



**Hinga v Gaitho Oil Limited (Environment & Land Case
1069 of 1998) [2025] KEELC 3950 (KLR) (21 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3950 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1069 OF 1998**

CA OCHIENG, J

MAY 21, 2025

BETWEEN

ANNE MUMBI HINGA PLAINTIFF

AND

GAITHO OIL LIMITED DEFENDANT

RULING

1. What is before the Court for determination is the Plaintiff's Notice of Motion application dated the 6th December 2024, where she seeks the following Orders:
 - a. Spent.
 - b. That this Honourable court be pleased to review and or set aside its orders and or judgment delivered on 4th July 2019 for non-compliance on the part of the Defendant/Respondent.
 - c. That in the alternative, the Honourable court do issue an order directing the Applicant/Plaintiff to refund the deposit of purchase price that was paid to her by the Defendant less penalty for breach.
 - d. That this Honourable court do issue an order of eviction against the Defendant, its agents servants, employees or anybody else acting on their behalf from LR Number 12337/6-Kiambu.
 - e. That this Honourable court do issue an order barring the Defendant/Respondent from in any way trespassing, selling, leasing out, disposing of, cultivating, constructing on, charging or in any other way dealing with land parcel LR No. Number 12337/6-Kiambu.
 - f. That upon granting order 'D' above, this this Honourable court do issue an order directed against the OCS Tigoni Police Station do supervise eviction exercise.



- g. That the Honourable court do issue any other orders it may deem fit and just to grant.
 - h. Costs of this application be provided for.
2. The application is premised on grounds on its face and on the Plaintiff's supporting affidavit. She asserts that in its judgement entered herein, the court directed the Defendant to pay her the balance of the purchase price within ninety (90) days from the date of the judgment with interest at 20% from 20th December 1996 and upon payment, she (Plaintiff) was to effect transfer of LR No. 12337/6 Kiambu to the Defendant within ninety (90) days but the Defendant has failed to comply with the said judgement despite the fact that it still utilizes and occupies the suit property.
 3. She asserts that there is need to have the aforementioned orders reviewed or set aside due to non-compliance on the Defendant's part. Further, that the Defendant should be evicted and barred from interfering with the suit property. She confirms her willingness to refund the Defendant its deposit, less the penalty for breach.
 4. The application is opposed by the Defendant through its Notice of Preliminary Objection dated the 27th January 2025. It contends that the Plaintiff has no locus to appear before the Court as she is in contravention of Order 9 Rule 9 of the Civil Procedure Rules.
 5. The Plaintiff filed a replying affidavit in response to the Notice of Preliminary Objection contending that she had engaged the law firm of Anjarwalla & Khanna LLP advocates to act for her in Civil Application No. 312 of 2019 and that the said firm filed an application to cease acting for her in the matter, which application was served on the Defendant herein who did not file a response. She avers that she is currently being represented by the firm of messrs Kamau J. Mwangi & Co. Advocates.
 6. The instant application and Notice of Preliminary Objection was canvassed by way of written submissions.

Submissions

7. The Plaintiff in her submissions reiterates the averments in her affidavits and contends that upon perusal of the judgment herein, it does not disclose and or provide any remedy and or direction to her particularly in the present circumstances where the Defendant has failed to comply with the judgment. She contends that this Court's orders of 4th July 2019 are incapable of being implemented and the only way to ensure compliance is for this court to review or set aside the said orders.
8. She urges the court to disregard the Notice of Preliminary Objection on the basis that a litigant has the ultimate right to legal representation and the right cannot be taken away as the Defendant seeks to do.
9. The Defendant did not file its submissions.

Analysis and Determination

10. Upon consideration of the instant Notice of Motion application including the affidavits, Notice of Preliminary Objection and plaintiff's submissions, the only issue for determination is whether the Court should review and/or set aside its judgment delivered on 4th July 2019 due to non-compliance by the Defendant and if the Notice of Preliminary Objection is merited.
11. In its Notice of Preliminary Objection, the Defendant contends that the Plaintiff's Advocates on record are messrs Anjarwalla & Khanna LLP Advocates and Nyamu and Nyamu advocates thus the



application is filed by a stranger contrary to the provisions of Order 9 rule 9 of the Civil Procedure Rules, which stipulates that:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court;

- a. Upon an application with notice to all the parties; or
- b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

12. The Plaintiff explains that her previous advocate ceased acting for her in the matter, however from record there is no application for leave for the new advocates to act for her nor a consent entered into with the erstwhile advocate. In *James Ndonyu Njogu v Muriuki Macharia* [2020] eKLR the Court held:

“Although the Applicant has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 above is mandatory and thus cannot be termed as a mere technicality.”

13. In the foregoing, noting that the Plaintiff’s current advocate did not seek leave to come on record for her in accordance with the provisions of Order 9 Rule 9 of the Civil Procedure Rules, nor record a consent with the erstwhile advocate, I find that the instant application as filed is incompetent as it is filed by an Advocate without locus.
14. On the second issue, the Plaintiff essentially seeks a review of this Court’s Judgment delivered on 4th July 2019.
15. I will proceed to highlight various legal provisions governing review.

Section 80 of the *Civil Procedure Act* provides that:

“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.”

16. Further, Order 45, rule 1 (1) of the Civil Procedure Rules provides as follows:

“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.”



17. In the case of *Nyamogo & Nyamogo -vs- Kogo* (2001) EA 174 the

Court held that:

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

18. While in the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR, the Court of Appeal held that:

“In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.”

19. It is trite that an application for review must be brought within the grounds stated at Order 45 Rule 1(b) of the Civil Procedure Rules. The Court of Appeal stated as follows in *Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers* [2019] eKLR;

“....an order for review is restricted to parameters set out by the law..”

20. The Supreme Court stated as follows in the case of *Parliamentary Service Commission v Martin Nyaga Wambora & Others* [2018] eKLR:

“We further add that the review window so envisaged is not meant to grant an applicant a second bite at the cherry. It is not an opportunity for an applicant to re-litigate his/her case. Sight should never be lost of the shore that in an application for review, like the one before the Court, at the core of the application is the Court’s exercise of discretion. It is the Court/Judge’s decision that is impugned and not the substantive application being re-argued. Hence an applicant is under a legal burden to lay a basis, to the satisfaction of this Court, that in exercise of its discretion, the limited Bench acted whimsically or misdirected itself in reaching the decision it made.”

21. From the Court record, the Plaintiff having been dissatisfied with this Court’s Judgment had lodged an Appeal with the Court of Appeal vide her Notice of Appeal dated the 18th July, 2019. Further, she filed Civil Appeal No. 151 of 2020 on 31st March, 2020 and Civil Application No. 312 of 2019 respectively. The Plaintiff has not indicated whether she proceeded with the Appeal or not. On review, the provisions of Order 45 of the Civil Procedure Rules are very clear. It is trite that a party who has filed



an Appeal against a decision cannot turn around to seek for review of the said decision and challenging the validity of a judgement is only subject to Appeal not review. See the case of Supreme Court No. 3 of 2014; Robert Tom Martins Kibisu v Republic [2018] eKLR, where it was held that dissatisfaction with a judgement is normally a ground for appeal not review.

22. In the current scenario, I note the Plaintiff vide her application dated the 28th July, 2023, had sought for the judgment dated the 4th July, 2019 to be set aside on the ground that the Defendant was vandalizing the suit property. The Plaintiff has now sought for the same orders in the instant application. I note Justice Mbugua vide her Ruling delivered on the 14th December, 2023 except for allowing for the lifting of the Caveat on the suit property, dismissed the prayer seeking review of the impugned judgment.
23. It is my considered view that since this suit revolved around specific performance and the Defendant has not paid the balance of the purchase price including interest as directed by the Court, in its impugned Judgment and is in still in possession of the suit property, the Plaintiff is at liberty to seek for a Notice to Show Cause why the Defendant should not be compelled to settle the balance of the purchase price, in enforcement of the terms of the impugned Judgment failure of which, the Court will issue appropriate orders.
24. Based on the facts before me while relying on the legal provisions cited and associating myself with the decisions quoted, I find the Notice of Preliminary Objection dated the 27th January 2025 merited and will allow it but proceed to strike out the instant Notice of Motion application as it is incompetent.
25. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF MAY 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Ms Nyamwaro holding brief for Ratemo for Plaintiff/Applicant

Oigara for Respondent

Court Assistant: Susan

