



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mukhwana v Nzoia Sugar Company Limited & 10 others (Environment and Land Appeal 7 of 2019) [2025] KEELC 3775 (KLR) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3775 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL 7 OF 2019**

**EC CHERONO, J**

**MAY 8, 2025**

**BETWEEN**

**JOHN SILIKHANI MUKHWANA ..... APPLICANT**

**AND**

**NZOIA SUGAR COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MIKE SITABUKA FWAMBA ..... 2<sup>ND</sup> RESPONDENT**

**TOM BARASA MUTANDA ..... 3<sup>RD</sup> RESPONDENT**

**JAMES WAFULA FWAMBA ..... 4<sup>TH</sup> RESPONDENT**

**REUBEN MUTANDA SARIFF ..... 5<sup>TH</sup> RESPONDENT**

**SIKUKU WAKHUNGU WANJUSI ..... 6<sup>TH</sup> RESPONDENT**

**GEOFFREY NGANGA ..... 7<sup>TH</sup> RESPONDENT**

**ISAAC BIOUKHA WANGORO ..... 8<sup>TH</sup> RESPONDENT**

**RICHARD MUTANDA ..... 9<sup>TH</sup> RESPONDENT**

**JOHN CHEMONGE ..... 10<sup>TH</sup> RESPONDENT**

**MOSES MUTANDA ..... 11<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the Notice of Motion Application dated 20/12/2024 filed by the Applicant under Section 1A,1B,3,3A,78 of the [Civil Procedure Act](#), Orders 22 and 45 of the Civil Procedure Rules seeking the following orders: -

a. Spent.



- b. Spent.
  - c. That this honourable court be pleased to review its judgment dated, signed and delivered at Bungoma on the 11/10/2024.
  - d. That upon reviewing the same, the honourable court be pleased to take additional evidence or to require the evidence be taken.
  - e. Costs be provided for.
  - f. Any other relief this honourable court deems necessary to serve ends of justice.
2. The application is premised on the grounds on the face thereof and further supported by the affidavit of the Applicant sworn on even date. The Applicant deposed that although both this court and the lower court have delivered their respective judgments over this matter, he has discovered new evidence. The said evidence is that although his name was included as an attendee of a community meeting held on 08/01/2023 which resolved that a road pass through various parcels of land including his, he never participated in the said meeting and that his name was falsely included among those present.
  3. He further deposed that contrary to the evidence that the road existed as far back as the year 1976, the contents of the abovementioned meeting disclose otherwise. That his complaints about the road emerged in the year 2024 after the said meeting. That he obtained a map dated September 1969 which shows the position of the road and which clearly diminishes the report of the land registrar and surveyor relied on by this court. The applicant equally filed a further affidavit dated 03/03/2025.
  4. The 1<sup>st</sup> Respondent filed a replying affidavit sworn by Rita Mukhongo dated 12/02/2025 in which she deposed that the minutes of the meeting held on 08/01/2003 indicate that the Respondent was absent and not present as alleged by the Applicant therefore, misleading to this court. It was argued that the assertion that the land registrar and surveyor in their report distorted the truth was baseless and a mischievous calculation to defeat justice. That the Applicant has not demonstrated the existence of new evidence or error on the record to warrant the orders sought. The court was urged to dismiss the application.
  5. When the said application came for directions, it was directed that the same be canvassed by way of written submissions. The Applicant filed two sets of submissions dated 06/01/2025 and 03/03/2025 and reiterated the contents of his supporting and further affidavit. The Respondents on their part filed submissions dated 30/04/2025.
  6. I have considered the material placed before me in this matter.

Order 45 rule 1(b) of the Civil Procedure Rules, provides as follows:

- “(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.”

7. The foregoing provisions are based on section 80 of the *Civil Procedure Act* Cap 21 Laws of Kenya which states as follows:

“ 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.”

8. Discussing the scope of review, the Supreme Court of India in the case of *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608. 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 stabilising it. It may be pointed out that the expression “any other sufficient reason” ..... means a reason sufficiently analogous to those specified in the rule”

9. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 John M. Mativo Judge culled out the following principles from a number of authorities: -

- a. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- b. The expression “any other sufficient reason” appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- c. 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.
- d. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.



- e. 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.
  - f. 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.
  - g. 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.
  - h. 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.
  - i. 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.
  - j. 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.
10. Thus, in an application for review based on discovery of new and important evidence, the court must exercise caution to prevent a party against whom a decision has been entered from procuring new evidence so as to strengthen or change the complexion of the case.
11. This case is one of negligence and lack of diligence during trial, rather than the discovery of new and important evidence that was previously unavailable despite due diligence. The applicant appears to be seeking a second bite at the cherry rather than presenting genuinely new findings. Upon examining the documents submitted, it is evident that the Applicant aims to re-open the case and have it re-evaluated for reasons unrelated to the discovery of fresh evidence. These documents should have been in the applicant's possession, especially considering that he initiated both suits before the lower court and this court. Therefore, he cannot now claim that he was unable to obtain them despite exercising due diligence.
12. Furthermore, the evidence presented does not impact the court's findings. Contrary to the Applicant's claim that the minutes of 08/01/2003 resolved to open a road, the records indicate that the discussion was about the maintenance of an existing road. Additionally, the Applicant only requested maps of the area after the court had already delivered its judgment and decree.
13. In the end, the applicant has been unable to demonstrate the discovery of new and important matter or evidence which was not within his knowledge or which could not be produced at the time of the trial. If anything, all the evidence which the Applicant now alludes to was not only well within his knowledge but was completely irrelevant for the purposes of the dispute before this Court. For that reason alone, this application must fail.
14. For the reasons stated hereinabove, the Notice of Motion dated December 20, 2024 does not meet the threshold for the grant of an order of review; thus, devoid of merit and it is hereby dismissed with costs.



15. Orders Accordingly.

**DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 08<sup>TH</sup> DAY OF MAY, 2025.**

.....

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

Appellant-present.

M/S Masengeli for the Respondent.

Bett C/A.

