



**Gichinga v Gichinga (Environment & Land Case E032 of 2024)  
[2025] KEELC 1136 (KLR) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1136 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E032 OF 2024**

**A OMBWAYO, J  
MARCH 6, 2025**

**BETWEEN**

**JOYCE MUTHONI GICHINGA ..... APPELLANT**

**AND**

**JOHN GICHINGA ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal arising from the ruling of Honourable B. Ochieng Chief Magistrate, Nakuru delivered on 13th June, 2024 in Nakuru Civil Suit No E114 of 2022.
2. The Appellant filed a Memorandum of Appeal dated 4th July, 2024 appealing against the said ruling on the following grounds: -
  1. That the learned Magistrate erred in law and fact in dismissing the appellant’s application seeking to review the ruling delivered on 2/2/2023 which ruling facilitated eviction of the appellant from her matrimonial home situated on LR NO. 12570/46.
  2. That learned magistrate erred in law and fact in disregarding the merits of the appellant’s application for review which action facilitated eviction of the appellant from her matrimonial home by the respondent at the interlocutory stage before the matter was heard and determined on merit. 3. THAT the learned magistrate erred in law and fact in finding the appellant did not demonstrate sufficient grounds to warrant review of the impugned ruling despite glaring facts and evidence adduced by the appellant.
  4. That the learned magistrate erred in law and fact in failing to appreciate Joseph Ngugi Mugo “the alleged owner of the suit land” did not put in any affidavit in support of the claim by the respondent and only relied on the uncorroborated claims by the respondent which reliance was/is detrimental and prejudicial to the appellant.



5. That the learned magistrate erred in law and fact in failing to appreciate with precision the mistake created by the trial court in the impugned ruling which ruling empowered the respondent to evict the appellant from her matrimonial home and which eviction can only be carried out after the main suit has been heard and determined on merit.
  6. That the learned magistrate erred in law and fact in failing to consider the necessity for review of the impugned ruling based on the aforementioned mistake “apparent on the face of the record” of the trial court which forms a proper ground for review.
  7. That the learned magistrate erred in law and fact in failing to order reinstatement of the appellant into her matrimonial home despite the fact the appellant was evicted by the respondent on the basis of ruling of trial court which aided the unlawful acts of the respondents.
  8. That the learned magistrate erred in law and fact in dismissing the application for review by the appellant despite the appellant having demonstrated sufficient cause to warrant review in accordance with the prevailing position of the law.
  9. That the learned magistrate erred in law and fact in ignoring the danger of the impugned ruling which failed to appreciate irreparable harm caused to the appellant who was evicted from her matrimonial home.
  10. That the learned magistrate erred in law and in fact in failing to consider submissions by counsel on record for the appellant.
3. The Appellant seeks orders setting aside the trial court’s ruling dated 13th June, 2024, an order directing the Respondent to vacate the suit land and the Appellant be reinstated to her matrimonial home.

### **Brief Facts**

4. The Appellant vide an application dated 9th February, 2022 sought for a temporary injunction against the Respondent from trespassing into PLOT NO 46 on BLOCK 12570(LR 12570) the suit property herein. The Respondent in response filed his replying affidavit sworn on 5th May, 2022 where he denied that he owned the suit property but maintained that he was only a caretaker and that the same belonged to his brother Joseph Ngugi Mugo. The trial magistrate in his ruling delivered on 2nd February, 2023 dismissed the application.
5. The Appellant thereafter filed an application dated 16th May, 2023 seeking review of the said ruling where the trial magistrate dismissed the same on 13th June, 2024.
6. The above ruling now forms the basis of the present appeal which this court on 30th January, 2025 directed that the same be canvassed by way of written submissions.

### **Submissions**

7. Counsel for the Appellant filed her submissions dated 6th February, 2025 where she submits that the basis for the application for review was informed by the discovery of new evidence which was not available at the time the trial court made its ruling. She argues that even after due diligence the Appellant, the said document being a letter dated 1st March, 2000 could not have been discovered. She submits that the letter was evidence confirming that the Respondent was earning house allowance from Telkom Kenya his former employer. It was counsel’s submission that the payslip was evidence that the Respondent who is the Appellant’s husband earned housing allowance courtesy of a house built



on the suit land. She added that the same was sufficient evidence that she lived with the Respondent which the Respondent jointly bought with his brother.

8. Counsel submits that immediately the trial court dismissed the application for review, the Respondent hired goons who evicted the Appellant. She submits that the Respondent ought to be denied audience as his hands are tainted with illegality. She further argues that the Appellant had previously enjoyed peace when Hon. E Oboge issued a temporary injunction on 21st April, 2022 which the trial court unfortunately in his ruling created a gap giving the Respondent a chance to illegally evict the Appellant. It was counsel's submission that the trial court ought to have discovered the said danger suo motto and when the Appellant sought protection, she was dismissed. She argues that the court ought to have made clarification on injunction. She added that the Appellant despite providing evidence to warrant review, the same was dismissed. She relied on Article 162 (2) (b) of *the constitution* of Kenya and Order 45 of the Civil Procedure Rules and submits that the eviction orders are only to be issued once parties have been heard on merit. She submits that the move by trial court in dismissing the application for review was premature. It was her submission that the review was based on discovery of new and important evidence which was not within the Appellant's knowledge even after exercise of due diligence. She relied on the case of James Maina Kimemia V James Maina Kimemia & Another [2019] eKLR. She further submits that the Appellant sufficiently demonstrated the need for review but the same was dismissed. She cited the case of Hon Attorney General V the Law Society of Kenya & Another Civil Appeal No 133 of 2011 and Article 159 of *the constitution*. She submits that the trial court went out of his scope of jurisdiction by considering extraneous facts and evidence. She added that injunctive orders are meant to preserve a subject matter pending hearing of the suit which was not the case. In conclusion, she urged the court to set aside the ruling and order the Appellant be reinstated to her matrimonial home pending hearing and determination of the main suit.
9. Counsel for the Respondent filed her submissions dated 20th February, 2025 where she identified three issues for determination. The first issue was whether there was an error/mistake apparent on the face of record. She relied on Order 45 Rule 1 of the Civil Procedure Rules and the case of Josiah *V Nyaga (Civil Appeal 34 of 2021)* [2023] KEHC 2054 (KLR). She submits that the Appellant did not specify the exact error hence the same is not apparent on the face of record. It was her submission that the application dated 16th May, 2023 together with the supporting affidavit did not mention any error or mistake on the face of record.
10. The third issue was whether there was new and important evidence provided by the Appellant. While submitting in the negative, she argues that the alleged document from Telkom Kenya confirming that the Respondent was drawing allowance was not annexed in the supporting affidavit. She added that the trial court noted that no new evidence had been presented. She further submits that the supporting affidavit reiterated matters already canvassed through the application dated 9th February, 2022. On the final issue, counsel urged the court to dismiss the appeal with costs.

### **Analysis and Determination**

11. This court has considered the record of appeal and the parties' submissions and the main issue for determination is whether the appeal is merited.
12. Section 80 of the *Civil Procedure Act* provides that:

“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 order, and the court make such order thereon as it thinks fit.”

Order 45 Rule 1 of the Civil Procedure Rules provides that:

“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 the judgment to the court which passed the decree or made the order without unreasonable delay.” In the instant case, the Appellant contends that there was discovery of new or important matter of evidence that she could not have placed before the trial before the ruling was delivered on 2nd February, 2023. It was trite law that the Appellant ought to have shown to the satisfaction of the trial court that there was discovery of new and important matter of evidence which was not within her knowledge or could not be produced at the time the ruling was made.

13. It was the Appellant’s case that the letter dated 1st March, 2000 from Telkom Kenya confirming that the Respondent was earning house allowance from their matrimonial property could not be obtained even after due diligence. In the case of Stephen Wanyoike Kinuthia (Suing on behalf of John Kinuthia Marega (deceased) v Kariuki Marega & another [2018] KECA 623 (KLR) the court held that:

“We emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation.”

14. I have keenly perused the Appellant’s supporting affidavit in the application dated 16th May, 2023 and it is a fact that the alleged letter was never annexed as evidence. The appellant has not demonstrated sufficient reasons to demonstrate that she attempted to obtain the letter but could not do so. It is my view that the said evidence therefore does not meet the threshold of discovery of new and important evidence to warrant review. In view of the same, I find that the trial magistrate did not err in dismissing the application for review. The upshot of the foregoing is that the appeal lacks merit and is hereby dismissed with costs. It is so ordered.

**SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO**

**THE JUDICIARY OF KENYA.**

**NAKURU ENVIRONMENT AND LAND COURT**

**ENVIRONMENT AND LAND COURT DATE: 2025-03-06 16:55:12**

