



**Nyakech v Ayoo (Environment and Land Appeal E025 of 2023)
[2025] KEELC 4317 (KLR) (5 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4317 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E025 OF 2023**

AE DENA, J

JUNE 5, 2025

BETWEEN

GEORGE OMONDI NYAKECH APPELLANT

AND

FRANCIS OGOLA AYOO RESPONDENT

RULING

1. The subject of this ruling is the Notice of Motion application dated 26th January 2025. It seeks the following verbatim reliefs; -
 1. Spent
 2. That this Honourable court be pleased to review its judgment issued on 31st October, 2024 by Lady Justice Hon. A. Y. Koross.
 3. That the Court be pleased to grant interim orders of stay of execution of judgment issued on 31st October, 2024 pending the hearing and determination of this application.
 4. That the judgment issued on 31st October, 2024 be set aside for the sake of justice.
 5. The costs of this application be provided for
2. The application is premised on the following verbatim grounds ; -
 - a. That the Appellate court did not consider the substratum of the appeal thereby leaving the dispute between the parties unresolved.
 - b. That the reasoning of the trial court cannot be considered separately from the decree as the reasoning is what informs the decree or final orders.



- c. That the judgment of the appellate court has far reaching consequences in terms of the binding nature of superior court decisions on lower courts.
 - d. That the final judgment of the court has the effect of usurping superior court decisions that were clearly set out in the appeal by the appellant.
 - e. That the appellant/applicant is ready, willing and able to comply with directions and orders of the court for the interest of justice.
3. The application is supported by the affidavit of George Omondi Nyakech sworn on 26/01/2025. Attaching a copy of the judgement the deponent reiterates the grounds set out above. The applicant is further pained for seeing justice being meted out by way of procedural technicalities. That he has an arguable case with high chances of success. That if the orders are not sought the applicant is likely to suffer irreparable loss and damage.
 4. The 1st Respondent filed a statement dated 6/02/2025. It is stated that the application is a re-appeal and not an application. That time for appeal has lapsed and no application to file appeal out of time has been filed. That the matter has gone through the process of appeal, judgement delivered and taxation concluded. The irreparable loss and damages alleged to likely occur has not been enumerated and explained. It is also stated the grounds raised have not been explained, properly identified to enable the respondent respond appropriately. That while it is sought that the application be allowed in the interests of equity and justice it is stated that justice should be based on factual representations to the court. That the appellant was rushing to block taxation which is now overtaken by events, judgement having been delivered and costs awarded.
 5. The 1st also filed a document dubbed 'Objection to the Appeal' opposing the application which is according to him and appeal and or re-appeal. The grounds are stated as follows; -
 1. The appeal is not an appeal but reappeal since the first appeal was concluded in the same high Court of Siaya.
 2. The appeal was made outside time without following the due process. And this appeal was made as a knee jack reaction when the appellant was rushing to block taxation ruling that was due on 31st January 2025.
 3. There are no material facts enumerated by the applicant to warrant review and reopening of the case apart from verbal diarrhea.
 4. Two case have been filed and concluded on this matter. Currently two cases on the same matter are running as per the attached evidences.

Submissions.

6. The application was heard by way of written submissions. The applicants' submissions are dated 8/02/2025 filed by the firm of Jesse David Ochanyo & Kurgat Advocates and the 1st respondents 26/02/2025 are filed by Francis Ogola Ayoo the respondent in person.

Applicants' submissions.

7. Citing Article 50 and 25 of *the Constitution* of Kenya 2010 on the right to fair hearing and fair trial it is submitted that the entirety of the judgement herein dismissed the applicants appeal on technicalities throwing out of the window the fair hearing and determination of the matter on merits. Reliance is also placed on the decision of the learned Supreme Court Judge Njoki Ndungu in Evans Odhiambo



Kidero & 4 Others Vs Ferdinand Ndungu Waititu & 4 Others SC Petition No. 18 of 2014 where the court emphasized that no one should be condemned unheard.

8. Referring to article 159(2) of *the Constitution* it is further submitted that the provisions are couched in mandatory terms, that courts in exercising judicial authority should ensure that the purpose and principles of *the constitution* are protected and promoted. That the appeal has merits as demonstrated in the memorandum of appeal and in the event it is not heard to completion the applicant stands to lose his constitutional rights to appeal and to have his case heard on merit. That the right of a party to enjoy the fruits of his judgement must be weighed against the right of a party to access court.

Respondents Submissions.

9. It is submitted that the matter is res judicata several previous cases MCELC E 055/2022, ELCLA E025/2023 concluded and determined upto taxation. The submissions largely rehash the averments in the statement and grounds filed herein by the respondent. It is contended that the case is a re-appeal which has no legal standing since the appeal has been dealt with and the case fully closed. The application is termed an abuse of the court process. The same court cannot go against its own judgement. The court is invited to sustain the judgement dated 31/10/2024 and dismiss the application.

Analysis And Determination.

10. I have considered the application, the statement in response together with grounds filed by the respondent in opposition and the submissions of the parties. The main issue for determination in my view is whether the applicant has met requirements for the grant of review of the judgement herein.
11. The application is brought under the provisions of Order 45 Rule 1 of the civil procedure Rules, and the *Environment and Land Court Act*, Section 13, Rule 3.7 and section 19 and sections 1A, 1B & 3A of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya.
12. The right to apply for review is provided for under the provisions of Section 80 of the *Civil Procedure Act* read together with Order 45 of the Civil Procedure Rules.
13. Section 80 provides; -
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 ActMay apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
14. Order 45, rule 1 provides for Application for review of decree or order as follows;-
“ 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)

14. The parameters for grant of orders of review was discussed in the case of Khalif Sheikh Adan V Attorney General [2019] eKLR where the Learned Judge cited the Case of Republic –Vs- Public Procurement Administrative Review Board & 2 Others (2018) eKLR and stated thus;-

“ That the rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds:

- a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made;
- b) On account of some mistake or error apparent on the face of the record, or
- c) For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.

15. The courts discretion must therefore be exercised within the confines of the above elements. Is there a new and important discovery or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made? From my review of the grounds set out there is no new information that is being brought to the attention of court that would warrant the grant of the orders for review.

16. I find that no new material fact has been presented before the court for consideration.

17. I have read the judgement of the court delivered on 31st October 2024. The court upon identifying the issues for determination found it necessary to consider the shortcomings in the Memorandum of Appeal as a preliminary issue as it could dispose of the entire appeal. The court then proceeded to undertake a postmortem of the nature and form of the memorandum of appeal against the provisions of order 42 of the Civil Procedure Rules and also referred to judicial precedent. I note every ground was scrutinized against the law and precedents cited and the reasoning why it would not suffice given. All this cannot be swept under the carpet.

18. What I can say is that what is before the court is an applicant who is aggrieved by the dismissal of the appeal by this court on technicality and urges that the court ought to have been guided by the constitutional provisions that mandate the courts to render substantive justice without recourse to technicalities.

19. The above is a ground of appeal and this court cannot seat on appeal of its own judgement. I have not been led to any argument that there is no opportunity for a second appeal to the Court Appeal. The court is simply being invited to change its view and which is not the purpose for review.

20. 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’.

20. Further in the case of Evan Bwire V Andrew Aginda Civil Appeal No. 147 of 2006 cited in the case of Stephen Githua Kimani V Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR where the Court of Appeal held as follows:

“An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh.’

21. Was there an error on the face of the record? I will not spend time on this element because I have not been moved in this direction. Even if the court was moved in this regard my finding would be in the negative as the grounds raised for the application would not meet the test in Nyamogo & Nyamogo Advocates –Vs- Kogo (2001) 1EA 173 where the court stated thus;-

“An error on the face of the record can only be determined on the facts of each case. For an error of law on the face of the record to form a ground for review, it must be of a kind that stares one in the face and on which there could be reasonably be no two options. If a courts original view was a possible one, it cannot be a ground for a review even though it may be one for appeal...

22. The upshot of the foregoing is that the application dated 26th January 2025 must fail and is hereby dismissed.

23. As to costs of the application these are discretionary. I’m inclined to decline to award costs to the respondent. This is for the reason that the respondent in his statement and submissions used some offending language and unnecessarily attacked counsel on record. This is unacceptable, courts must be approached with decorum and respect.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 5TH DAY OF JUNE 2025.

A.E. DENA

JUDGE

5/6/2025

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

Mr. Ochanyo for applicants/appellant

No appearance for Respondent

Mr. Ishmael Orwa Court Assistant.

