



**Nyingi v Thuita (Environment & Land Case 214 of 2013)
[2025] KEELC 5135 (KLR) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5135 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 214 OF 2013**

**JO OLOLA, J
JULY 10, 2025**

BETWEEN

JAMES GATIBA NYINGI PLAINTIFF

AND

HELLEN WARUKIRA THUITA DEFENDANT

RULING

1. By the Notice of Motion dated 4th March, 2024, Hellen Warukira Thuita (the Applicant) prays for the following:
 1. Spent;
 2. That this Honourable Court be pleased to grant leave to M/s Gori, Ombongi & Co. Advocates to come on record for the Defendant/Applicant in place of C.M Kingori & Co. Advocates after Judgment and Decree have been passed;
 3. That this Honourable Court be pleased to order stay of execution of the Judgment delivered on the 2nd of November, 2023 and the decree therefrom;
 4. That this Honourable Court be pleased to review and/or set aside the Judgment which was delivered on the 2nd November, 2023;
 5. That in the alternative, but without prejudice to the powers of review, have the matter heard de novo; and
 6. That the costs of this application be provided for.
2. The application is supported by an Affidavit sworn by the Applicant and is premised on the grounds:
 - i) That the Applicant has been served with the notice to vacate Plot No. 35 Nyaribo (the suit property);



- ii) That the Applicant was not informed of the progress of the matter in Court by her former Advocates and only came to know of the outcome of the case after she was served with the Judgment and notice to vacate the suit property on the 18th of December, 2023;
 - iii) That the Applicant's former Advocates on record failed to file relevant documentary evidence which if the Court had taken into account would have led to a different result; and
 - iv) That the Applicant has been in possession and occupation of the suit property for over 11 years and has extensively developed it by putting up 19 rental houses/hostels for students and it is in the interest of justice that this application be granted.
3. James Gatiba Nyingi (the Respondent) is opposed to the application. In his Replying Affidavit sworn on 17th May, 2024, the Respondent avers that at the time of the hearing of this case and even now, the Applicant has nothing to prove her ownership of the suit property. The Respondent further avers that the entire application is premature, misconceived, incompetent, fatally defective and a mere waste of precious judicial time.
 4. I have carefully perused and considered the application as well as the response thereto. I have similarly perused and considered the submissions placed before me by the Learned Advocates representing the Applicant and the Respondent acting in person.
 5. By her application before the court, the Applicant prays for an order of stay of execution of the judgment delivered herein on 2nd November, 2023. In addition, she urges the court to review and/or set aside the Judgment and in the alternative, to have the matter heard de novo.
 6. Order 42 Rule 6 of the Civil Procedure Rules 2010 provides for stay of execution as follows:
 - “(1). No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2). No order for stay of execution shall be made under subrule (1) unless—
 - a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
 7. As it were, the Judgment which the Applicant is seeking to stay pending a review was delivered on 2nd November, 2023. The Applicant has not offered any explanation why it took her about four (4) months before the application for stay was filed.



8. In matters of review of Judgment, Order 45 Rule 1(i) of the Civil Procedure Rules, 2010 provides 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.”

9. The guiding principles for an application for review were laid down by the Supreme Court in *Parliamentary Service Commission –vs- Martin Nyaga Wambora & Others* (2018) eKLR where the apex Court quoting with approval the decision of the East Africa Court of Appeal in *Mbogo & Another –vs- Shah* (1968) EA stated as follows:

- “(31) Consequently, drawing from the case law above, particularly *Mbogo and Another v Shah*, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:
- i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court;
 - ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
 - iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application;
 - iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically;



- v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review;
- vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
 - a. as a result, a wrong decision was arrived at; or
 - b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”

10. In the matter herein, the Applicant prays for an order of review on the basis that the Advocates previously on record for herself were negligent in the prosecution of her case and that they failed to present her evidence before the court thereby leading to the judgment that was entered against her. It is the Applicant’s case that she had documents in support of her claim over the suit property but the Advocates then on record failed to file the same in court.

11. I was not however persuaded that the failure on the part of the Applicant to testify and adduce evidence could amount to a ground for review. The record reveals that when the matter came up for hearing the Applicant’s then Advocate on record Mr. C.M. King’ori informed the court that the Defence would not call any witnesses.

12. As Mutungi J. Stated in Duale Mary Ann Gurre –vs- Amina Mohamed Mahamood & Another (2014) eKLR:

“An advocate is the agent of the party who instructs him and such instructing client as the principal continues to have the obligation and the duty to ensure that the agent is executing the instructions given. In the case of litigation, the suit belongs to the client and the client has an obligation to do follow up with his Advocate to ensure the Advocate is carrying out the instructions as given. The litigation does not belong to the Advocate but to the client. If the Advocate commits a negligent act the client has an independent cause of action against the Advocate.”

13. In the premises, I was not persuaded that the Applicant has demonstrated any sufficient cause to warrant a review of the Judgment delivered herein on 2nd November, 2023. The Motion dated March 4, 2024 is dismissed with costs to the Respondent

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 10TH DAY OF JULY, 2025

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J.O. OLOLA
JUDGE

In the presence of:

Ms. Firdaus Court Assistant.

Mr. James Gatiba Present in Person

No appearance for the Defendants

