



REPUBLIC OF KENYA



KENYA LAW
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**Mbindah & another v Mwende & 10 others (Environment & Land
Case 32 of 2021) [2025] KEELC 4183 (KLR) (30 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4183 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 32 OF 2021**

**AE DENA, J
MAY 30, 2025**

BETWEEN

CHRISTOPHER MBINDAH 1ST PLAINTIFF

THE ADMINISTRATOR OF THE ESTATE OF PANCRAS

MBINDAH 2ND PLAINTIFF

AND

CLAUDE MWENDE 1ST DEFENDANT

GEORGE OGINGA 2ND DEFENDANT

ODHIAMBO OGORO 3RD DEFENDANT

OTIENO GORO 4TH DEFENDANT

PHILEMON OMONDI 5TH DEFENDANT

JOHN OMONDI 6TH DEFENDANT

JOHN MARK OMONDI 7TH DEFENDANT

RUEBEN ONYANGO OHOLA 8TH DEFENDANT

ODHIAMBO ORARE 9TH DEFENDANT

OOKO OMWANDA 10TH DEFENDANT

HENRY MOI MARANJE 11TH DEFENDANT



RULING

1. The subject of this ruling is the Notice of Motion application dated 26/11/2024 brought under section 1A, 1B, 3, 3A and section 80 of the Civil Procedure Act, and Order 45 of the Civil Procedure Rules. The said application seeks the following orders:
 1. Spent
 2. The Honorable court be pleased to set aside, review and /or vary the judgement and decree issued herein by the honorable court on the 26th day of September 2024 dismissing the Plaintiff's/Applicants suit with costs.
 3. That the costs of the application be provided for.
2. The application is supported by an affidavit of Christopher Mbinda the 1st plaintiff sworn on 26/11/2024 with authority of the 2nd plaintiff. It is deponed that plaintiffs filed the suit by way of plaint dated 23rd October 2013, which suit was initially filed in the Environmental and Land Court in Kisumu as ELC No, ELC No, 291 of 2013 and was later transferred to Siaya vide ELC No. 32 of 2021. In the suit they sought a permanent injunction restraining the Defendants/Respondents from getting into, remaining in, trespassing on all the property known as North Ugenya Ndega/587, North Ugenya /Ndenga/589, and North Ugenya Ndega/591.
3. That subsequently they instructed their Counsel to file an amended plaint pursuant to the leave granted by the court which he did but inadvertently forgot to date and sign it. The counsel realized the error and placed a signed copy dated 11th October 2023 in the court file. That the signed and dated amended plaint was not considered, despite it being placed in the court file.
4. The deponent further states that the omission to sign and date the amended plaint was on the part of the Advocate and the plaintiffs should not be punished for the same. That they are prejudiced by the non-consideration of their dated and signed Amended plaint placed in the court file by their Counsel since the issues raised were not dealt with. This entailed the Land Registrar's report dated 18th May 2012 which indicated that the 1st and 2nd Defendant's toilet had partly intruded on the access road.
5. It is also deponed that the judgment keeps referring to the Registrar's report as one dated 12th May 2012 yet it is in-fact dated 18th May 2012. It is prayed that the Judgment and decree made on 26th September 2024 which is highly prejudicial to them be set aside and the amended plaint be considered.
6. In a rebuttal, the 1st and 2nd Defendants/Respondents filed grounds of opposition dated 6th December 2024 stating that:
 1. This Honorable court cannot exercise its review jurisdiction under order 45 of the Civil Procedure Rules and section 80 of the Civil Procedure Act where an active appeal has been preferred to a superior court on the same subject matter and between the same parties.
 2. The reliefs of Review and Appeal are not simultaneously available to an aggrieved party, such as the Applicant herein, that once a party opts for appeal the remedy of review cannot at the same time be available to the same party.
 3. That the Applicant is flagrantly abusing and disregarding the provisions of the Civil Procedure Act and Rules since they have already preferred an appeal to the Court of Appeal over the same issues.



4. That the application is vexatious and brought in bad faith with the sole intention of frustrating the 1st & 2nd Respondents from enjoying the fruits of their judgment delivered on 26th September 2024.
5. That the application on the face of it is frivolous as the applicants have not demonstrated sufficient cause for grounds upon which the court can exercise its discretion to grant the orders sought,
7. The 1st and 2nd Defendants/Respondents have also filed a replying affidavit dated 6th December 2024 in rebutting the Applicant's application. It is stated there's a Notice of Appeal dated 26th September 2024, properly on record, lodged by the Applicant on 2nd October 2024. That legally, a litigant cannot exercise the right to appeal and review concurrently. That if the Applicant is genuinely aggrieved by the judgment of the court, he should move to the Court of Appeal to seek determination on whether the court improperly exercised its discretion or erred.
8. The applicant exercised their right of further reply by a supplementary affidavit sworn on 31/01/2025. It is deponed that the Notice of Appeal herein is an intention to appeal the judgement and does not amount to filing the substantive appeal which is signified by filing a Record of Appeal. That the respondent has not denied there is an error in terms of the description of the land registrars report necessitating review. The allegations in paragraph 15 of the respondents affidavit are specifically denied.
The rest of the defendants did not participate in the

Submissions

9. The application was canvassed by way of written submissions and oral highlighting of the same. The applicants submissions filed by the firm of J.A. Guserwa & Company Advocates are dated 11th February 2025. The Respondents submissions filed by the firm of Wasuna & Company advocates are dated 16/02/2025.

Analysis And Determination

10. I have considered the application, its supporting affidavit, the grounds of opposition, together with the Replying affidavit, the submissions of the parties and judicial precedents cited. I find the issues for determination is whether the court has jurisdiction to hear and determine the application and whether the reliefs sought should issue.
11. The application is brought under the provisions of section 1A, 1B, 3, 3A and 80 of the [Civil Procedure Act](#) and Order 45 of the Civil Procedure Rules.
12. Section 80 reads
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.
13. Order 45 provides as follows;-
 1. Application for review of decree or order [Order 45, rule 1]



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.

Whether the court has jurisdiction to hear and determine the application

14. It is highly contested whether this court is clothed with jurisdiction to hear and determine the present application for the reason that an appeal has been filed in the Court of Appeal. Indeed it is trite law that jurisdiction is everything and without it the court cannot do anything, it must down its tools. Any determination made outside jurisdiction would be null and void. The applicant contends they only filed a Notice of Appeal which connotes an intention to appeal the judgement and it is not an appeal.
15. When is an appeal considered an appeal? I have read the two precedents cited by the respondent and none of them dealt with the issue of whether there was an appeal filed by dint of the Notice of Appeal. The court therein looked at jurisdiction from the perspective that a court cannot seat on appeal of its own judgement. The applicant relied on its own interpretation of the provisions of order 45 herein.
16. The Court of Appeal in *Multi Choice (Kenya) Limited Vs. Wananchi Group (Kenya)Ltd & 2 Others (2020)eKLR* faced with an Appeal from a ruling of Justice Mumbi Ngugi (as she then was) where two issues had emerged namely whether under Order 45, the filing of a notice of appeal to the court of appeal is or is not a bar to the filing of an application for review. The learned Judge, observed from her research that, there are several conflicting decisions on this point, both from the High Court but also from the Court of Appeal. The Superior court in the end chose to go with the authorities that state that a notice of appeal is not an appeal but is a means through which a party evinces an intention to appeal. This seems to be the position taken by the applicant in the present case.
17. The Court of Appeal stated thus (and I have picked selected relevant excerpts) with regard to the provisions of section 80 of the *Civil Procedure Act* and Order 45;-

‘Both provisions require no further elucidation as they are as clear as they can be; that a party will only be entitled to seek review, if he has not preferred an appeal or if there is no right of appeal. While the statement requires no explanation, the dispute is on the question of, when an appeal is “preferred”? Or put differently, is a notice of appeal an appeal?’
18. The Court of Appeal went further to state as follows; -

‘It is the notice of appeal, evincing the aggrieved party’s intention to challenge, in this Court the impugned decision, that gives jurisdiction to the courts to entertain applications under Rule 5(2)(b) and Order 42 rule 6(4),’ respectively. For the purposes of the latter, an appeal



to the Court of Appeal is “deemed to have been filed when under the Rules of that Court notice of appeal has been given”. This is the only instance, as far as I am concerned, where the notice of appeal is treated as an appeal, yet strictly speaking, the two are distinct. It has been explained before that a notice of appeal will be treated as an appeal only for the very specific and limited purpose of enabling a party who has lost in the superior courts below to seek an order of stay of execution, or of proceedings, or an injunction before this Court.

19. The Court of Appeal also stated thus:-

‘An appeal is preceded by lodgment of a notice of appeal. If appeal is not instituted within the appointed time above, the notice of appeal will, by the provisions of Rules 83 and 84 be deemed to have been withdrawn or struck out, as the case may be.

To construe the provisions of Order 45 and to answer the question, whether a notice of appeal is an appeal, the court has to do so with reference to all the relevant provisions. This brings me to the crux of the first limb of this appeal, at which point it is apposite to state that as far my reading of the authorities in this field goes, there has never been any major inconsistencies in interpretation of Order 45, both by the High Court and this Court. Save for the case of Kisy Investments Ltd, (supra), all the rest of the decisions cited to us by both sides are actually in agreement, as I will shortly illustrate by the review of sampled decisions, including those cited in the appeal; that the court has jurisdiction to entertain an application for review where only the notice of appeal has been lodged. Conversely, the court will not hear an application for review when an appeal has been instituted under Rule 82 of this Court’s rules.

20. Emphasis is mine in all the foregoing excerpts.

21. Guided by the above elucidation and the facts before this court it is my finding that the applicant therefore is well within the law to have filed the application before this court notwithstanding the Notice of Appeal filed in the Court of Appeal. I would in any case add that the same has been deemed to have been struck out or withdrawn going by the applicant’s confession that they have not taken any further action to file the Record of Appeal since then.

Whether the reliefs sought should issue.

22. I will now proceed to review the merits or otherwise of the application.

23. From the provisions of section 80 and order 45 herein, the powers to review is discretionary. However further guidance on the exercise of this discretion is provided under Order 45 which requires the following grounds should exist: -

- a. Discovery of a new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
- b. There was a mistake or error apparent on the face of the record; or
- c. Any other sufficient reasons; and
- d. The application must be made without unreasonable delay

24. The applicant has emphasized in its submissions that they are specifically moving the court on the basis of sufficient reason. Therefore, it is submitted that the signing and filing of an undated Amended plaint was the mistake by counsel which ought not to be meted against the innocent litigant.



25. What then entails sufficient reason? Mativo J (as he then was) in Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR had this to say; -

‘A court can review a judgment for any other sufficient reason. In the case of Sadar Mohamed vs Charan Signh and Another [16] it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter..... Where the application is based on sufficient reason it is for the Court to exercise its discretion. I am not persuaded that the reasons offered by the applicant amounts to ‘sufficient reason’ within the meaning of the rules cited above nor is it analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1. My finding is fortified by the holding in the case of Evan Bwire vs Andrew Nginda [20] where the court held that ‘an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh...’

26. Guided by the above dictum I must be cautious because the clear gist of the application before me is to re-open the case afresh by setting aside the judgement.

27. In the instant application, the Applicant has admitted filing an Amended Plaintiff that was neither dated nor signed and thereafter placed on record a signed dated copy. It is submitted by the respondent that the later copy does not bear the automated court stamp as per the current practice. That there was no demonstration either that it bore a physical court stamp if it was received by the registry. This is termed as an attempt to introduce new evidence.

28. Is an error committed by counsel sufficient reason for purposes of the provisions herein. The applicant submits that a mistake by counsel does warrant an order for review. What I hear counsel for the applicant to be saying is that this error of counsel resulted into the striking out of a pleading.

29. I think it is not enough to state that the mistake of an advocate on record should not be visited upon a client. What the court exercising the discretion is also enjoined to consider is the pronouncement with regard to the issue in the impugned decision and ensure that it does not seat on an appeal of its own decision. I’m guided by the case of Republic V Cabinet Secretary for Interior and Co-Ordination of National Government Exparte Abdullahi Said Salad [2019] eKLR where the court stated thus; -

‘... I emphasize that review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible’.

30. I have read the judgement of the court. The issue of the plaintiff unsigned pleadings was dealt with as a stand alone issue, ‘whether the plaintiffs suit is incompetent.’ The analysis of this issue is covered under paragraphs 45 – 50 of the judgement. The court analysed and discussed the issue at length citing the law and judicial precedent in support of her finding that the amended plaintiff dated 12/10/2023 a nullity. This analysis and reasoning cannot be wished away by ostensibly on the basis that the learned Judge did not see the plaintiff. For me an analysis has been rendered, caselaw cited and a finding made and the matter becomes a point of appeal. I have noted the argument by counsel for the applicant that while rendering judgement the court did not consider the fact that the Plaintiff witness PW1 adopted the dated and signed amended Plaintiff dated 11th October 2023. This buttresses my argument even further for clearly the applicant is saying that this court erred since the document was adopted during the main hearing then it ought not to have been struck out. A review is by no means an appeal in disguise whereby an



alleged erroneous decision is reheard and corrected – see Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR.

31. This court will not seat on appeal of its own judgement and I decline to entertain that there is sufficient reason to warrant review when I'm clearly being invited to exercise appellate jurisdiction.
32. On the issue of error apparent on the face of the record I'm of the considered view that the issue will lie for consideration at the appellate forum whether the same went to the root of the judgement of the court.
33. I think I have said enough to demonstrate that the orders for review or even setting aside the judgement cannot issue and the application must be dismissed.
34. Consequently, the application dated 26/11/2024 is hereby dismissed with costs to the respondents who participated in the application.

DELIVERED AND DATED AT SIAYA THIS 30TH DAY OF MAY 2025

HON. LADY JUSTICE A.E. DENA

JUDGE

30/05/2025

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Museve for the Plaintiff/Applicant

Mr. Odhiambo appearing alongside Mr. Ondari for 1st and 2nd Defendant/Respondents

Court Assistant: Ishmael Orwa

