



REPUBLIC OF KENYA



**Gichohi v Mulwa (Environment and Land Appeal 9 of 2016)  
[2025] KEELC 3063 (KLR) (2 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3063 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL 9 OF 2016**

**SM KIBUNJA, J**

**APRIL 2, 2025**

**BETWEEN**

**EDWARD KARIUKI GICHOHI ..... APPELLANT**

**AND**

**HENRY MULWA ..... RESPONDENT**

**RULING**

**Notice of Motion Dated 30th October 2024**

1. The appellant/applicant moved the court through the notice of motion dated 30th October 2024, seeking for the following orders:
  - a. Spent.
  - b. That the firm of Bunde Mangaro & Co. Advocates be granted leave to act for the Appellant/Applicant herein in place of Muthee & Partners Advocates.
  - c. That there be stay of execution of the judgment Decree of 8<sup>th</sup> 4/2016 issued in CMCC 2402 of 2009 between *Henry Mulwa v Edward Kariuki* pending the inter-partes hearing and determination of the application herein.
  - d. That the orders of this court of 27th day of July 2021 striking out the record of appeal for non-compliance be reviewed and/or set aside and the appeal be reinstated.
  - e. The Applicant be granted leave to file a supplementary record of appeal within 30 days.
  - f. Costs of the application be in the cause.”



The application is based on the nineteen (19) grounds on its face and supported by the affidavit of Edward Kariuki Gichohi, appellant, sworn on 30th October 2024, in which he inter alia deposed that the trial court delivered a judgment on 8th April 2016 in favour of the respondent directing that property be shared on 50/50 basis, including payment of rent cost; that he was aggrieved and filed this appeal and obtained an order for stay pending determination of appeal; that when the appeal came up for directions, his previous counsel was ordered to file a supplementary record, including certified copies of proceedings and decree which were not available at the time of filing of appeal; that the said advocates failed to file the same despite several reminders and on 27th July 2021, the court struck out the appeal for non-compliance; that he was forced to engage Khatib & Co. Advocates to act for him in matter, but the said firm latter declined to represent him citing conflict of interest; that he then the new advocates who have obtained a signed consent from Muthee LLP & Partners Advocates to come on record; that there is sufficient or new evidence to warrant a review of the afore said ruling as the proceedings had not been typed or certified; that the trial court on 3rd October 2024 directed that he vacates and give vacant possession in 30 days, though the decree had not ordered vacant possession; that the proceedings have now been typed and he is willing to file supplementary record of appeal within 30 days and prosecute the appeal; that the respondent has moved to execute the trial court judgment by evicting him from the suit premises, and he will suffer irreparable harm if the application is not allowed as he lives on there.

2. The application is opposed by Henry Mulwa, the respondent, through the replying affidavit sworn on 19th November 2024, inter alia deposing that the appeal was dismissed on 27th July 2021, and it had emanated from the trial court's judgement of 8<sup>th</sup> April 2016, about eight years seven months ago; that from the date the appeal was dismissed on 27<sup>th</sup> July 2021 to the date of filing this application, a period of over three years four months has lapsed and there has been delay in filing the application; that the appellant has not disclosed that he has filed another application for stay before the trial court; that this application was filed after the trial court orders of 27<sup>th</sup> August 2024 and 3<sup>rd</sup> October 2024 to vacate from the suit property and committal to civil jail; that the house without land that is subject matter in the suit and appeal was sold by public auction; that the application does not meet the threshold for review, as the alleged the new evidence has already been addressed in his notice of motion dated 16th October 2017 that resulted in this court striking out the appeal on 27th July 2021; that the applicant owes him money as his share after the share of the house and reviewing the order will only be an academic exercise and the application should be dismissed.
3. The learned counsel for the appellant and the respondent filed their submissions dated 4th February 2025 and 11th December 2024 respectively, which the court has considered.
4. The following are the issues for determinations by the court:
  - a. Whether the appellant has met the threshold for review of the order sought.
  - b. Who bears the costs?
5. The court has after carefully considering the grounds on the notice of motion, affidavit evidence by parties, submissions by the learned counsel, superior courts decisions cited come to the following determinations:
  - a. Other than the prayer (b) for leave for Ms. Bunde Mangaro & Company Advocates to come on record for the appellant/applicant in place of Ms. Muthee & Partners Advocates, the other prayers remaining for determinations are (d) & (e), which seeks for the orders of this court of 27th day of July 2021 striking out the record of appeal for non-compliance to be reviewed and/or set aside and the appeal be reinstated and for the Applicant be granted leave to file a



supplementary record of appeal within 30 days. The prayer for review of the ruling dated 27th July 2021 is said to be based on new evidence or sufficient evidence. Review of orders/decrees is provided for under section 80 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya, and is guided by Order 45 Rule 1 of the [Civil Procedure Rules](#) which states:

“ 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.”

This provision has been considered in several superior courts decisions, including the case of [Republic v Public Procurement Administrative Review Board & 2 others](#) [2018] eKLR where it was held that:

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds;

- (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 there is a requirement that the application has to be made without unreasonable delay.”

Similarly, in the case of [Ajit Kumar Rath v State of Orisa & Others](#), 9 Supreme Court Cases 596 at Page 608 the supreme court of India had this to say:-

“ the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that



the expression “any other sufficient reason” ..... means a reason sufficiently analogous to those specified in the rule”

Also in the case of *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR the court proffered the following principles from a number of authorities:

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. The expression “any other sufficient reason” appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
- ix. Section 80 of the *Civil Procedure Code* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Code* does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
- x. The power of a civil court to review its judgment/decision is traceable in Section 80 *CPC*. The grounds on which review can be sought are enumerated in Order 45 Rule 1.”



- b. The new evidence or sufficient cause that the appellant/applicant alleges is that the trial court's proceedings had not been typed at the time, and that it is now ready and he can file the supplement record of appeal in thirty (30) days. I have perused the ruling sought to be reviewed, that was delivered on 27<sup>th</sup> July 2021, to confirm whether the issue of delay in obtaining typed proceedings from the trial court was dealt, and noted at paragraph 23, the court as follows:

“23. .... the Appellant has onus to ensure the judgment of the trial court is typed and certified as well as to extract the Decree in order to make his record complete. From the material on record, the Appellant has not demonstrated to court the steps he took to follow up on the lower court file since he filed the record of appeal on 5th May 2016. The Appellant did not extract the orders this court made on 17th October 2018, summoning the Executive Officer to attend court to explain why the lower court file cannot be traced. This court had extended the summons severally but the appellant did not adduce evidence showing that he had served the Executive Officer with the summons. The Appellant had not demonstrated to the court that he followed up with the Deputy Registrar on the status of the lower court as directed by the court.”

Applying the principles set out in the superior courts decisions cited above to the instant application and it being so clear from the above extract of the impugned ruling that indeed the issue of the trial court's proceedings was dealt with, then the court finds what the appellant/applicant alleges to be new and or sufficient evidence is not actually new or sufficient for purposes of the review order sought. The prayer for review is therefore without merit. The prayer for review having been declined, it follows that the prayer for leave to file a supplementary record of appeal has no basis and also fails.

- c. Even, assuming that it is true that the trial court's proceedings were not typed at the material time, the court would have expected the appellant/applicant to disclose clearly the date he received the certified proceedings, and to attach a copy thereof to enable the court to peruse it and confirm when it was indeed certified, with a view of seeking for the court's discretion under section 3A of the *Civil Procedure Act*. To grant the applicant's/appellant's prayer for review would be to say the least against the overriding objectives of this court under sections 1A and 1B of the *Civil Procedure Act*, as the appeal was struck out after he failed to comply with the court's directions and bringing the application so late in the day relying on grounds already canvassed upon amount to an abuse of court process. Further, the filing of applications for stay of execution orders by the appellant/applicant as shown by the respondent before this court and the trial court without full disclosure is not only unprofessional conduct on the part of counsel who is an officer of the court also amounts to an abuse of court process.
- d. The review or setting aside of court orders striking out an appeal can only be done on a case by case basis, as was discussed in the case of *Nyutu Agrovat Limited v Airtel Networks Limited* [2015] eKLR. In this application, even assuming that the appellant was right when he stated that the proceedings had not been typed by the time the ruling of 27<sup>th</sup> July 2021 was delivered, and also assuming that he took steps thereafter in following up on the typing of proceedings, the factual position seen from the memorandum of sale dated 8<sup>th</sup> December 2022 that is attached to the replying affidavit shows that the suit house had already been sold through auction. That as the suit house has now legally changed hands, and the buyer is not



joined in the proceeding, reviewing or setting aside the order of 27<sup>th</sup> July 2021, would result to orders prejudicial to a third party being issued without according them a fair hearing.

- e. Though I find no merit in prayers (d) and (e) of the notice of motion dated the 30<sup>th</sup> October 2024, I find no prejudice will be suffered by granting the appellant/applicant prayer (b) for the new counsel to come on record for him.
- f. In civil litigations, costs follow the event as provided for by section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya, unless where the court for good cause orders differently. In the case of *Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 Others* [2013] eKLR the court cited with approval the case of *Levben Products v Alexander Films (SA) (PTY) Ltd* 1957 (4) SA 225 (SR) at 227 where the Court held;

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (*Fripp v Gibbon & Co.*, 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

The appellant/applicant having failed in his application, the successful party is therefore the respondent, who has triumphantly defended it, and is awarded costs.

6. From the foregoing conclusions on the application dated the 30<sup>th</sup> October 2024, the court finds and orders as follows:
  - a. That other than prayer (b) for Ms. Bunde Mangaro & Company Advocates to come on record for the appellant, which is allowed, the rest of the application is without merit is hereby dismissed.
  - b. The appellant to bear the respondent's costs.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 2<sup>ND</sup> DAY OF APRIL 2025.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In the presence of:

Appellant/Applicant : M/s Juma for Bunde

Respondent : Mr Mutugi

Shitemi – Court Assistant.

**S. M.KIBUNJA, J.**

**ELC MOMBASA.**

