Mbugua & another (Suing as Legal Representatives of the Estate of Lawrence Githua Mbugua - Deceased) v Kariuki & 12 others (Environment and Land Case Civil Suit 104 of 2023) [2025] KEELC 4315 (KLR) (9 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4315 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT 104 OF 2023

OA ANGOTE, J

JUNE 9, 2025

BETWEEN

ELIZABETH WANJIKU MBUGUA ..... 1ST PLAINTIFF

SAMUEL MBUGUA GITHUA ..... 2ND PLAINTIFF

SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF LAWRENCE GITHUA MBUGUA - DECEASED

AND

STEPHEN GITAU KARIUKI ..... 1ST DEFENDANT

FRANCIS NGUNG'U KINYANJUI ..... 2ND DEFENDANT

FRANCIS NJOGU GITAU ..... 3RD DEFENDANT

PAUL NGUGI KAMAU ..... 4TH DEFENDANT

DAVID KAMAU NGUGI ..... 5TH DEFENDANT

JOSEPH NJENGA ..... 6TH DEFENDANT

PELAGIA KANYI KOIMBURI ..... 7TH DEFENDANT

MARIA WATETU ..... 8TH DEFENDANT

ESTHER WANGUI NDUNG'U ..... 9TH DEFENDANT

MARY WAMUHU KAMAU ..... 10TH DEFENDANT

LILIAN WAIRIMU KAMAU ..... 11TH DEFENDANT

REGISTRAR OF LANDS ..... 12TH DEFENDANT

ATTORNEY GENERAL ..... 13TH DEFENDANT

RULING

1. Before this court for determination is the Plaintiffs'/Applicants' Notice of Motion application dated 14th October, 2024, brought pursuant to the provisions of Sections 1A, 1B and 80 of the *Civil Procedure Act*, Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules seeking the following reliefs:

    i. That this Honourable Court be pleased to review and/or set aside its judgment in this suit that was delivered on the 25th January, 2024 and all consequential orders thereon.

    ii. That this Honourable Court do make any such further order(s) and issue any other relief that it may deem just in the circumstances.

    iii. That the costs of this Application be provided for.

2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Elizabeth Wanjiku Mbugua, the Plaintiff/Applicant, dated the 7th October, 2024 with due authority from her co-Plaintiff.

3. The 1st Plaintiff deponed that on 25th January, 2024, the court delivered judgment against them holding that land parcel number Muguga/Muguga/T.69 (suit property) is unregistered community land which was irregularly transferred from the Native Trust Board to Karanja Thuku and subsequently to the deceased, Lawrence Githua Mbugua.

4. She deponed that during these proceedings, it was their case that the deceased, Lawrence Guthua Mbugua, had lawfully purchased the suit property in 1982 and obtained legal and absolute title thereto; that in response, the Defendants contended that the title held by the deceased was fraudulently acquired and that this court found that the title was null and void ab initio on the grounds that no evidence had been adduced in court to show that the suit property underwent any process of adjudication before it was registered in favour of Karanja Thuku and thereafter the title issued to him, which title was then transferred to the deceased.

5. It was her deposition that consequently, they exercised diligence by doing further investigations at the offices of the Kiambu County Government, successor to the Kiambu County Council on the validity of the title to the suit property and established that Mr Karanja Thuku gave up his plot Muguga/Muguga/516(measuring 0.44Ha) to the County Council of Kiambu in exchange for the suit property and other parcels to wit:

Muguga/Muguga/T.69	0.25acres
Muguga/Muguga/T. 353	0.25acres
Muguga/Muguga/T. 204	0.25acres
Muguga/Muguga/T.361	0.25acres

6. According to Ms Mbugua, the Kiambu County Government issued them with letters dated 8th December, 1978, 8th December, 1980 and 8th December, 1981 affirming the aforesaid position and that

the County Government of Kiambu is ready, if summoned, to confirm the veracity of their records in this regard.

7. The availability of the aforementioned letters, it was deposed, is new and important evidence that shows that Mr. Karanja Thuku procedurally acquired the suit property from the Kiambu County Council/Native Land Trust Board and thereafter transferred it to the deceased.

8. It is the Plaintiffs' case that this evidence was not within their knowledge at the time of the institution of the suit up until the delivery of the judgment; that the interests of justice favour the review of the judgment as equity looks upon as done that which ought to be done and that equity will not suffer a wrong to be without a remedy.

9. Additionally, it was urged, no prejudice will be occasioned to the Defendants should the orders be granted having not acquired any proprietorship rights over the suit property.

10. In response to the Motion, the 1st-5th, 10th and 11th Defendants/Respondents filed a Preliminary Objection dated the 29th January, 2025 premised on the grounds that:

    i. Under Section 80 of the *Civil Procedure Act* and Order 44 of the Civil Procedure Rules, the review remedy is not available to the Plaintiff as it is only available to parties not appealing or have no right of appeal.

    ii. The Applicants herein have no right of review under Order 44 of the Civil Procedure Rules as they filed a Memorandum of Appeal on the 5th February, 2024.

    iii. The principle of res judicata under Section 7 of the Civil Procedure bars the same parties re-opening the matter and litigating on the same dispute as final judgment was rendered after a full hearing by Hon O.A Angote on 25th January, 2024.

    iv. The Application has no basis upon which the court can exercise its discretion.

    v. The Application is a total abuse of the court process as no excuse is given filed[sic] after matter was in court represented by Counsel from 2013 to 2024 giving them more than ample time to trace the documents.

    vi. The Plaintiffs are barred by the doctrine of laches as the Application has been brought after 11 years since case was commenced.

    vii. Other grounds to be adduced.

11. No other response was filed to the Motion.

Submissions

12. The Plaintiffs'/Applicants' counsel submitted that the courts in Yani Haryanto vs E.D & F.Man(sugar)Limited, Civil Appeal No 122 of 1992, The Chairman Board of Governors Highway Secondary School vs William Mmosi Moi, Civil Application No 277 of 2005 and Noradhco Kenya Limited vs Gloria Michele (1998)eKLR, have held that the filing of a Notice of Appeal does not preclude the filing of a Motion for review.

13. Counsel also referenced the cases of Kamau Ndirangu vs Commercial Bank of Africa(1994)eKLR and Multichoice (Kenya)Ltd vs Wananchi Group (Kenya) Limited Communications Commission of Kenya & Kenya Broadcasting Corporation[2020]KECA 633 KLR in this regard.

14. It was submitted that contrary to the Defendants' assertions, the fact of the delivery of the judgment does not preclude the court from determining the plea for review, and as such, it cannot be said that the Motion contravenes the principles of res judicata or that the court is functus. Reliance in this regard was placed on the case of Teresia Nyakairu vs George Otieno, HCCA No 11 of 2000.

15. In any event, it was urged, as guided by the cases of Mukisa Biscuits Manufactering Co Ltd vs West End Distributors[1969]E.A 696 and George Kamau Kimani & 4 Others vs the County Government of Trans-Nzoia & Anor [2014]eKLR, the plea of res judicata cannot be brought by way of Preliminary Objection.

16. Counsel urged that the Defendants' objection on laches is unfounded and the Motion has been brought less than a year after the judgment. As regards review, it was submitted that the same is subject to the discretion of the court, which discretion has to be exercised judiciously.

17. In this instance, it was submitted, there is discovery of new and important evidence as demonstrated in the Supporting Affidavit, which information was not available to the Plaintiffs during the pendency of the proceedings. It was urged that the interests of justice dictate that the Motion is granted.

18. The Defendants'/Respondents' Counsel submitted that reviews are only permitted where an Applicant demonstrates that he has not filed an appeal and in this case, a Notice of Appeal having been filed on 5th February, 2024, review cannot lie and that having failed to reveal the existence of the appeal, the Plaintiffs have come to court with unclean hands and are undeserving of the orders sought.

19. Counsel submitted that nonetheless, no new information has been demonstrated there being no evidence showing that the documents adduced could not be found and why they could not be found. It was submitted that the Plaintiffs took 8 months after judgment to file the present Motion and this constitutes unreasonable delay. Reliance was placed on the case of Orero vs Seko[1984]KLR 238 and Stephen Somek Takwanyi & Another vs David Mbuthis Githare & 2 Others, Milimani HCCC No 368 of 2009.

Analysis and Determination

20. Having considered the Motion, Preliminary Objection and submissions, the issues that arise for determination are:

    i. Whether the Preliminary Objection is competent and if so merited?

    ii. Whether the Plaintiffs/Applicants have made a case warranting the grant of orders for review?

21. The law on Preliminary Objections is now well settled. Law JA in Mukisa Biscuits Manufacturing Co. Ltd. vs West End Distributors (1969) EA 696 at 700 stated that:

> " ...a 'preliminary objection' consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

22. Newbold, P further held:

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing butt unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop."

23. Vide the objection, the Defendants/Respondents contend that the review remedy is not available to a party who has appealed; the Motion is barred by the principle of res judicata; that the application is an abuse of process, no reason having been given as to why the evidence now sought to be adduced was not adduced during the period the matter was in court and that the application is barred by the doctrine of laches.

24. Beginning with the contention that the Plaintiffs have no right of review having filed an appeal, the court opines that this is a proper objection. There is no dispute that there is a duly filed Notice of Appeal on record. What the court has been called upon to do is to determine whether, as a matter of law, the act of filing a Notice of Appeal extinguishes a party's right to subsequently seek a review. If the answer is in the affirmative, it will dispose of the Motion.

25. As regards the plea of res judicata, the same bars re-litigation of matters that have been conclusively determined by a court of competent jurisdiction. A finding of res judicata is dispositive, barring the court from proceeding with the matter. In the circumstances, the plea of res judicata being alleged to have arisen within these same proceedings, the same will be discernible from the court record and does not necessitate any evidential inquiry. The court finds that this constitutes a proper preliminary issue.

26. With respect to the Defendants' assertions that the Motion constitutes an abuse of court process due to the Plaintiffs failure to offer any explanation for not tracing and producing the documents at an earlier stage, this is not a pure point of law capable of being determined as preliminary objection.

27. Rather, it requires factual and evidentiary examination as to whether the evidence does indeed constitute new information as per the parameters of Order 45 of the Civil Procedure Rules, and may call on the court's discretion in determining whether the explanation for the delayed presentation of evidence is credible.

28. Similarly, the invocation of the doctrine of laches, which is an equitable defence premised on unreasonable delay that prejudices the opposing party requires the court to interrogate the length of the delay, the reasons for it, and whether it has caused demonstrable prejudice to the opposing party. These are inherently factual matters that cannot be assumed or inferred without a proper evidentiary foundation. As such, they fall outside the scope of what constitutes a proper preliminary objection.

29. Having found that the questions of whether the doctrine of res judicata has been contravened, and whether the filing of a Notice of Appeal precludes an Applicant from invoking this court's review jurisdiction are proper preliminary questions, the court will determine whether they are merited.

30. The law on res judicata is found in Section 7 of the *Civil Procedure Act*, which provides that:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court

competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

31. This doctrine applies to bar subsequent proceedings when there has been adjudication by a court of competent and/or concurrent jurisdiction which conclusively determined the rights of the parties with regard to all or any matters in controversy. [See the Supreme Court Case of John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment)]

32. The present Motion is to be distinguished from one that would be barred by the doctrine of res judicata as discussed above. The legal framework governing the court's jurisdiction to review its own decisions is found in Section 80 of the *Civil Procedure Act* and Order 45, Rule 1(1) of the Civil Procedure Rules, which allows the court to re-examine its own decisions where the conditions stipulated in the aforesaid provisions are met. This plea fails.

33. As aforesaid, the law governing the framework of review is set out in Section 80 of the *Civil Procedure Act* and Order 45, Rule 1(1) of the Civil Procedure Rules. Section 80 of the Act provides as follows:

> " 80. 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."

34. Whereas Order 45 Rule 1(1) of the Civil Procedure Rules, 2010 provides as follows:

> " 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 review of judgment to the court which passed the decree or made the order without unreasonable delay."

35. It is clear from the foregoing that the avenue of review is only available to a party who, although has a right to challenge the decision in question by an appeal, is not appealing or to whom there is no right of appeal. In other words, a person cannot concurrently exercise the right of appeal and review. This position was affirmed by the Court of Appeal in Multichoice (Kenya) Ltd vs Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR which observed that:

> " It is now an accepted view that both the Civil Procedure Rules and the Court of Appeal Rules did not contemplate the simultaneous proceedings of review and appeal before two

different courts at the same time. Where a party has filed an appeal but subsequently wishes to apply to the court from which the appeal came to review the decision impugned, that party must, in the first place withdraw the appeal."

36. According to the Defendants, the Motion herein goes against the express provisions of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules for the reasons that the same has been proffered after the filing of an appeal. The Plaintiffs on the other hand contend that what they have merely filed a Notice of Appeal which does not constitute an appeal for purposes of a review application.

37. The question that lends itself from the foregoing is what constitutes an appeal for purposes of review proceedings? In the case of Kisya Investments Ltd vs Attorney General & another [1996] eKLR the court held that:

> " The principal and the only ground of appeal urged before us was that the first defendant having filed a Notice of Appeal which was struck out it cannot by a subsequent application made thereafter proceed by way of a review...A review application is incompetent after appeal is preferred."

38. Taking a similar position, the Court of Appeal in Multipurpose Co-operative Society Ltd vs Serser & 3 others (Civil Appeal 160 of 2018) [2023] KECA 441 (KLR) (14 April 2023) (Judgment) stated as follows:

> " We have given anxious consideration to that decision. It appears to suggest that even though an appellant had filed a Notice of Appeal, it would still be open to him to file an application for review, provided that he had not yet pursued the option of the appeal to its logical conclusion.
>
> To our minds, that implies that it is open to the appellant to commence the process of appeal, and then take a pause, so that he could pursue the option of a review first. That would imply that the appellant had the two options (of review and of an appeal) running concurrently. Yet the court did not conclude that both options cannot be pursued concurrently or one after the other.
>
> In the case of Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR, this Court expressed itself thus; Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed it would then pursue the appeal. It was gambling with the law and judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place. There can be no place for review once an intention to appeal has been intimated by filing a notice of appeal. (See: Kamalakshi Amma vs A. Karthayani [2001] AIHC 2264). The respondent's application for review was thus incompetent, hence the court did not have jurisdiction to grant the orders sought under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules." We are persuaded that this is the correct position in law. We say so because a party who had filed a notice of appeal is permitted to invoke the provisions of Rule 5(2)b of the Court of Appeal Rules; the reason for that is that the said party is deemed to have lodged an appeal. Conversely, a party who had not yet lodged a notice of appeal cannot seek an order either for stay of execution or an injunction, pending the hearing of his appeal, because he would

not have instituted the appeal. Accordingly, when the appellant filed a notice of appeal, it is deemed to have instituted an appeal: and as soon as that happened, it was not open to the appellant to seek review of the judgment from which the appeal or the intended appeal accrued from. It is therefore, our finding that the learned Judge cannot be faulted for dismissing the appellant's application for review, on the grounds that the same was not available, since it was filed in contravention of Order 45 rule 1(a)."

39. In contrast, the Court of Appeal in Yani Haryanto vs. E. D. & F. Man. (Sugar) Limited Civil Appeal No. 122 of 1992 held:

> "…….A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including rule 79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed…What rule 4(1) of Order 41 of the Civil Procedure Rules prescribes for is an exception to the rule relating to the actual filing of the appeal which is rule 81(1) of the Court of Appeal Rules. The exception is the deeming of the appeal to be filed for the purposes of rule 4 of Order 41 only on the giving of the notice of appeal. Therefore despite the lodging of a notice of appeal the court has jurisdiction to entertain an application for review… An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 and the inclusion of a memorandum of appeal."

40. Affirming this position, the Court of Appeal in Multichoice (Kenya) Ltd vs Wananchi Group (Kenya) Limited & 2 Others (supra), stated:

> "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 as 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 Kisya Investments Ltd, (supra), all the rest of the decisions cited to us by both sides are actually in agreement, as I will shortly illustrated 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.
>
> …While it cannot be denied that Kisya Investments (supra) case has been followed in some cases, it is equally true that the predominant position by the courts is that the mere filing of the notice of appeal will not bar a party from taking out an application for review. I endorse that as the correct position."

41. Whereas there appears to be differing positions by the Court of Appeal as demonstrated hereinabove, the court is entitled to adopt either position. To that end, the court adopts the view in Multichoice Kenya (supra). Accordingly, the court finds that the filing of a Notice of Appeal does not preclude them from seeking review. The court therefore rejects the Defendants' objection on this ground.

42. In the end, the court finds the Preliminary Objection to be unmerited and will proceed to determine the merits of the Motion.

43. As aforesaid the statutory provisions governing review are Sections 80 of the *Civil Procedure Act* as read with Order 45 of the Civil Procedure Rules.

44. A reading of the above provisions makes it clear that Section 80 of the *Civil Procedure Act* grants the court the power to make orders for review, whereas Order 45 sets out the jurisdiction and scope of review by limiting the same to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.

45. Discussing this, the Court of Appeal in Benjoh Amalgamated Limited & Another vs Kenya Commercial Bank Limited [2014] eKLR observed that:

> "In the High court, both the *Civil Procedure Act* in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review".

46. By way of a brief background, the Plaintiffs instituted the present suit seeking inter-alia, a declaration that the deceased was the lawfully registered proprietor of land known as Muguga/Muguga/ T.69,(suit property), and an order for the eviction of the 1st to 11th Defendants and/or their agents, servants and/ or representative from the property.

47. It was their case that the deceased, Lawrence Githua Mbugua, is the registered proprietor of the suit property situated within Muguga Location, Kiambu County having purchased the same in 1982, from one Karanja Thuku and the same was registered in his name as provided for under the Registration of *Land Act*.

48. They averred that in December 2012, the deceased discovered that the 1st to 11th Defendants had trespassed and illegally occupied the suit land and despite asking them to vacate, they declined to do so.

49. In response, the 1st, 2nd, 3rd, 4th, 5th, 10th and 11th Defendants asserted that the land was community land held by the Native Land Trust Board on their behalf and that the suit property was fraudulently transferred to the deceased in breach of the community's land rights.

50. The Defendants filed a Counterclaim, in which they sought a declaration that the suit property is trust land and the registration thereof in the name of the deceased was fraudulent. Further, they sought orders that his registration be cancelled and the title to revert to the Native Land Trust Board.

51. The matter proceeded for hearing and vide its judgment, this court found that there was no evidence to show that Mr. Thuku legitimately purchased the suit property from the Kiambu County Council, and as such the title passed to the deceased was void ab initio. Similarly, the court found that the Plaintiffs' suit was barred by the provisions of Section 7 of the *Limitation of Actions Act*. The Plaintiffs' case failed.

52. The court issued a declaration that the suit property was unregistered community land which was irregularly transferred from the Native Trust Board, and directed the Land Registrar to cancel the registration of the land in the name of the deceased and the Plaintiff's name, and revert to the County Government of Kiambu.

53. The court also directed that the Defendants' interests in the suit property to be considered by the National Land Commission and the Kiambu County Government as provided for under *the Constitution* and the *Community Land Act* and any other relevant laws. The judgment aforesaid is the subject of the present Motion.

54. At the onset, the court will first consider whether the Motion has been brought without unreasonable delay as this is a crucial aspect pursuant to Order 45 rule 1 of the Civil Procedure Rules. This was buttressed by the Court of Appeal in the case of Francis Origo & another vs Jacob Kumali Mungala [2005] eKLR when it held thus:

> "...most importantly, the applicant must make the application for review without unreasonable delay."

55. What constitutes unreasonable delay is a matter of fact dependent on the circumstances of the case. The judgment in question was delivered on the 25th January, 2024 whereas the present Motion was filed on the 14th October, 2024, approximately 9 months later. Upon a careful consideration of the Affidavit in support of the Motion, the court notes that the Deponent has made no attempts to explain why it took him this long to file the present Motion. This period is unexplained and inordinate.

56. Nonetheless, the court will move on to the next ambit for purposes of completion.

57. The Plaintiff's Motion for review is based on the grounds of discovery of new and important evidence. Speaking to this, the court in Nasibwa Wakenya Mosesv University Of Nairobi & Another [2019] eKLR, stated as follows:

> "A review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was passed. The underlying object of this provision is neither to enable the court to write a second Judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial."

58. In Charles Kimaita Mwithimbu & another vs Edward Mutua M' Mwithiga [2016] eKLR the court stated as follows:

> "[8]The judgement was delivered on October 5, 2012 and this application was filed on November 26, 2012. There was, therefore, no delay in filing it. But besides that, the Applicant seems to rely on the ground of discovery of new and important matter or evidence. It is not enough to merely state that there has been a discovery of new and important matter or evidence. You must show that, at the time of the decree, the new and important matter or evidence which has now been discovered, was not within your knowledge or could not have been produced even after exercising due diligence at the time of the decree. This strict proof is a requirement of the law. See the proviso to Order 45 Rule 3 (2) of the Civil Procedure Rules...This threshold is meant to prevent attempt by unscrupulous parties to reopen lost cases with aim of mending the weak areas which were exactly the Achilles of the lost case."

59. This position was affirmed by the Court of Appeal in Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited (supra) where the learned judges stated:

> "Order 45 Rule 3(2) provides that an application for review shall, '...not be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within

his knowledge or could not be adduced by him when the decree was passed or made without strict proof of such allegation."

60. The Plaintiffs have adduced before this court evidence which they contend demonstrates that Mr. Karanja Thuku legitimately acquired the suit property from the Kiambu County Council. The evidence to that effect includes letters dated 8th December, 1978, 8th December, 1980 and 8th December, 1981 with respect to an exchange of plots between the Kiambu County Council and Mr. Karanja Thuku.

61. It is the Plaintiffs' case that they came across this information for the first time after conducting due diligence and further investigations after the determination of this court.

62. They state that the availability of the aforesaid documents constitute new and important evidence warranting the review of the judgment. The court has considered the same vis the principles laid out with respect to the aspect of discovery of new and important information. The jurisprudence laid out hereinabove makes it clear that a party cannot seek a review merely because additional evidence has become available after judgment.

63. The Applicant (s) must demonstrate that they had exercised all reasonable diligence and still could not access or produce the material evidence at the time of trial.

64. Indeed, if the information regarding the exchange of plots as between Kiambu County and Mr. Thuku alluded to was contained in official records of the Kiambu County Government dating back to the 1980's, it begs the question why the Plaintiffs did not seek to obtain or request such information at the time of filing the original suit. There is no indication that the records were confidential, restricted, or otherwise inaccessible at that time.

65. Consequently, the court is left with the conclusion that this attempt to introduce new material is, in essence, a belated effort to have a second bite at the cherry. As emphasized by the Court of Appeal in Gerald Kithu Muchange vs Catherine Muthoni Ngare & Another [2020] eKLR:

> " The applicant wants to have a second bite of the same cherry, and he cannot be permitted to do so...Litigation must come to an end somehow and it cannot be conducted on the basis of trial and error."

66. In any event, the suit was not only dismissed on the ground that the land vested in Kiambu County Government on behalf of the community, but also that the suit was time barred. That aspect cannot be cured by the alleged discovery of new evidence.

67. In the end, the court finds that the present Motion does not meet the legal threshold required under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.

68. Consequently, the Notice of Motion dated 14th October, 2024 is found to be unmerited and is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF JUNE, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Thiga for Plaintiff

No appearance for Defendant

Court Assistant: Tracy