



**Pius & 2 others v Odoyo (Environment and Land Appeal
E052 of 2022) [2025] KEELC 5363 (KLR) (14 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5363 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E052 OF 2022
FO NYAGAKA, J
JULY 14, 2025**

BETWEEN

ODERO MARIKO ALIAS PIUS 1ST APPELLANT

OTIENO MARIKO 2ND APPELLANT

GORDON ODIRA 3RD APPELLANT

AND

PAULVET OKEYO ODOYO RESPONDENT

RULING

Brief Facts

1. The Appellants/Applicants filed the instant application dated 1st April, 2025 seeking the following orders:
 1. That this Honourable court be pleased to grant the Appellants/Applicants herein leave to file a Record of Appeal out of time.
 2. That the Honourable court be pleased to set aside or vary the orders issued on 12th February, 2025 directing parties to file and serve their written submissions on the appeal to enable the Appellants/Applicants file the Record of Appeal before parties can file their written submissions.
 3. That the costs of this application be in the cause.
2. The Application was based on grounds set out and supported by the Affidavit of Quinter Adhiambo Aduo the Appellant/Applicant's advocate sworn on 1st April, 2025.



3. She stated that the Applicants being dissatisfied with the ruling of Hon. Nicodemus N. Moseti in Mbita ELC No. E010 of 2021 delivered on 21st September, 2022, preferred an appeal against the said ruling.
4. She further stated that they filed a Memorandum of Appeal on 24th October, 2022 and later an application to cease acting due to lack of proper instructions from the Applicants.
5. She went on to state that the Applicants later reached out to her and they ironed out the issue that were between them and therefore she continues to represent them in the matter. She added that it was at this point that she realized that the Applicants through the firm of J.O. Otieno & Co. Advocates had filed another ELCA No. 9 of 2023 with similar parties and touching on the same issues in the present appeal.
6. She stated that the two files had been mentioned together and she inadvertently omitted to file the Record of Appeal in the present suit.
7. She stated that there was need to file and serve the same before the Appeal could be canvassed by way of written submissions.

Response

8. The Respondent filed his replying affidavit sworn on 3rd April, 2025 where he averred that the present application was filed quite late and that the appeal has been pending for over 3 years which delay had been occasioned by the Applicants.
9. He further averred that the appeal was filed on 24th October, 2022 after the expiry of the prescribed 30 days without the court's leave. He added that no convincing explanation has been given by the Applicants for the unreasonable delay.
10. He also averred that the appeal was lodged to hinder her from executing the original decree. He added that the issue of filing the record of appeal first arose on 3rd March, 2023 when the court directed the Applicants to file and serve the same within 30 days which duration lapsed on 3rd April, 2023.
11. She averred that the Applicants were granted more time to file and serve the record of appeal but they failed to do so.
12. She averred that grant of leave to file the record of appeal would be an exercise in futility since they have failed to show any interest in having the appeal heard and determined.
13. She urged the court to dismiss both the application and appeal.
14. The appeal was disposed of by way of written submissions. They are summarized as below.

Submissions

15. The Respondent file her submissions dated 18th April, 2025 where she relied on the case of Fakir Mohammed v Joseph Mugambi & 2 Others [2005] eKLR. She submits that the appeal was filed on 24th October, 2022 while the application for leave to file record of appeal was filed on 1st April, 2025 after about 888 days had lapsed from the date of lodging the appeal.
16. It was her submission that the present application was an afterthought to buy time and stop her from enjoying the fruits of her judgment. She further submits that the Applicant's allegation was false since the appeal was never mentioned in court until 2nd April, 2025 when her application for dismissal came up for hearing.



17. She submits that the move by the Applicant to change advocates was intentional with the cooperation of their advocates so as to misguide the court that the advocates did not know the existence of the other. She adds that the Applicants failed to give an excusable reason for the inordinate delay in filing the instant application.
18. She further submits that the Applicants had been granted numerous chances to file their record of appeal but they failed to do so. She adds that the appeal was for the Applicants and not their advocates, she cited the case of *Habo Agencies Limited V Wilfred Odhiambo Musingo (2015) eKLR*
19. She relied on Section 79B of the *Civil Procedure Act* and argues that the memorandum of appeal did not raise pertinent issues of law and that the chances of the appeal succeeding was slim.
20. She added that execution proceedings had already commenced against the Applicants who were successfully evicted from her land following the court's order on 8th June, 2024. She submits that the appeal has since been overtaken by events.
21. It was her submission that should the court be inclined to allow the application, she urged the court to compel the Applicants to pay or deposit for the awarded damages as security.
22. In conclusion, she urged the court to dismiss the application and appeal with costs.
23. The failure for other parties to file submissions did not prejudice the determination on merits of the application.

Analysis and Determination

24. This court has carefully considered the application, responses and submission by both parties and the law. The main issue for determination is whether the application is merited.
25. One of the prayers sought by the applicant is the setting aside of the earlier orders of this Court. The orders were not made in absence of the parties or granted due to nonattendance of the parties. They were made upon the court hearing the parties' submissions on the issue and issuing directions subsequent thereto. It was these that were not complied with hence the instant application. In essence the applicant seeks a review of the orders of this Court.
26. The jurisdiction of this court for review of orders is provided for under Order 45 Rule 1 (1) of the Civil Procedure Rules which provides as follows:
 - “ 1. Application for review of decree or order
 - (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.”

27. It is this court’s view that the basis of an application for review of an order is on the recovery of new and important matters or evidence which after due diligence, was not within the Applicant’s knowledge or could not be produced by them at the time when the order was made. Further an application for review may also be made on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.
28. The Applicants claim that it had ceased acting for the Applicants and later came on record for them. They further claim that they only realized that the Applicants had filed a separate appeal ELCA No. 9 of 2023 with similar parties and touching on the same issues in the present appeal through the firm of J.O. Otieno & Co. Advocates.
29. It was the Applicants’ claim that as a result, they had inadvertently failed, for that reason, to file the record of appeal in the present case thus the need to regularize the same before the appeal is heard and determined.
30. The Respondent, on the other hand, contends that the application is a delaying tactic by the Applicants since they had been given sufficient time to file and serve their record of appeal.
31. I have perused the court proceedings. It is not in dispute that on 13th March, 2023, the court directed the Applicants to file and serve their record of appeal within 30 days. Further, it is not disputed that the Applicants advocate ceased acting for them and that another law firm represented them as evidenced from the same proceedings. Again, there is no contention that there was another appeal preferred against the Respondent by the Appellant and it was later in a way taken to have been consolidated with the present one. That other appeal is no longer alive.
32. That the there was no record of appeal filed as directed by the Court was a matter or fact not within the knowledge of the advocate who was no longer on record for the Appellant. It came to light to the Appellant and counsel at the time of withdrawing the other appeal that there was no record of appeal filed herein, the party having taken it that the one filed in the matter withdrawn court was sufficient for use in the current appeal which was mistakenly taken as having been consolidated. Further, as a result of the withdrawal of the appeal No. 9 of 2023 the instant one was left ‘bare’. It was a new and important matter not within the knowledge of the applicant at the time directions impugned were given and their time lapsed.
33. It is this court’s view that failure by the Applicants to file the record of appeal was not intentional as seen from the subsequent proceedings of the court.
34. In the circumstance, this court in the interest of justice shall proceed to exercise its discretion and allow the Applicants file their record of appeal within the next 30 days failure which the appeal stands dismissed.
35. The upshot of the foregoing is that the instant application is merited and is therefore allowed as prayed. The appellants have 15 days to submit and the Respondent have 15 days. Leave granted to the Respondent to file a supplementary record of appeal in case the appellants’ is not complete. That be done with the submissions.
36. Hearing of the Appeal on 14th October, 2025. Each party to bear its own costs.



37. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 14TH DAY
OF JULY 2025**

HON. DR. IUR NYAGAKA

JUDGE

In the presence of,

Ms. Quinter Adoyo Advocate for the Applicant

Mr. Paulvet (Respondent) in person

