Registered Trustees of Christ Co-Workers Fellowship v Dianga & 2 others (Environment & Land Case 1540 of 2013) [2025] KEELC 3742 (KLR) (12 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3742 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 1540 OF 2013

JA MOGENI, J

MAY 12, 2025

BETWEEN

THE REGISTERED TRUSTEES OF CHRIST CO-WORKERS FELLOWSHIP ..... PLAINTIFF

AND

JOHN ABUKO DIANGA ..... 1ST DEFENDANT

TITUS MWAI KARIUKI ..... 2ND DEFENDANT

NAIROBI CITY COUNTY ..... 3RD DEFENDANT

RULING

1. The 1st Defendant's Application is dated 08/10/2024. Therein, they seek the following orders:
    1. Spent.
    2. That this Honorable Court be pleased to review and set aside the orders made herein on 25th January 2022, and proceed with the hearing and determination of this suit.
    3. That costs be provided for .
2. The Application is premised on various grounds set out at its foot and in the Supporting Affidavit of John Abuko Dianga thereto attached. In brief they are that pursuant to an order issued on 25/01/2022 at the Plaintiff's behest, the proceedings herein were stayed until the matter ELC 1453 of 2007 is heard and determined.
3. That the 1st Defendant has ascertained that the said suit has not only been determined, but also that it pertained to completely different parties and subject matter. So the staying of this suit worked to delay the hearing of the eleven year old suit. The 1st Defendant attached a copy of the Judgment as annexure

"JAD1". This is the Judgment in Kenya Power and Lighting Company Ltd vs Isaac Gachagua & 4 Others.

4. Thus that it has become necessary for this Court to review and set aside the order it issued to facilitate the hearing and determination of this suit since justice delayed is justice denied.

5. The Plaintiff filed Grounds of Opposition to the Application dated 19/10/2024 and stated that there is no error apparent on the face of the record as is required in law to warrant the Application. They contended that there is no discovery of any new and important matter or evidence which, after the exercise of due diligence was not within the Applicant's knowledge or could not be produced by him at the time when the decree was passed.

6. That infact the Plaintiff/Respondent had filed a Notice of Appeal and therefore the Application for Review is not available to him as he opted to proffer an Appeal and also that the Application is being brought after issuance of the orders on 25/01/2021. It is the Plaintiff's contention that as per the orders sought to be reviewed, the conditions have not been met and therefore the Application herein is superfluous, bad in law and an abuse of the Court process and should be dismissed.

Analysis and Disposition .

7. What this Court is dealing with here is a review Application. Review is governed by Section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the Civil Procedure Rules. Section 80 of the *Civil Procedure Act* provides as follows:

> " 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."

8. Order 45 Rule 1 of the Civil Procedure Rules provides as follows:

> "(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."

9. Has the Applicant made a good case for review and setting aside of the orders issued by this Court on 25/01/2022? It all depends on the grounds they have provided. Principal among these is that the Court in ELC 1453 of 2007 allowed the Plaint by the Kenya Power but the 1st Defendant was not a party in the said suit. Neither is the suit property bearing the same registration since the one in the suit is LR No 113044/R while the suit property in this suit is LR No Church Plot – Komorock EAST as per the Letter of Allotment dated 27/10/1992.

10. The present Application is expressed to be brought under Order 45 rules 1. The Applicant not having been very specifically reliant on Order 45 Rule 1(b) which provides for the ground upon which review orders may be granted, I am inclined to consider whether the present Application has met any of the grounds set out under that provision. The parameters within which a review Application is weighed or can be granted are as follows:

    a. Whether there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the Applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made; or

    b. Whether there is some mistake or error apparent on the face of the record; or

    c. Whether there is any other sufficient reason; and finally

    d. Whether the Application has been brought timeously.

11. The principal ground relied on is that there was discovery of the Judgment of the ELC Case No. 1453 of 2007 earlier mentioned. The Applicant state that since the 1st Defendant was not a party they only discovered later that the Judgment has been delivered on 26/09/2024.

12. The Plaintiff on the other hand avers that the 1st Defendant cannot seek review since they filed for Appeal. Unfortunately this averment is not supported by any evidence to lend credence to this claim. There is no documentation to attest to the fact that an Appeal has been lodged.

13. What I am however also wondering about is let me for a moment assume that indeed there is an Appeal filed it would be about which cause of action? Since the concluded case is ELC 1453 of 2007. If this is the case then the Applicant is right in approaching Court since the 1st Defendant and the suit property are different. This however does not mean that these are new discoveries. Why do I say so? This is because this matter was stayed on 25/01/2022 so that ELC 1453 of 2007 can be concluded. It is not the first time that the Applicant is coming onto the information about ELC 1453 of 2007.

14. The Applicant had an opportunity to appeal the decision of the Court but chose not to. Now two years later they are running to Court to seek review yet the Plaintiff contends that they have already gone on Appeal.

15. Courts have settled well the law on review in this country. Many a times the Courts have decided that a review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review where it is thought that another Judge could have taken a different view of the matter. See (National Bank of Kenya Ltd vs Ndungu Njau [1977] eKLR).

16. The Court of Appeal in Pankras T Swai v. Kenya Breweries Ltd [2014] eKLR, stated that a party cannot seek review on grounds of law since those are grounds of appeal and not review. The Court then stated with regard to review:

> " The power to review decisions on appeal is vested in appellate Courts. Order 44 rule 1 (now order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limps therein stated or "for any sufficient reason. The Court went on to state that the words, "for any sufficient reason" must be viewed in the context, firstly; of section 80 of the *Civil Procedure Act* which confers an unfettered right to apply for review and, secondly; on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order."

17. At the same time the Court of Appeal in Benjoh Amalgamated Ltd & Another v Kenya Commercial Bank Ltd [2014] eKLR, stated:

> "(26) The basic philosophy inherent in the concept of review, is acceptance of human fallibility and acknowledgement of frailties of human nature and sometimes possibility of perversion that may lead to miscarriage of justice. In some jurisdictions, Courts have felt the need to cull out such power in order to overcome abuse of process of Court or miscarriage of justice.
>
> (27) In the High Court, both the *Civil Procedure Act* in section 80 and the Civil Procedure Rules in order 45 rule 1 confer on the Court power to review. Rule 1 of order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but Section 80 gives the High Court greater amplitude for review."

18. The jurisprudence emerging from these decisions is that an Applicant must base his Application for review on the three limbs in Order 45 rule 1, or on any other sufficient reason.

19. This suit was stayed on 25/01/2022 to allow for ELC 1453 of 2007 to be heard and determined. The question is can the suit just proceed without the stay order being reviewed? I do not think so why because that is an order of the Court which has not been set aside, reviewed or appealed against. Is the Plaintiff right in averring that since ELC 1453 of 2007 has been heard and determined then the conditions earlier provided have been met and therefore the Application is superfluous? I do not think so either.

20. The Plaintiff has also argued that the Application for review has been brought late in the day and therefore too late to be considered. Now, a determination of whether the Motion has been filed without unreasonable delay, is a critical consideration pursuant to Order 45 of the Civil Procedure Rules. The Court in Jaber Mohsen Ali & Another v Priscillah Boit & Another [2014]eKLR, stated:

> " The question that arises is whether this Application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgement could be unreasonable delay depending on the judgement of the Court and any order given thereafter..."

21. A determination was made in ELC 1453 of 2007 on 26/09/2024 and the present Application is dated 8/10/2024. The period between determination of the suit and filing of the Motion is a period of two weeks.

22. The Applicant has stated that not having been a party in ELC 1453 of 2007 they were not aware that the judgment had been delivered.

23. Moving to the merits of the Motion, the same is predicated on the grounds of error apparent on the face of the record and sufficient reason. In discussing this concept, the Court of Appeal in Kenya Trypanosomiasis Research Institute vs Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs) [2019] eKLR referred to its various decisions as follows:

> " This Court in Muyodi v Industrial and Commercial Development Corporation & Another [2006] 1 EA 243 described an error on the face of the record as follows:
>
> "In Nyamogo and Nyamogo v Kogo [2001] EA 174 this Court said 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 the 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 a 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 apparent on the face of the record even though another view was also possible. Mere 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."

24. The Court of Appeal took a similar view in the case of Apollo Waswa Basude & 2 Others (As administrators to the Estate of the late Sepiriya Rosiko) vs Nsabwa Ham, Civil Appeal No 288 of 2016, where the Court at para 310 stated thus:

> " ... an error apparent on the face of the record is one that is evident and its incorrectness does not require any extraneous matter by way of proof. It is so manifest and clear that no Court of law exercising its judicial power would allow it to remain on the Court record. This error may be either of fact or of law ..."

25. From the foregoing, it is apparent that an error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.

26. So what is the error herein? According to the Applicant, the same is evinced by the fact of the staying of the instant suit to allow for the hearing and determination of ELC 1453 of 2007 where the Applicant was not a party. This thus caused delay in hearing of the instant suit.

27. In response, the Plaintiff argues that the contention does not pass the test set under Order 45 Rule 1 on review.

28. The Court has considered the proceedings leading to the staying of the suit that there was a pending matter touching on the same suit property and involving the same parties. Where it has clearly emerged

that the suit property is different and some parties were not participating in ELC 1453 of 2007 and therefore they have a right to be heard.

29. In view of the foregoing narration, it is clear that what is being called into question is the merit of the Court's determination, a question that falls squarely within the purview of an Appeal. As aptly stated by the Court of Appeal in Nyamongo vs Nyamongo(supra):

> " ..... Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

30. Thus the threshold for review on account of error on the face of the record has not been met.

31. The scope of the ground "for any other sufficient reason" has been subject to different interpretations by the Courts. There are two schools of thought, first being that the "sufficient reason" alluded to must be analogous to the grounds pertaining to discovery of new evidence or error on the face of the record and second, that the "sufficient reason" need not be analogous to the previous grounds.

32. The position that the sufficient reason ought to be analogous to the grounds of discovery of new and important evidence and error apparent on the face of the record was embraced by the Court in Nasibwa Wakenya Moses v University of Nairobi & Another [2019] eKLR, where Mativo J observed:

> " An Application for review may be allowed on any other "sufficient reason." The phrase 'sufficient reason' within the meaning of the above rule means analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1. This position was illuminated in Sadar Mohamed vs Charan Singh and Another [13] where the Court held that: -"Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter)."Mulla in the Code of Civil Procedure [14] (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression 'any other sufficient reason'...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in the rules, would amount to an abuse of the liberty given to the tribunal under the Act to review its judgment.Perhaps it is worth citing Evan Bwire vs Andrew Nginda [15] where the Court held that 'an Application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the Application or case a fresh."

33. In the case of Assets Recovery Agency v Charity Wangui Gethi & 3 Others [2020] eKLR the Court of Appeal stated that:

> " The ground "other sufficient reason" has been held to be consonant with the first two grounds: See Kuria v Shah [1990] KLR 316."

34. Whereas in the case of Official Receiver and Liquidator vs Freight Forwarders Kenya Ltd [2005] eKLR the Court of Appeal took a different view and held that:

> " With respect, the learned Judge erred in his conclusion that "for any (sic) sufficient reason" had to be ejusdem generis with the first two grounds set out in Order 44 r. 1(1) or analogous to them. This Court in the well known case of Wangechi Kimita v Wakibiru [1982-88] 1KAR 978, which was determined in 1985, and which was binding on the learned Judge, espoused the contrary view of the law. Nyarangi JA. in his judgment in this case, had this

to say on the issue:"I see no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly s 80 of the *Civil Procedure Act* confers an unfettered right to apply for a review and so the words 'for any other sufficient reason' need not be analogous with the other grounds specified in the Order: See Sadar Mohamed v Charan Singh [1959] EA 793.".In his concurring judgment, Hancox JA. as he then was, made the following observation:"I would add that I also agree with the reasoning of Nyarangi JA that the third head under Order 44 r. 1(1), enabling a party to apply for review, namely 'or for any other sufficient reason' is not necessarily confined to the kind of reason stated in the two preceding heads in that sub-rule, which do not in themselves form a genus or class of things with which the third, general, head, could be said to analogous.".Kneller JA's brief concurring judgment was as follows:"Nyarangi JA's judgment embraces the essential facts and the relevant law to be applied to them in this appeal, and, with respect, I am in agreement with the conclusions he has reached."

35. In my view I take the positon that "any sufficient reason" must not be analogous to the grounds of discovery of new evidence and/or error apparent on the face of the record.

36. On the issue of what constitutes sufficient cause, the Court will be guided by the exposition of the Supreme Court of India in the case of Civil Appeal 1467 of 2011 Parimal v Veena Bharti [2011] which stated:

> "Sufficient cause is an expression which has been used in large number of statutes. The meaning of the word, "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which then the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man ..."

37. According to the Applicant, the sufficient reason in the circumstances include the fact that the Court made a decision to stay the hearing of the instant suit until the hearing and determination of ELC 1453 of 2007. The assumption made was that the parties in both suits were the same and the so was the suit property. It turns out that this was not so, since I have perused the pleadings and the read the decision of ELC 1453 of 2007.

38. However, the Court notes that this instant suit was stayed to allow the hearing of ELC 1453 of 2007 to be heard and concluded and this was done and Judgment was even delivered. The Court agrees that it would have been impossible for the matter to proceed in the circumstances until the matter in ELC 1453 of 2007 was finalized after all the Court had stayed this instant suit and the order was not set aside. Now that the earlier dispute has been resolved it is only just that the instant dispute over the property proceeds and be fully determined on its merits.

39. As to whether the Plaintiff will be unduly prejudiced, the Court thinks not. A fully merited determination of the dispute will enable all the parties involved have their positions fully heard and evaluated thus promoting a fair and equitable resolution of the dispute.

40. The Court finds that sufficient reasons have been established warranting the review of the Orders of 25/01/2022.

41. In conclusion, the Court finds the Motion dated 08/10/2024 to be merited and proceeds to grant the following orders:

    a. The Court does hereby review and set aside its orders of 25/01/2022 staying the instant suit.

b. The matter shall be set out down for hearing on priority basis.

c. The costs of the Application shall be in the cause.

42. Orders Accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 12TH DAY OF MAY 2025 VIA MICROSOFT TEAMS.

.....

MOGENI J

JUDGE

In the presence of:

Plaintiff – Absent

Mr. Ngugi for 1st Defendant/Applicant

2nd and 3rd Defendants - Absent

Mr. Melita – Court Assistant