



REPUBLIC OF KENYA



**Apondi v Obiba & 6 others (Environment & Land Case
29 of 2018) [2025] KEELC 3015 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 3015 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 29 OF 2018**

**AA OMOLLO, J
MARCH 27, 2025**

BETWEEN

LEONORA APONDI PLAINTIFF

AND

PETER JOLANA OBIBA 1ST DEFENDANT

MARY NABWIRE BWIRE 2ND DEFENDANT

REGINA WANGIRA 3RD DEFENDANT

JONANES BOY OKOBA 4TH DEFENDANT

JAMES WAFULA WANGIRA 5TH DEFENDANT

LAND REGISTRAR BUSIA COUNTY 6TH DEFENDANT

HON ATTORNEY GENERAL 7TH DEFENDANT

RULING

1. For determination is the application dated 17th September 2024 which is brought under the overriding Sections of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. The Application is filed by the 5th Defendant (hereafter referred to as Applicant) and seeks for orders:
 - i. Spent
 - ii. Spent
 - iii. That the Honourable Court do issue an Order of temporary Injunction against the Respondent from selling, alienating and or in any way interfering with Land Parcel NO Bunyala/Bulemia/8354, 8440, 8441, 8442, 8443, 8444 and 8445 all created from land parcel No. Bunyala/Bulemia/309.



- iv. That the Honourable Court be pleased to Review and or vary the Judgment and other consequential orders of 22/6/2022.
 - v. That in any event the Honourable Court be pleased to allow and admit fresh evidence in support of the Applicant's claim and or defence to ownership of suit property Bunyala/Bulemia/309 or its derivatives.
 - vi. That in any event the Honourable Court do issue all and any such orders as are appropriate in the circumstance of the case.
 - vii. That costs of this application be provided for.
2. The application is brought on the following grounds:
- a. That there is fresh and new evidence in support of the Applicant's position and claim to property subject matter of suit land Bunyala/Bulemia/309 and any of its derivatives as now subdivided into NO. Bunyala/Bulemia/8354, 8440, 8441, 8442, 8443, 8444 and 8445.
 - b. That the implementation of the decree as passed on the ground has the effect of causing injustice to the 5th Defendant/Applicant whose property as developed on the ground is greatly affected.
 - c. That the property of the late husband who purportedly sold the land to the Respondent was inherited by other persons as the 2nd house belonging to the deceased husband's estate was never considered in the apportionment of land.
3. The application was also supported by the affidavit of Leonora Apondi sworn on 17/9/2024. She deposed inter alia, that the implementation of the decree will negatively affect her as she has extensively developed her property. She deposes that there is fresh and new evidence in support of her claim which was never considered during the trial as regards her ownership of the suit property L.R Bunyala/Bulemia/309.
4. She avers that among the crucial evidence that was left out is that the portion of the suit property of her late husband which is purported to have been sold to the Respondent was inherited by other persons/dependants of the deceased from the 2nd house. Further, that the property of the 2nd house which forms part of her husband's estate was never considered in the apportionment of land. That the Plaintiff/Respondent will not suffer any prejudice if any temporary orders of stay is granted.
5. I have not seen any response by the Plaintiff in the file sent to me from Busia.
6. The Applicant filed written submissions dated 22/9/2024 in prosecuting her motion. She submitted that a keen look at the prayers sought by the Plaintiff/Respondent in his pleadings differs from what the Court awarded. That the Plaintiff was awarded 3 acres contrary to what he prayed for. Further the Court failed to take note in the judgment "the fact that the entire Bunyala/Bulemia/309 as previously was, was to be equally shared amongst the previous owners 2 houses (wives) and their respective children."
7. Hence the decision of the Court in awarding the Respondent half of the land and failing to consider all beneficiaries has the effect of rendering the Applicant and others homeless. That the evidence left out is that what was sold to the Plaintiff was inherited by dependants from the second house and have been occupying and utilizing the same for over 40 years now. She urged that the orders of review sought and the intended appeal should not be rendered an academic exercise and also that their only inheritance should not be disposed off and rendered internally displaced persons.



Analysis and Determination:

8. This application was not opposed but I am still obligated to consider the application on its merits. I am guided on this by the decision in the case of *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR where the Supreme Court of Kenya held that:

“...as a court of law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter. We see no such jurisdictional issue in the application before us. Hence we have proceeded to consider the facts before us as against the jurisprudence for grant of stay orders set by this Court...”

9. The 5th Defendant/Applicant has sought for review based on discovery of new and important evidence which the Applicant avers the Court did not consider while rendering judgment. The duty of this Court is to determine whether the application meets the threshold of Section 80 of *Civil Procedure Act* and or Order 45 (1) of the Rules.

10. Order 45 (1) states that:

45 (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.” (underline for emphasis).

11. The test put forth in the above provision of the law is that:

- 1. The Applicant must choose between lodging an appeal or applying for review but not take both steps.
- 2. She must demonstrate that the new and important evidence sought to be relied upon could not have been obtained despite due diligence having been undertaken.
- 3. A good point for appeal must not be confused as one that can be brought in a review application.



12. I have perused the record, there is mention that the 5th Defendant/Applicant filed a Notice of Appeal to the Court of Appeal. This was represented by the Applicant in the application dated 17/1/2024 where they sought orders of injunction pending appeal. Under paragraph 6 of that motion, she pleaded thus:

“That in any event, the honourable Court be pleased to issue any conservatory orders pending hearing and determination of the appeal filed.”
13. Consequently, having opted to lodge an appeal against the judgment of this Court, the present application amounts to an abuse of the Court process. The application should fail on this account.
14. In the event there is no appeal lodged, there is an argument fronted that there is discovery of new and important evidence which was not considered while rendering the judgment. The burden of proof is on the shoulders of the Applicant to display that indeed the evidence is new and this is stated under the proviso to order 45 (3) of the Civil Procedure Rules thus:

“Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.”
15. In this case, what the Applicant pleaded as new and important evidence is as set out in paragraph 6 of this ruling i.e. that the suit land Bunyala/Bulemia/309 which belonged to her late husband was to be shared equally between the two houses. Secondly, that the portion sold to the Plaintiff/Respondent comprises the share inherited by the second wife’s house.
16. The 5th Defendant/Applicant does not tell Court when this evidence came into her knowledge. It is the Court’s considered view and I so hold that the information about the shares of dependants was within the Applicant’s knowledge and or could have easily been obtained if she undertook due diligence. Further this Court lacks jurisdiction to determine who owns what shares of a deceased estate. In the absence of evidence/order from the probate and administration Court that settled the question of who is entitled to what portion of L.R Bunyala/Bulemia/309, what the Applicant refers to as new evidence does not meet the threshold for reviewing the findings of this court.
17. Thirdly, the Applicant submitted that this Court awarded the Plaintiff/Respondent more land than what was prayed for in the plaint. The entire land as per copy of green card produced in evidence showed the suit land measured 2.4 Ha. The Plaintiff had pleaded in paragraph 11 of the plaint and prayer (b) of the reliefs sought that the suit land be divided into two portions. One portion in favour of the 1st and the 2nd Defendants and the 2nd portion in favour of the Plaintiff.
18. The 1.2 Ha size of land awarded to the Plaintiff in the judgment rendered on 22/6/2022 amount to half of the suit property. The Applicant does not lay any basis to the claim that the 3 acres was not pleaded in the plaint yet it was granted. However, if they are unhappy with the size of land awarded, their recourse lies in appeal and not review because contesting the size of land awarded cannot be treated as mistake or error on the face of the record. (See the Case of National Bank Ltd v Ndungu Njau [1997]eKLR).
19. In light of the foregoing analysis, I hold that the application dated 17/9/2024 is without merit. It is dismissed and since it was not opposed, costs are not awarded.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF MARCH 2025.

A. OMOLLO

JUDGE

