARY 2025

