



**Njoroge & another (Suing as Administrators of the Estate of Njoroge Ngugi)
v Haji; Four Quad Residence Limited (Intended Defendant) (Environment &
Land Case E412 of 2022) [2025] KEELC 5084 (KLR) (8 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5084 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E412 OF 2022**

**CG MBOGO, J
JULY 8, 2025**

BETWEEN

JOHN KIARIE NJOROGE 1ST PLAINTIFF

LUCY WANJIRU NJOROGE 2ND PLAINTIFF

SUING AS ADMINISTRATORS OF THE ESTATE OF NJOROGE NGUGI

AND

NOOR HAJI ALI DEFENDANT

AND

FOUR QUAD RESIDENCE LIMITED INTENDED DEFENDANT

RULING

1. Before me is the notice of motion dated 10th February, 2025 filed by the intended 2nd defendant/ applicant, and it is expressed to be brought under Articles 50, and 159 of *the Constitution* of Kenya, Sections 1A, 1B, and 3A, 80, and 100 of the *Civil Procedure Act* and Order 1 Rule 10, Order 45 Rule (1) & 3 and Order 51 of the Civil Procedure Rules seeking the following orders: -
 1. Spent.
 2. Spent.
 3. That this honourable court be pleased to review, set aside and/ or vacate its judgment dated 21st November, 2024 and all consequential orders arising therefrom.
 4. That this honourable court does set aside all proceedings undertaken in this matter, and do direct that the same commence de novo



5. That this honourable court does order and direct that the pleadings herein be amended and the applicant be joined as the 2nd defendant.
 6. That this honourable court does order and direct that all pleadings, documents and applications filed in this matter be served upon the applicant.
 7. That this honourable court does grant any other order as it may deem fit and just in the interest of justice and fairness.
 8. That costs of this application be borne by the respondents.
2. The application is premised on the grounds inter alia, that judgment was delivered in this matter on 21st November, 2024 directing that the certificate of title in favour of the defendant in respect of LR. No. 367 plot 433 be revoked and/or nullified.
 3. The application was supported by the affidavit of Abdirashid Sheikh Khalifa, director of the intended 2nd defendant applicant sworn on even date. The intended 2nd defendant/ applicant deposed that it is the registered proprietor of the suit property with a certificate of title issued on 27th October, 2023, having purchased the same from the defendant vide a transfer dated 26th April, 2023. Further, that it has been in peaceful occupation of the suit property since the purchase until recently when it was notified of the existence of a judgment revoking the title registered in the name of the defendant.
 4. The intended 2nd defendant/applicant deposed that while the suit was proceeding, construction was ongoing and none of the plaintiffs/respondents and the defendant informed this court of the existence of its occupation. Further, that there is need to review the judgment and the emanating orders as there are errors apparent on the face of record given that the court was misled. Further, that judgment was procured through material non-disclosure of material facts pertinent to the determination of this matter, since the plaintiffs/ respondents have been to the suit property while the intended 2nd defendant/applicant was undertaking construction. It was deposed that the intended 2nd defendant/applicant is an innocent purchaser for value, and should be afforded an opportunity to participate in these proceedings.
 5. The intended 2nd defendant/applicant deposed that it stands to suffer immense prejudice, as it faces imminent eviction and harassment by dint of the orders against the defendant, and that it is in the interest of justice that this application is allowed.
 6. The application was opposed by the replying affidavit of the plaintiffs/respondents sworn on 28th February, 2025. The plaintiffs/respondents deposed that the intended 2nd defendant/applicant has not given proof of authorization from the company to swear the affidavit. Further, that there is collusion between the defendant and the intended 2nd defendant/ applicant by virtue of the letters dated 16th December, 2024, which is an afterthought, and aimed at circumventing justice. Further, they deposed that throughout the hearing, the defendant averred that he was the owner of the suit property, and that at no point did he mention that he had transferred the same to a third party. They deposed that there was mischief and immoral conduct on the part of the defendant, and the intended 2nd defendant/applicant owing to the transactions while there was an application for injunction dated 2nd December, 2022, that was pending ruling scheduled for 27th April, 2023. Further, that it is suspicious that the transfer documents were executed on 26th April, 2023, and an injunction granted on 27th April, 2023. The plaintiffs/respondents deposed that despite the orders of injunction, the defendant submitted the transfer documents to the lands office on 16th May, 2023 which shows bad faith and total disregard for the law.



7. The plaintiffs/respondents deposed that to their knowledge, the defendant was carrying out the construction in contravention of the court's orders of 27th April, 2023. Further, that during the hearing, the defendant indicated that the construction had gone up five floors, and if indeed any construction was ongoing the same was illegal as there were orders maintaining status quo pending the determination of the main suit. Further, that the intended 2nd defendant/ applicant is a stranger to them, and that there was no way to inform a stranger of a pending suit. They deposed that the defendant is guilty of material no-disclosure as he was aware of the suit and allegedly sold the same to the intended 2nd defendant/applicant.
8. The plaintiffs/respondents deposed that the applicant has no locus in this suit, and it should sue the defendant/respondent as the matter is already concluded. Further, it was deposed that the defendant/respondent has no case against them but with the defendant, since he did not acquire a proper title, and hence he could not transfer the same.
9. The intended 2nd defendant/applicant filed a further affidavit sworn on 17th March, 2025. The intended 2nd defendant/applicant deposed that the only nexus between it and the defendant is the sale agreement dated 31st October 2022, and that there has not been any collusion as alleged as the circumstances of the case reveal a bona fide transaction between the parties. It was further deposed that when the judgment was brought to their attention late in January 2025, they approached the firm of Ahmednassir Abdullahi Advocates LLP who have represented them in many transactions, and that since the defendant withdrew instructions from the said law firm, there is no conflict of interest.
10. The plaintiffs/respondents filed a notice of preliminary objection dated 28th February, 2025 challenging the application on the following grounds: -
 1. This honourable court is functus office as the final judgment was delivered on the 21st November, 2024.
 2. The application herein is bad in law and should be dismissed with costs.
11. The application and the notice of preliminary objection were canvassed by way of written submissions. The intended 2nd defendant/applicant filed its written submissions dated 17th March, 2025 where it raised two issues for determination:-
 - a. Whether the applicant has met the requisite threshold for review and/ or setting aside the judgment dated 21st November, 2024 as the same was procured through gross non-disclosure of material facts and fraudulent concealment of pertinent facts.
 - b. Whether the applicant ought to be joined as the 2nd defendant in the proceedings in the instant suit with the same being heard de novo so as to accord the applicant the basic right to be heard.
12. On the first issue, the intended 2nd defendant/applicant submitted that the power of review can be exercised by the court in the event of discovery of new evidence that is crucial to the determination of the matter. It was submitted that they were deliberately sidelined from participating in the proceedings leading up to the judgment, and that at the time of rendering the judgment, this court was misled through concealment of pertinent facts which would have altered the course of the proceedings and the resultant determination. Further, that the court orders in question are absurd, ineffective and unenforceable as they are directed against a party who no longer holds ownership or occupation of the suit property. In support thereof, the intended 2nd defendant/ applicant relied on the cases of *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya (Miscellaneous Application 317 of 2018)* [2019] KEHC 6379 (KLR) (Judicial Review) (25 June 2019) (Ruling), and *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 Others* [2021] eKLR.



13. The intended 2nd defendant/applicant further submitted that if the sale agreement, certificate of title, and the due diligence reports were before this court, it would have affected this court's consideration, as it would consider the innocent third-party proprietor rights. Further, that the plaintiffs/respondents were aware that the proprietorship of the suit property had changed since and which was occasioned by the search they undertook in order to know who to institute the suit against. Further, that having full knowledge of its proprietorship, the plaintiffs/respondents willfully failed to join the applicant as a party to the proceedings. Further reliance was placed in the cases of Khalif Sheikh Adan v Attorney General [2019] eKLR, and Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited [2014] KECA 872 (KLR).
14. On the second issue, the intended 2nd defendant/applicant submitted that it has a clear and identifiable interest in the proceedings as it is the proprietor of the suit property. Further, that it will be in the interest of justice that the proceedings in this suit are re-opened, and a de novo hearing be conducted to allow it present its case with facts which were not within the knowledge of this court. To buttress on this submission, the intended 2nd defendant/applicant relied on the cases of Elton Homes v Davis & Others [2019] eKLR, Mbaki & Others v Macharia & another [2005] 2 EA 206 at page 210, Joseph Njau Kingori v Robert Maina Chege & 3 Others [2002] eKLR, Youth Limited v Kihiko & another; Kenya Railways Corporation (Intended Defendant)(Environment and Land Case Civil Suit 160 of 2019) [2024] KEELC 1413 (KLR)(14 March 2024) (Ruling), and Eunice Wangui Mbogo & another v Margaret Mbuca Mathuri (Sued as Administrator of Adriano Mathuri Ngondi) & 2 Others [2022] eKLR.
15. The plaintiffs/respondents filed their written submissions dated 1st April, 2025 where they raised three issues for determination as follows:-
 1. Whether the court is functus officio.
 2. Whether the applicant is warranted to the orders sought in the application.
 3. Who bears costs of this application.
16. On the first issue, the plaintiffs/respondents submitted that the judgment in paragraphs 109, 110, 115 and 116 determined the question as to whether the defendant held a proper title, and whether he had the right to undertake any conveyance with regards to the suit property was discussed. While relying on the cases of Japheth Nzila Muangi v Kenya Safari Lodges & Hotels Ltd [2003] eKLR, Menginya Salim Murgani v Kenya Revenue Authority [2014] eKLR and Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR, they submitted that this court cannot reopen this matter to determine it on merit as the questions raised in the main suit have exhaustively been answered, and the same does not fall within the exceptions to the doctrine of functus officio.
17. On the second issue, the plaintiffs/respondents submitted that the intended 2nd defendant/applicant is a stranger to this suit, and that they have only known of their existence through this application. Further, that there is no prayer seeking leave to be joined as a party as it is not an automatic assumption. Further, that no joinder has been granted by this court either on an application or suo moto, as they are not proper parties. To buttress on this submission, the plaintiffs/respondents relied on the cases of Zephir Holdings Limited v Mimosa Plantations Limited, Jeremiah Matagaro & Ezekiel Misango Mutisya [2014] eKLR, and Apex International Limited & Anglo-leasing and Finance International Limited v Kenya Anti-Corruption Commission [2012] eKLR.
18. The plaintiffs/respondents further submitted that it is impossible for the applicant to be joined as a defendant in this matter for the reason that it is not their wish to litigate against it, and that the viability



of a party is not upon an intended defendant to determine by themselves. Reliance was placed in the cases of Joseph Leboo & 2 Others v Director Kenya Forest Services & Another [2013] eKLR, and Marigat Group Ranch & 3 Others v Wesley Chepkoimet & 19 Others [2014] KEHC 2589 (KLR). Further, it was submitted that the intended 2nd defendant/applicant is not a necessary party to this suit, and that the issues raised at the main suit will not be unanswered if it does not participate in the same. The plaintiffs/respondents relied on the cases of Joseph Njau Kingori v Robert Maina Chege & 3 Others [2002] KEHC 1192 (KLR), and Julian Adoyo Ongunga & Another v Francis Kiberenge Bondeva (Suing as the administrator of the Estate of Fanuel Evans Amudavi, deceased) [2016] KEHC 4186 (KLR).

19. The plaintiffs/respondents further submitted that the alleged evidence of ownership of the suit property by the intended 2nd defendant/applicant does not qualify as new evidence, and that it is pure mischief. This, they submitted was based on the testimony of the defendant which was available at the time to inform the court that ownership had changed hands. They submitted that if this evidence was credible, it could have been submitted before the judgment was delivered. The plaintiffs/respondents relied on the cases of Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited [2014] KECA 872 (KLR), and Paul Mwaniki v National Hospital Insurance Fund Board of Management [2020] eKLR.
20. While further relying on the cases of Republic v National Environment Tribunal & Another [2013] eKLR, Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited & Another [2020] KEHC 1672 (KLR), Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR, and Mapis Investment (K) Limited v Kenya Railways Corporation [2006] eKLR, they submitted that the exact dates when the transfers were executed and signed compared to the date when this court gave injunctive orders is a testament to the illegality committed by the defendant and the intended 2nd defendant/applicant. They submitted that the application has no foundation, and it cannot be allowed to see the light of day.
21. On the third issue, they prayed that the application be dismissed with costs.
22. The intended 2nd defendant/applicant filed supplementary written submissions dated 9th April 2025, and submitted that the doctrine of *functus officio* has exceptions to the general rule including the application for review. To further buttress on this issue, the intended 2nd defendant/applicant relied on the cases of Francis Muendo John v Republic [2020] eKLR, Re Estate of Kinuthia Mahuti (deceased) [2018] eKLR and Jersey Evening Post Ltd v AlThani (2002) JLR 542 at 550 as cited in the case of Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR.
23. I have considered the application, the replies thereof and the written submissions filed by the respective parties. I am of the view that the issues herein are intertwined and, in my view, the following issues are for determination: -
 - i. Whether the intended 2nd defendant/ applicant ought to be joined as a party to these proceedings post judgment; and
 - ii. Whether the orders for review should be granted.
24. Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules provides as follows:-

Section 80. Review

“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.”

[Order 45, rule 1.] Application for review of decree or order.

“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) 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”

- 25. From the above provisions, it is clear that while Section 80 of the *Civil Procedure Act* grants the court the power to make orders for review, Order 45 sets out the jurisdiction and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.
- 26. It is also clear that an application for review may be made by a person who was not necessarily a party in the proceedings, but one who is aggrieved by the decision thereof as in the instant case. See the case of *JMK v MWM & another* [2015] KECA 524 (KLR). The intended 2nd defendant/applicant was not a party to these proceedings, and among other orders for joinder as sought, it was right in seeking an order for review at this stage. As earlier stated that the issues are intertwined, the question then is, whether joinder of the intended 2nd defendant/applicant qualifies at this stage?



27. Order 1 Rule 10(2) of the Civil Procedure Rules provides that: -

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

28. The intended 2nd defendant/applicant contended that it is the registered proprietor of the suit property with a certificate of title issued on 27th October, 2023, having purchased the same from the defendant vide a transfer dated 26th April, 2023. The intended 2nd defendant/applicant further contended that it has been in peaceful occupation of the suit property since the purchase until recently when it was notified of the existence of a judgment revoking the title registered in the name of the defendant. It was argued that construction was ongoing, and the parties did not inform the court at the time that ownership had changed hands. Further, it was argued that the plaintiffs/respondents have been to the suit property and thus was aware of its existence. On the other hand, the plaintiffs/respondents maintained that the intended 2nd defendant/applicant is a stranger and that during the hearing, the defendant made it clear that it was the registered owner of the suit property. In rebuttal, the intended 2nd defendant/applicant argued that the search conducted by the plaintiffs/respondents was proof that they knew who the registered owner of the suit property is and thus failed to disclose to the court this material information.

29. The decision to join a party to any proceeding is discretionary and such discretion ought to be exercised so judiciously so as not to defeat justice to a deserving party. However, and in consideration of such a prayer, a heavier duty is imposed on such a party to show that it is deserving of joinder for the reason, and particularly so where judgment has already been delivered. It is trite law that the decision to sue a party rests with the plaintiff. In *Central Kenya Ltd v Trust Bank Ltd & 5 others* [2000] KECA 367 (KLR), it was observed as follows: -

“The jurisdiction of the court under O.1 rule 10(2) and O.VI rule 3(1) of the Civil Procedure Rules, respectively, is specific. The decision as to who to sue is essentially that of the plaintiff, and the court's duty thereafter, is to consider the allegations made against the named defendants and if it considers that there are other parties who should have been joined or were improperly joined give appropriate directions under O.1 rule 10(2), above.”

30. The plaintiffs/respondents have stated that they have no claim against the intended 2nd defendant/applicant as it is a stranger to them. Equally, and while it was argued that they stand to be affected by the orders as the defendant is not the registered owner of the suit property, the issues surrounding the legality of the title have been discussed in the judgment, and it would be embarrassing for this court to state so as regards the intended 2nd defendant/applicant. I have also read the judgment delivered 21st November, 2024, the defendant in his testimony did not inform the court that the suit property had changed hands, and thus there was need for a third party. In fact, he maintained that he was the registered owner of the suit property. In my view, nothing prevented the defendant from introducing the intended 2nd defendant/applicant to these proceedings at the time, and sadly further engaging in land transactions with regards to the suit property while there were temporary orders in force barring the same.



31. In dealing with the second issue, in Republic versus Public Procurement Administrative Review Board & 2 others [2018] e KLR it was held:-

“Section 80 gives the power of review and Order 45 sets out the rules. 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 or;
- (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.”

32. Also, in the case of Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR, the Court of Appeal held that:-

“The main grounds for review are therefore; discovery of new and important matter or evidence, mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.”

33. The intended 2nd defendant/applicant argued that there was material non-disclosure of facts in the proceedings that led to the court in arriving at its finding. That had this information been made available in the course of proceedings, the court would have arrived at a different finding. Having analysed the issues herein, the intended 2nd defendant/applicant blamed the parties in the main suit for not disclosing to this court its existence despite being aware of the same. However, it has not been shown the exact certificate of official search produced by the parties during the hearing which indicated that it was the owner of the suit property and not the defendant. Further, the mere fact that the plaintiffs/respondents visited the suit property is not enough to show that they knew who engaged in construction despite the injunction orders in place. Was the intended 2nd defendant/applicant personally known to the plaintiffs/respondents? It has not been shown.

34. In my view, the intended 2nd defendant/applicant has a valid claim against the defendant whom it should pursue. I read mischief in this application between the applicant and the defendant to the extent that little or no blame has been placed on the defendant, and further, the dealings on the title of the suit property whilst the matter was still ongoing. I do agree with the plaintiffs/respondents that this application is aimed at circumventing justice where it is due. From the above, I find no merit in the notice of motion 10th February, 2025, and it is hereby dismissed. The plaintiffs/respondents are awarded the costs of this application.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 8TH DAY OF JULY, 2025.

HON. MBOGO C.G.

JUDGE

08/07/2025.

In the presence of:



Mr. Benson Agunga - Court assistant

Mr. Athman for the 2nd Intended Defendant/Applicant

Mr. Rukwaro holding brief for Mr. Kimani for the Plaintiffs/Respondents

