



Nthenge v Mwasaru & 3 others (Sued in Their Capacities as Office Bearers of Ushirika Boma Welfare Society); Mwasaru & 3 others (Sued in Their Capacities as Office Bearers of Ushirika Boma Welfare Society) (Plaintiff to the Counterclaim); Nthenge & 6 others (Defendant to the Counterclaim) (Environment & Land Case 148 of 2018) [2025] KEELC 3539 (KLR) (6 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3539 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 148 OF 2018**

AY KOROSS, J

MAY 6, 2025

BETWEEN

JONAH KISESE NTHENGE PLAINTIFF

AND

TEODA MWASARU, NYONGESA WAFULA, ROSEMARY WANJIRU & AMOS MUSYOKA (SUED IN THEIR CAPACITIES AS OFFICE BEARERS OF USHIRIKA BOMA WELFARE SOCIETY) DEFENDANT

AND

TEODA MWASARU, NYONGESA WAFULA, ROSEMARY WANJIRU & AMOS MUSYOKA (SUED IN THEIR CAPACITIES AS OFFICE BEARERS OF USHIRIKA BOMA WELFARE SOCIETY) PLAINTIFF TO THE COUNTERCLAIM

AND

**JONAH KISESE NTHENGE DEFENDANT TO THE COUNTERCLAIM
MBUKONI HOLDINGS LIMITED DEFENDANT TO THE COUNTERCLAIM
THOMAS WAMBUA DEFENDANT TO THE COUNTERCLAIM
RUTH NZULA DEFENDANT TO THE COUNTERCLAIM
COMMISSIONER OF LANDS DEFENDANT TO THE COUNTERCLAIM
REGISTRAR OF TITLES DEFENDANT TO THE COUNTERCLAIM
DISTRICT LAND REGISTRAR, MACHAKOS DEFENDANT TO THE COUNTERCLAIM**



RULING

1. The notice of motion that is the subject of this ruling is dated 14/05/2024 whereby this court has been moved within the provisions of Articles 48 & 159 of *the Constitution* of Kenya, Sections 1A, 3A and 80 of the *Civil Procedure Act* and Orders 1 Rule 3, 10 Rules 10 & 11, 12 Rule 7, 22, 45 Rule 1 and 51 Rule 1 of the Civil Procedure Rules.
2. In the motion, the plaintiff sought several reliefs, some of which have been granted, and the following outstanding prayers are pending determination before this court: -
 - a. Leave be granted to the law firm of Musee Manyolo & Associates Advocates to come on record as advocates of the plaintiff in place of the firm of F.M. Mulwa Advocate.
 - b. This honourable court be pleased to set aside the judgment of 9/02/2024, the proceedings therein, all consequential orders thereto, and the matter be heard de novo.
 - c. This honourable court does review the orders it granted in the judgment delivered on 9/4/2024.
 - d. Costs of the motion be in the cause.
3. The motion is supported by the grounds set out in the body thereof and the supporting affidavit of the plaintiff that was deposed on 10/05/2024.
4. In brief, it was stated there was an error and/or mistake apparent on the face of the record, and the court proceeded to hear a matter that was conducted and concluded by an advocate who was not properly on record and had no authority to address the court.
5. Furthermore, it was argued that the entire proceedings were therefore irregular and the court ought not to have relied on them in its judgment, the mistake of an advocate should not be visited upon the innocent client, and it would be in the interests of justice if the orders sought were granted.

Defendant's case (defendant in the original case)

6. It opposed the motion by its grounds of opposition dated 14/06/2024 and a replying affidavit deposed by one of its officials, Nyongesa Wafula, on 20/06/2024.
7. The reasons advanced in the grounds of opposition were inter alia, all parties were heard during the trial with the plaintiff being represented by R.K. Mutua Advocate; the judgment was regular, procedural and legal; the grounds raised are matters for appeal and not review; the motion was an abuse of the court process and lastly, it fell far short the threshold for review.
8. Turning to the replying affidavit, it was stated in the proceedings, the plaintiff was initially represented by F.M. Mulwa Advocate and upon his demise, R.K. Mutua Advocate, represented him.
9. He read mischief in the motion, which, from his perspective, was intended to derail the enjoyment of the judgment by the defendant and argued the court did not make a mistake as it merely struck out the plaintiff's submissions and exercised its discretion in ensuring due fidelity of the law.
10. Moreover, he stated that an erroneous conclusion of law or evidence was not a ground for review.
11. Notably, the other parties in this matter did not file any documents in opposition to the motion.



Submissions and preliminary issues

12. Despite stringent timelines being given to file written submissions and leave for the plaintiff to file a supplementary affidavit on diverse dates of 19/9/2024 and 10/02/2025, both the plaintiff and defendant in the original suit did not comply.
13. Therefore, the submissions by M/s. Musee Manyolo & Associates Advocates dated 15/01/2025 and the plaintiff's further affidavit deposed on 4/11/2024 are hereby expunged from the record. Further, if the firm of Ms. Arusei & Co. Advocates files its submissions, they shall be considered as having been filed out of time.
14. Additionally, although the plaintiff has relied on several provisions of law that deal with setting aside judgments for non-appearance or non-attendance, they do not arise in the circumstances of this case, and clearly, the relief for setting aside the judgment is misplaced as this matter was heard on merits upon hearing all parties.

Issues for determination.

15. I have carefully considered the motion, its grounds, grounds of opposition and affidavits, and the following issues, which shall be handled concurrently, arise for determination;
 - a. Whether Musee Manyolo & Associates Advocates should be granted leave to come on record as advocates of the plaintiff.
 - b. Whether the plaintiff has met the threshold to warrant a review of the orders that were issued in the judgment rendered on 29/04/2024.
 - c. What orders should be issued, including an order as to costs?

Analysis and Determination

a. Whether Musee Manyolo & Associates Advocates should be granted leave to come on record as advocates of the plaintiff.

16. Order 9 Rule 9 of the Civil Procedure Rules captures the post-judgment process where an advocate or party seeks to come on record in place of an advocate who was previously on record. This provision provides as follows;

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

- (a) upon an application with notice to all the parties; or
 - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
17. This proviso does not impede a litigant from choosing an advocate of its choice, and the mischief of this legal provision is to cure instances of a litigant circumventing paying the legal fees of an advocate who was previously on record and also to inform the court and parties of such a change.
 18. However, it outlines procedures to be adhered to and if a party seeks to change Advocates, post-judgment, the first scenario is that the incoming advocate or litigant who now wants to act in person



must make a formal application to the court with notice to all parties who participated in the suit for grant of leave to come on record or act in person.

19. In the alternate scenario, the incoming advocate or litigant in person has to obtain the written consent of the previous advocate on record, file the consent in court, and then seek leave to come on record.
20. It was undisputed that the proprietor or one of the proprietors of the law firm of F.M. Mulwa Advocate is deceased; nevertheless, this court is uncertain of the status of the firm.
21. This is particularly so because it was not disclosed if the operations of the law firm were taken over by an administrator as envisaged by Regulation 14 of the Law Society of Kenya (General) Regulations or if the operations of the law firm are being operated by a partner.
22. However, there is no evidence of service of the motion on the administrator law firm or the firm of F.M. Mulwa Advocate, as the case may be; therefore, and in accordance with the law, the motion is unsustainable.

b. Whether the plaintiff has met the threshold to warrant a review of the orders that were issued in its judgment rendered on 29/04/2024.

23. The applicable provisions that govern the review of court decisions are encapsulated by Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 states 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 made the order, and the court may make such order thereon as it thinks fit.”

24. Further, Order 45 Rule 1 (1) 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.”

25. Additionally, Order 45 Rule 3 reveals that:

“(1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.”



26. The salient conditions brought out in Order 45 Rule 1 (1) of the Civil Procedure Rules, such as the discovery of new and important matter, mistake, and sufficient cause have to be proved by an applicant, and in dealing with such applications, the court has to exercise its judicious discretion.

27. Further, this court associates itself with the decision of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR where the Court of Appeal stated: -

“On an application for review, it is particularly necessary that the application should disclose in the body of the notice of motion the ground or grounds on which the review is being sought...A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

28. Having outlined the law and jurisprudence on the grounds for revision, this court has examined the grounds in support of the motion, and the only ground posited on its face is that there was an error and or mistake because the case was handled by R.K. Mutua Advocate who allegedly was not properly on record.

29. Since the issue of mistake has been raised, it is pertinent to look at the definition of mistake. The Court of Appeal in the case of *Intercountries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees and 5 others* [2019] eKLR referred to Black’s Law Dictionary, which defined it as follows:

“1. An error, misconception, or misunderstanding; an erroneous belief. 2. Contracts. The situation in which either (1) the parties to a contract did not mean the same thing, or (2) at least one party had a belief that did not correspond to the facts of law. As a result, the contract may be voidable.”

30. Having considered the record and the Law Society of Kenya (General) Regulations and Order 9 Rule 1 of the Civil Procedure Rules, it emerges the plaintiff appointed the law firm of F.M. Mulwa Advocate to act for him, and that is the position that still obtains to date.

31. The plaintiff’s documents have always been filed by this law firm except for written submissions dated 14/11/2023, which were filed by the law firm of M/s. R.K. Mutua & Co. Advocates, which when considered by this court in its judgment, stated as follows: -

“On the issue as to the legality of documents filed by R. K. Mutua & Company Advocates, the record shows that the plaintiff’s pleadings and representation was done by the firm of F. M. Mulwa & Company Advocates and it is only the submissions that were filed by the firm of R. K. Mutua and Company Advocates. Therefore, the only document that was filed by the said firm are submissions. As there is no notice of change of advocates on record which is a requirement under Order 9 from 5 of the Civil Procedure Rules, it is clear that the plaintiff’s submissions were filed by a stranger and therefore the same are expunged from the court record.”



32. R.K. Mutua Advocate has always appeared in this matter either as holding brief for the law firm of F.M. Mulwa Advocate or as an advocate from this firm. At no time was this representation challenged by either party during the proceedings, and there was never a mistake on this.
33. The only time the court had an issue with the plaintiff's representation was when R.K. Mutua Advocate purportedly filed submissions using his law firm of M/s. R.K.Mutua & Co. Advocates without following the procedures envisaged under Order 9 Rule 5 of the Civil Procedure Rules.
34. Given this, it suffices that the plaintiff has failed to discharge that there was an error or mistake in its judgment. Therefore, this court agrees with the defendant and finds the motion has not met the threshold to warrant a revision.
35. Consequently, this court having rendered a final decision which was well within its purview, the plaintiff cannot now raise issues that should have been appropriately handled on appeal.
36. Having rendered its final decision, it follows that this court is functus officio. It must be noted the doctrine of functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision.
37. This doctrine was highlighted in the case of Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR which cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, "The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" [2005] 122 SALJ 832 which read: -

"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."
38. As a result, the plaintiff has not satisfied the ingredients for review, and if at all he is dissatisfied with the decision of this court, as it appears he is, the only avenue that was available to him was an appeal to the Court of Appeal and not otherwise.
39. Ultimately and for the reasons stated above, I find the motion dated 14/05/2024 not merited and it is hereby dismissed with costs to the defendants (in the original suit). This file is hereby effectively marked as closed.

It is so ordered.

DELIVERED AND DATED AT MACHAKOS THIS 6TH DAY OF MAY, 2025.

HON. A. Y. KOROSS

JUDGE

06.05.2025

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Mr Kibet holding brief for Mr Arusei for defendant/respondent

N/A for plaintiff



Ms Kanja- Court Assistant

