



Kirionki & another v Olodaru & 2 others (Environment and Land Appeal 17 of 2021) [2025] KEELC 3091 (KLR) (3 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3091 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL 17 OF 2021**

MN MWANYALE, J

APRIL 3, 2025

BETWEEN

DANIEL KIRIONKI 1ST APPELLANT

NELLY PARANAI KINE 2ND APPELLANT

AND

OLE MUTAMPERIA OLODARU 1ST RESPONDENT

GIDEON PERE 2ND RESPONDENT

JULIUS PERE 3RD RESPONDENT

RULING

1. This Ruling is in respect of the Notice of Motion dated 18th September 2024 seeking orders as follows; -
 - i. A Review of the judgment/decree dated 13th March 2024, which upheld the judgment/decree of the subordinate court that dismissed the Appellant/Applicants suit with costs to the Respondent.
 - ii. The Applicant to be allowed to produce additional evidence, to wit, the Land Registrars and the Sub-county Surveyors Transmara East, West and South Sub-counties reports dated 24th July 2024 and 19th July 2024.
 - iii. The Appellant/Applicant be allowed to file a supplementary record of Appeal incorporating the reports dated 24th July 2024 and 19th July 2024 respectively lodged in court on 24th July 2024.
 - iv. The court to hear a fresh and/or allow submissions on the basis of additional evidence and make determination based on those submissions.



2. The Application is premised on sections 78(i) d and (2) of the *Civil Procedure Act*, Section 13 of the *Environment and Land Court Act* Order 42 Rules 27, 28 and 29 of the *Civil Procedure Rule*, Order 45 Order 51 Sections 1AB, 3, 3A and 80 of the *Civil Procedure Act* as well as Article 50(1) and 159(2) and 162 of the *constitution*.
3. The Application is based on grounds interalia; -
 - i. That their Appeal against the judgment in the subordinate court was dismissed with costs and in the said dismissal the court ordered that the Land Registrar and Sub-county Surveyor re-establish the boundary markings of Transmara/Shartuka/971 within 90 days of Judgment and file a report on the implementation.
 - ii. The said order of the court was implemented, there having been no appeal against the discharge of stay of execution orders issued on 6th May 2024.
 - iii. The reports confirmed the Appellants position which they held in the trial court and in the Appeal that Transmara/Shartuka/971 does not exist in the lands record as it does not appear in the Registry Index Map, and that the Respondents are in occupation of the suit property registered in the name of Joseph Mpaiyo Ole Kine.
 - iv. That the additional evidence sought to be adduced ins relevant to the Appeal and the trial court and interests of justice would be served if the same was adduced; thus, the instant application so that the Reports can confirm the Appellants/Applicants side of their story.
4. The Application is supported by the supporting affidavit of Nelly Paranai Kine who reiterates the grounds in support of the application and has annexed the Complaint, in the Lower Court, the title deed and certificate of Official Search, a Memorandum of Appeal and a decree.
5. She depones that there is sufficient cause to warrant the judgment and or decree herein to be reviewed and/or set aside; as the Reports filed in court confirm the position they held before the trial court and in the Appeal that L.R No. Transmara/Shartuka/971 does not exist in the Lands record nor does it appear in the Registry Index Map and that the reports therein confirm that the Respondents are in occupation of the suit property registered in the name of Joseph Mpayio Ole Kine (deceased).
6. Thus, there is sufficient cause to warrant variation and/or Review of the judgment/decree.
7. In response to the application the 1st Respondent Gideon Leshan Ole Pere filed a Replying affidavit,
 - i. narrating the cause of litigation before the trial court and the Appeal herein leading to Judgment in this Appeal that upheld the judgment in the lower court.
 - ii. That Transmara/Shartuka/971 exists on the ground as confirmed by the judgment of this court delivered on 13th March 2024.
 - iii. That there is no discovery of new and important matter or evidence which after exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by them before decree was passed hence application does not meet the conditions set out in Order 45 Rule 1 of the *Civil Procedure Rules*.
 - iv. That in so far as there is no new evidence the court is functus officio and the application ought to be dismissed.
8. The court directed filing of submissions in respect of the application.



Applicant Submissions

9. The Applicant framed and submitted on 4 issues.
10. Issue 1 whether the court has jurisdiction to review the judgment and/or decree made on 13th March 2024. The Applicant submits that the court has jurisdiction under Section 80 of the [Civil Procedure Act](#) and Order 45 of the [Civil Procedure Rules](#). The applicants submit that their application is premised on sufficient cause and have defined what sufficient cause is citing the decision in the case of [Wilson Cheboi Vs. Samuel Kipsang Cheboi](#) (2019) eKLR.
11. And that it is the duty of the applicant to demonstrate sufficient cause to warrant an order for review of the decree, which in this case was new evidence that was obtained vide the court order, which order has not been set aside.
12. On issued number 2, the Applicant that the decree dated 13th March 2024 was fully implemented by the visit of the Land Registrar and Surveyor culminating into the new evidence.
13. On issue number 3, the Applicant submit that an Appellate court like this one has powers under Section 78 of the [Civil Procedure Act](#) to allow production of additional evidence. The Applicant submit that the evidence was not within their reach save for the court order.
That they have demonstrated sufficient cause to warrant production of the additional evidence.
14. On issue 4 the Applicant submits that the Application is merited. They place reliance on the decision in the case of [Attorney General Vs. Zinj Limited](#) (KESC) 63 KLR on the applicable principles to allow additional evidence.
15. On the strength of the above they argue the court to allow the application.

Respondents Submissions

16. The Respondents have submitted on two issued for determination.
17. On issue number 1 it is their submissions that there is no discovery of new important matter or evidence as envisaged under Order 45(1) (c) to warrant a review of the judgment.
18. That the contents of the report dated 24th July 2024 and 19th July 2024 was already in the knowledge of the Applicant having being the testimony of PW1 before Justice Okongo, as well as testimony of DW1, was also subject of a ruling dated 17th September 2019.
19. That the ground of any other sufficient cause can only be considered when the grounds are analogous to the two other grounds; as held in [Sadar Mohammed Vs. Charan Singh](#) quoted by Mativo J, in [Republic Vs. Cabinet Secretary for Interior Ex-parte Abdullabi Said Salad](#) 2019 (eKLR)
20. The Respondent further placed reliance in the court of Appeal decision in [Pancras T. Swai Vs. Kenya Breweries](#), for the proposition that where there is no new evidence an order for adduction of new evidence fails.
21. The Respondent further submitted that adduction of additional evidence was not permissible where the evidence existed all along; and that the court was *functus officio*.
22. The Respondent urged court to dismiss the application.
23. The court wishes to note the undisputed facts in this application before framing issues for determination.



24. The undisputed facts are;
 - i. That there is a judgment that was delivered in respect of this Appeal.
 - ii. The application before court is a post-judgment application seeking review of the said judgment and other incidental orders.
25. Having analysed the application, the affidavits, the submissions and considered the law, the court frames the following as issues for determination;
 - i. Whether or not the application meets the conditions for Review applications?
 - ii. Whether the application is merited.?
 - iii. What orders ought to issue?
 - iv. Who bears the costs of this application?

Analysis And Determination

26. Order 45 Rule (1) of the Civil Procedure Rules and Section 80 of the [Civil Procedure Act](#) are the legal basis for an application for review. The Applicant has cited the above provisions as the foundation of their application.
27. Order 45 Rule 1 envisaged 3 scenarios for an application for review;
 - i. Discovery of new and important matter or evidence.
 - ii. Mistake or error apparent on the face of the record.
 - iii. Sufficient cause.
28. The applicant has cited sufficient cause to be grounds of filing the application; and that court shall examine the application under that lens, so as to determine whether the application meets the criteria.
29. With regard to discovery of new and important matter as well as mistake or error apparent on the face, the above conditions were not pleaded as grounds for review and hence would not aid the Applicant as no reliance was placed on them.
30. The Applicant has cited the decision in *Hon. Attorney General Vs. Law Society of Kenya and Another* Civil Appeal No. 133 of 2011 on the definition of sufficient cause or good cause where “sufficient cause or good cause” was generally defined “the burden placed n a litigant (usually by court or order) to show why a request should be granted in an action excused”, according to [black’s Law Dictionary](#)”
31. Is sufficient cause applicable in this application.
32. For purposes of a review application the court of Appeal in its decision in the case of [Nasibwa Wakenya Moses Vs. University of Nairobi and Another](#) 2019 (eKLR) quoted the decision in *Sadar Mohammed Vs. Charan Singh and Another* which held *interalia*; “Any other sufficient cause for purposes of review refers to grounds analogous to the other two for example error on the face of the record and discovery of new fact”.
33. In the matter before court, the Applicant submits that the reports dated 19th July 2024 and 24th July 2024 are new and important facts which were discovered after judgment pursuant to the order and which confirm what the Applicant had indicated before the trial court as well as this Appeal that Transmara/Shartuka/971 does not exist.



34. It is the court's view that if indeed the Applicants had maintained before the trial court and this Appeal that Transmara/Shartuka/971 did not exist, then the same cannot be new evidence as it was within their knowledge all through; and that cannot be sufficient cause, as although it is analogous to the ground on discovery, there is actually no discovery of new facts or evidence.
35. Thus, in answer to issue number 1, the court finds that the discovery made through in the reports Is not new as it existed hence was within Applicant's knowledge and the applicant has not met the conditions for a review.
36. On issue number 2, having found that the applicant has not met the conditions for review it follows that the application to adduce additional evidence is not merited more so because the additional new evidence sought to be adduced had been known to the Applicants before the passing of the decree before the Lower court and the Appeal herein. It is not new evidence.
37. The upshot is that the Application having not met the criteria for review is not merited and the same is dismissed with costs.

DATED AT KILGORIS THIS 3RD DAY OF APRIL, 2025.

HON. M.N MWANYALE

JUDGE

In the presence of

CA – Emmanuel

Mr. Otieno for the Applicant

Mr. Bunde for Mr. Ochillo for Respondents

