



REPUBLIC OF KENYA



KENYA LAW
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**Dokhole & another v Usinfecha & 5 others (Environment and Land
Appeal 1 of 2023) [2025] KEELC 4875 (KLR) (30 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4875 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISILOLO
ENVIRONMENT AND LAND APPEAL 1 OF 2023**

**JO MBOYA, J
JUNE 30, 2025**

BETWEEN

ABDULLAHI NEW DOKHOLE 1ST APPELLANT

PAUL HIRBO ISATU 2ND APPELLANT

AND

ZAINABU RAMATU USINFECHA 1ST RESPONDENT

HALATI ZAKARIA 2ND RESPONDENT

STEPHEN ZAKARIA 3RD RESPONDENT

GUMATO WARIO 4TH RESPONDENT

IBRAHIM BUNGE 5TH RESPONDENT

MPIRAON RAPHAELA NEEPE 6TH RESPONDENT

RULING

1. What is before me is the Notice of Motion application dated the 3/6/2025 filed pursuant to the provisions of inter alia Order 45 Rule 1 of the Civil Procedure Rules 2010 and Section 80 of the Civil Procedure Rules Chapter 21 Laws of Kenya and in respect of which the Application [2nd Appellant in the Appeal] now seeks to review the Judgment and Decree of the court delivered on the 2/4/2025.
2. The application before hand is premised on the various grounds which have been highlighted o the face thereof. Further the application is premised on two (2) affidavits namely; the main affidavit sworn on the 3/6/2025 and the supplementary affidavit sworn on the 28/6/2025 and to which the Application has annexed a copy of the consent duly elected between the Application [Sic] out going advocates and the Applicant herein. For good measure the consent is slated to allow the Application to proceed with the matter by timeline in place of the outgoing advocates.



3. The Respondent responded to the application by way of Notice of Preliminary Objection dated the 27/6/2025 and wherein, the some have colluded inter alia the application is premature; misconceived and filed in contravention of the provision of Order 9 Rule 8 of the Civil Procedure Rules 2010. In this regard the respondents have posted that the application before the court is incompetent and that the same ought to be struck out with costs to the Respondents.
4. The application came up for hearing on the 30/6/2025 when the Applicant informed the court that same had filed written submissions dated the 23/6/2025; and which submissions the Applicant sought to adopt and rely on. To this end, the Applicant implored the court to take into account the written submissions filed and to find and hold that the application for review was meritorious.
5. In particular, the Application contended that the same had placed before the court evidence of leu and important evidence which was not before the court at the time when the decree sought to be reviewed was issued.

Furthermore, the Applicant has contended that the bereaved has also known as Newa Dokhole and hence the Grant of Letters of Administration and Litem should refer to and include Newa Dokhole.
6. In addition, the Applicant contended that the same was only on [Interested Party in ELC No. 13 of 2018 and hence the doctrine of Res Judicata could not be deployed to detect his claim over and it respect of the instant matter. To this end, the Applicant posited that the court committed an error and thus there exists a basis to warrant review of the Judgment and Decree of the court.
7. Finally, the applicant contended that the application should be allowed in the interest of justice.

In any event, it was contended that the failure to file and serve a notice to act in person in terms of order 9 Rule 8 of the Civil Procedure Rules 2010; was a procedural defect and hence the same should not affect the mandate of the court to grant the relief sought.

In this regard, the Applicant pleaded with the court to grant the application to review the judgment and to allow to the production of new evidence in the matter.
8. The Respondent raised and canvassed two (2) key issues namely; that the application was defective and premature for failure to comply with the provision of Order 9 Rule 8 of the Civil Procedure Rules 2010. It was contended that the applicant had failed to procure and obtain leave of the court before filing the application dated the 3/6/2025. To this end, the Respondent posted that the application was contrary to and in contravention of Order 9 of the Civil Procedure Rules 2010.
9. Further and in addition, the counsel for the Respondent submitted that the Applicant has not meet and/or established the threshold for granting an order of review in terms of Order 45 Rule 1 of the Civil Procedure Rules, 2010. In this regard, it was contended that the application before the court constitutes and amounts to an abuse of the due process of the court.

In short, the court was invited to dismiss the application by the Applicant.
10. Having reviewed the application; the Respondent thereto and upon consideration of the oral submissions made by and on behalf of the parties; and having also considered the written submissions by the Applicant dated the 23/6/2025; I come to the conclusion that the determination of the application before the court turns on three (3) issues; namely; Whether the application beforehand is competent or otherwise; Whether the court is seized of jurisdiction to entertain the application for review on the face of an existing Notice of Appeal by the same Applicant and whether the Applicant has not or established the grounds for review as known to how or otherwise.



11. Regarding the first issue, namely; whether the application for review is competent, it is important to recall that the Applicant herein was represented by a firm of advocates up to and including the delivery of the Judgment to extent that the Applicant was duly represented by a firm of advocates up to and including the delivery of the judgment, it is believed that the applicant to seek for and obtain leave of the court before filing [Sic] a notice to act in person. [see the provisions of Order 9 Rule 9 of the Civil Procedure Rules 2010].
12. Nevertheless, in respect of the instant matter, there is no gainsaying that the Applicant didn't procure and/or obtain leave of the court either in the manner prescribed or at all, the failure to obtain leave in the prescribed manner goes to the root of the application and the same is vitiated to the root. [see the holding of the court of appeal in the case of Mumo Matemu v Trusted Society of Human Rights alliance [2013] eLKR; where the five (5) Judge Bench of the court of appeal dealt with the question of failure to comply with procedure and that legal consequences thereof]

[see also the decision of the Supreme Court of Kenya in the case of Moses Mwirigi & Others v IEBC [2016] eKLR at paragraph 65 – 67 thereof].
13. Other than the failure to obtain leave of the court in terms of Order 9 Rule 9 of the Civil Procedure Rules 2010; it is also important to observe that the Applicant proceeded to file the application before filing a Notice of Intention to act in person or at all. In this regard, there is no gainsaying that by the time the application was filed, the Applicant had no right to file the application by himself. Yet again the application violates the provisions of Order 9 Rule 8 of the Civil Procedure Rules 2010. Suffice it to state that the Applicant had the occasion to remedy the apparent defect beforehand, but the Applicant adopted and deployed a perfunctory casual approach and hence the application also fails on this ground. [see the decision of the majority of the court of appeal in the case Nicholas Kiptoo Arap Salat v IEBC and 7 Others [2013] eKLR.
14. Turning onto the second issue, namely; whether the court is seized of the requisite jurisdiction to entertain and adjudicate upon the application for review; it is important to note that the current application had filed/lodged a Notice of appeal against the Judgment and Decree of the court. The notice of Appeal is still in existence. To the extent that the Applicant has already filed/lodged a notice of appeal deemed as an appeal for purposes of the law, I hold the view the applicant cannot now revert to this court and seek to pursue review at the same time. In my humble view such kind of endeavor is tantamount to playing lottery with the due process of the court.

Furthermore, I hold the view that the notice of appeal [had not been withdrawn] diverts this court of the requisite jurisdiction to entertain the application for review [see Order 45 Rule 1 of the Civil Procedure Rules 2010]. [see also the decision of the court of appeal in the case of Otieno Rogot and Company Advocate v National Bank of Kenya Ltd [2010] eKLR.
15. With the issue of whether the Applicant has met or established the requisite grounds to warrant the grant of the orders of review in the manner envisaged under the law or at all. Suffice it to state that an applicant seeking for review is obliged to satisfy any of the grounds stipulated under Order 45 Rule 1 of the Civil Procedure Rules, 2010. In any event, it is not enough to merely recite the grounds on the face of the application; the Applicant must lay before the court plausible evidence to justify the ground [s] if at all.

[See the decision in the case of Republic v Advocates discipliner tribunal ex-parte Appollo Mboya [2019] eKLR.
16. In respect of the instant matter, the Applicant has contended that he same has discovered a new and important evidence and hence there need for review. However, what is touted to be new evidence is



what was always in the custody and possession of both the Applicant and the 1st Appellant. Suffice it to state that the Grant ad Litem and the contents thereof were well known to the Applicant.

17. Furthermore, it is important to state that the issue, now been deployed by the Applicant to accrue review are issues/matters that were highlighted by the court in the body of judgment and hence the Applicant is being mischievous by attempting to use the reasoning of the court in the judgment to propel the application for review. Such an endeavor is intended to avail to the Applicant a second bite on the Cake/Cherry. The law does not fathom a situation where a party uses/deploy the reasoning of the court to list her case. such kind of situation is frowned upon and must be deprecated in the strongest terms possible [see the decision of the Supreme Court in the case of Fredrick Otieno out a v Jared Odoyo Okello [2017] KESC [Ruling].
18. Finally, I also wish to point out that the Applicant herein had previously been involved in litigation vide Meru ELC No. 13 of 2018; and wherein the same issues were raised and canvassed. Suffice to observe that the Applicant was an interested party in the said case namely ELC No. 13 of 2018; but the Applicant raised some issues and hence the same issues cannot be re-canvassed again. In this regard, this court firmly hold what the ingredient of Res Judicata were proved.
19. Despite the foregoing, the Applicant has now contended that this court committed an error in finding that the suit was Res Judicata. I beg to observe that if there was an error in the conclusion of this court, such an error doesn't warrant review. It is not an error of mistake as known to laws. On the contrary, the purported error can only be an erroneous exposition of the law or mere error and hence the court cannot be called upon to revisit the issues for good measure, such an invitation shall be tantamount to inviting this court to sit on appeal on own decision.

Instructively, such an endeavor will amount to an absurdity. [see the holding of the court of appeal in the case of National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR; See Nyamogo and Nyamogo Advocate v Kogo [2002] eKLR; See also paragraph 7 Swai v Kenya Breweries Ltd [2014] eKLR].
20. In the premises, I come to the conclusion that the current application constitutes and amount to an abuse of the due process of the court [See the decision of the court of appeal in the case of Muchanga Investments Ltd v Safaris Africa [unlimited] Limited [2009] eKLR; See also Satya Bharna v Director of Public Prosecution [2019] eKLR at paragraph 27 and 28 thereof].

Final Disposition

21. Flowing from the foregoing, it must become apparent that the application dated the 3/6/2025, is bereft of merits.
22. In the premises, the final order of the court are as hereunder;
 - i. The application be and is hereby dismissed.
 - ii. Costs of the application shall be borne by the Applicant.
23. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 30TH OF JUNE, 2025.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In The Presence Of;

Ms Mukami – Court Assistant



Mr Misati for the Respondent - [save for the 4th Respondent]

Paul Hirbo Isatu – [the 2nd Appellant/Applicant – [present in person]

