



**Muliango & 2 others v Andai (Environment and Land Appeal
E039 of 2023) [2025] KEELC 5129 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 5129 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E039 OF 2023**

**A NYUKURI, J
JUNE 30, 2025**

BETWEEN

BENARD MULIANGO 1ST APPELLANT

SILAS MULIANGO 2ND APPELLANT

BILHA VIHENDA 3RD APPELLANT

AND

SHADRACK MUSE ANDAI RESPONDENT

*(Appeal against the ruling of Honourable R. S. Kipng'eno, (Principal Magistrate)
delivered on 14th November, 2023 in Butali Magistrates Court ELC Case No. 1 of 2021)*

JUDGMENT

Introduction

1. This appeal is a challenge against the ruling of Honourable R. S. Kipng'eno, (Principal Magistrate) delivered on 14th November, 2023 in Butali Magistrates Court ELC Case No. 1 of 2021. In the impugned ruling, the learned trial magistrate allowed the respondent's application dated 27th September, 2023 wherein he had sought setting aside and or review of the ruling made on 23rd May, 2023. The trial court also proceeded to dismiss the application dated 20th April, 2023 in which the appellant had sought and been granted orders of review of the orders of 13th October, 2022 which had allowed the plaintiff to produce both the title deed and green card for the suit property.

Background

2. On 29th January, 2016, Shadrack M. Andai instituted a suit being ELC Case No. 9 of 2016 at Kakamega ELC vide a plaint dated 22nd January, 2016 against the defendants who are the appellants herein. He stated that he was the registered proprietor of Parcel No. Kakamega/Lumakanda/5876 having



purchased the same in 2011 and that the defendants had trespassed thereon, cut down trees and purported to sell the land to strangers. He sought a permanent injunction against the defendants. The defendants filed defence dated 17th May, 2016 denying the plaintiff's claim. They alleged that the plaintiff acquired registration of the suit property by fraud and that the 1st defendant was the rightful owner thereof. They argued that there is a similar suit being Eldoret ELC Case No. 609 of 2012. They sought the dismissal of the plaintiff's suit.

3. The suit was later transferred from Kakamega ELC to Butali Principal Magistrates Court and registered as Butali PMC ELC Case No. 1 of 2021. The record shows that parties have filed several applications and so far nine applications have been determined yet the conclusion of the trial is not in sight. Among the applications filed are applications dated 22.1.2016, 3.2.2016, 3.3.2016, 15.11.2018, 12.12.2019, 13.3.2018, 20.4.2023, 27.9.2023 and 8.12.2023. These are nine applications. The appeal herein is in regard to the ruling dated 14.11.2023 which is in regard to the application dated 27.9.2023. Even when this appeal was pending, one of the parties herein still filed application dated 8.12.2023. It is clear that none of the parties is keen on having the dispute resolved at once.
4. The application dated 27.9.2023 was filed by the plaintiff seeking that the ex parte orders made on 23rd May, 2023 allowing the respondents' application dated 20.4.2023 be set aside and that the court considers the applicant's replying affidavit and submissions both dated 22nd May, 2023 and filed on 23rd May, 2023 which were in response to the application dated 20.4.2023 and issue a fresh ruling.
5. The basis of the application was that on 2.5.2023, parties were directed to file submissions in regard to the application dated 20.4.2024 and the same was listed for mention to confirm filing of submissions on 23.5.2023, only for the court to deliver its ruling on 23.5.2023, without considering the response and submissions of the applicant. The applicant attached inter alia a copy of the mention notice for 23.5.2025 served on his counsel by the defendant's counsel as well as the ruling of 23.5.2023 and his submissions and replying affidavit dated 22.5.2023.
6. The plaintiff's application dated 27.9.2023 was opposed. Bilha Muliango the 3rd defendant filed a replying affidavit dated 18th October, 2023. She stated that the application was an afterthought aimed at derailing the matter as the trial court properly applied its mind to the issues and made a proper decision. That it was necessary to call Kakamega Land Registrar to confirm the authenticity of the title deed and green card. She further stated that the issue of the court having failed to consider the replying affidavit and submissions by the respondent were irrelevant as the ruling was meant to prevent miscarriage of justice.
7. It was also the defendants' averment that the plaintiff will not suffer prejudice if the Land Registrar, Kakamega testifies in court but that the defendants will suffer prejudice if the Land Registrar does not attend court to clarify the issue of ownership of the suit property. They maintained that the plaintiff had not met the threshold for grant of orders of review and stated that the application had been brought after inordinate delay, was made in bad faith and meant to conceal material facts.
8. Upon consideration of the application, response and submissions, the learned trial Magistrate held that the application dated 20.4.2023 was an afterthought as none of the parties intended to call the Land Registrar to produce the title deed and green cards. On that basis the court allowed the application dated 27.9.2023 and held that the title deed and green card remain produced as P. Exhibits 3 and 4 respectively.
9. Aggrieved with the above ruling, the appellants herein challenged the ruling of 14th November, 2023 citing the following grounds of appeal;



- a. That the learned trial magistrate erred in law and fact in dismissing the appellants application dated 20.4.2023 which he had previously allowed while sitting on an appeal against his ruling disguised as an application for review.
 - b. That the learned trial magistrate erred in law and fact in entertaining and allowing a second application for review when he had lacked jurisdiction to entertain and allow the said application.
 - c. That the learned trial magistrate erred in law and fact in allowing the respondents application for review dated 27th September, 2023 without considering whether the respondent had met the threshold for the issuance of an order of review.
 - d. That the learned trial magistrate erred in law and fact in allowing the production of contested documents namely title deed for land Parcel No. Kakamega/Lumakanda/5876 and a purported certified copy of greencard for land parcel No. Kakamega/Lumakanda/22 as plaintiff's exhibit 3 and plaintiff's exhibit 4 respectively by the respondent without the respondent calling the Registrar of Lands.
10. Consequently, the appellants sought the following orders;
- a. That the ruling of the Learned trial magistrate in respect of the respondent's application dated 27.9.2023 be set aside in its entirety and in its place, there be an order for dismissal of the said application.
 - b. That the order for marking the respondents contested documents namely title deed for land parcel No. Kakamega/Lumakanda/5876 and a certified copy of the greencard for land parcel No. Kakamega/Lumakanda/22 as PMFI3 and PMFI4 be sustained pursuant to the ruling by the learned trial magistrate dated 23.5.2023.
 - c. The Butali Principal Magistrate ELC NO. 1 of 2021 be transferred and/or allocated to another magistrate of competent jurisdiction for further hearing and final determination.
 - d. That costs of this appeal be provided for.
11. The appeal was canvassed by way of written submissions. On record are the appellants' submissions dated 1st March, 2024 and the respondent's submissions dated 4th December, 2024.

Appellants' submissions

12. Counsel for the appellant submitted that the learned trial magistrate lacked jurisdiction to determine a second application for review. Counsel submitted that on 13.10.2022, the trial court allowed the plaintiff to produce a title deed and green card. That the appellant having been aggrieved by the said decision, filed application for review dated 20.4.2023 and a ruling in that respect was made on 23.5.2023 allowing the said application on the basis that there were allegations of fraud. Counsel argued that in allowing the application dated 27.9.2023, the trial magistrate was sitting on appeal of his decision of 23.5.2025.
13. Order 45 Rule 6 of the Civil Procedure Rules was cited by counsel, who argued that no application for review an order emanating from an application for review shall be entertained by the court. Counsel contended that the respondent's only recourse in regard to the ruling of 23.5.2023 was to file an appeal. To buttress this argument, counsel cited the case of George Gikubu Mbuthia –vs- Housing Finance Co. Ltd & 2 Others 2009 (KLR). Counsel submitted that it was the respondent's duty to procure



attendance of the Land Registrar because he was the one relying on the title deed and green card to prove his case.

14. On the issue as to whether Butali PM ELC No. 1 of 2021 should be transferred to another court for hearing and determination, counsel submitted that the trial magistrate had exhibited bias by sitting on appeal of his own case when he was aware of pending investigations of fraud. Counsel also argued that the trial magistrate proceeded with hearing the suit on 30.1.2024 when this matter was pending, showing open bias and that the appellants stand to suffer prejudice if the matter proceeds before the same court.

Respondent's submissions

15. Counsel for the respondent submitted that the only issue that arose is whether the trial court can be faulted for allowing the application dated 27th September, 2023. Counsel relied on provisions of Order 45 Rules 1 and 3 of the Civil Procedure Rules, Sections 1A, 3A and 80 of the *Civil Procedure Act* and submitted that there were sufficient grounds for review and or setting aside of the order of 23.5.2023.
16. On whether the trial court sat on appeal of its decision, counsel submitted that as the orders of 23.5.2023 were made ex parte without the respondent's participation, the court did not sit on appeal of its decision and that the court had jurisdiction to make the impugned orders under Provisions of Order 45 of the Civil Procedure Rules and section 80 of the *Civil Procedure Act*. On whether the orders of 27.9.2023 met the threshold for review, counsel argued that as the orders of 23.5.2023 were made ex parte the same could be reviewed and that the application of 20.4.2023 for reviewing orders of 13.10.2023 was made upon inordinate delay and that the application did not meet the threshold for review.
17. It was contended for the respondent that the application of 20.4.2023 was allowed on the incorrect presumption that it was not opposed and that there was a criminal case of forgery in regard to the title deed in question. That the trial court having realized from the application of 27.9.2023 that the application of 20.4.2023 had indeed been opposed and that the criminal case had been withdrawn, it rightly made the orders appealed against and that it was the appellants that had misled the court in the application of 20.4.2025.

Analysis and Determination

18. The court has duly considered the appeal, parties' rival submissions and the entire record. It is trite that the duty of this court as the first appellate court is to re-analyse and re-evaluate the findings and conclusions of the trial court and ascertain whether the conclusions arrived by the trial court are to stand or not and give reasons either way.
19. The issues that arise for the court's determination are;
 - a. Whether the trial court had jurisdiction to hear and determine the application dated 27th September 2023.
 - b. Whether there was merit in the application dated 27th September 2023.
20. The respondent predicated his application dated 27th September 2023 on provisions of sections 1A, 1B and 3A of the *Civil Procedure Act*; section 13 of the *Environment and Land Court Act*; Order 45 Rule 1 of the Civil Procedure Rules and Order 51 of the Civil Procedure Rules. In the trial court, the respondent sought that the ex parte ruling delivered on 23rd May 2023 allowing the appellant's application dated 20th April 2023 be set aside and or reviewed and that the court considers the respondent's replying affidavit and submissions, both dated 22nd May 2023 in the determination of



the application dated 20th April 2023. His complaint was that he had been required by court to file his replying affidavit and submissions and the matter was fixed for mention to confirm compliance on 23rd May 2023, but that when he came to court on that date, he was surprised to find a ruling, which had not taken into account his response and submissions. Essentially, he complained of being condemned unheard. In its ruling of 14th November 2023, the trial court allowed his application.

21. The appellant is unhappy with the ruling of 14th November 2023, first, on the basis that the application dated 20th April 2023 was an application for review and that a court has no jurisdiction to review an order emanating from a review application by dint of the provisions of Order 45 Rule 6 of the Civil Procedure Rules.

22. Order 45 Rule 6 of the Civil Procedure Rules provide as follows;

“Bar of subsequent applications

No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained.”

23. Essentially, a court is barred from entertaining an application seeking to review a decision made in regard to an application for review. This means that the court cannot review a decision made in regard to a review. Put differently, a second review cannot be entertained by the court.

24. In the case of AN v BK [2015] eKLR, the court held as follows;

“The provision of Order 45 Rule 6 of the Civil Procedure Rules is mandatory that a second application for review shall not be entertained.”

25. In the instant case, the respondent sought that the ruling of 23rd May 2023 be set aside and or be reviewed and that his replying affidavit and submissions be considered in the determination of the application dated 20th April 2024 because the same was wrongly not considered and the application erroneously proceeded ex parte. Basically, the respondent’s argument is that his right to a fair hearing had been violated because he had been condemned unheard. The court could not proceed to determine the application under the provisions of Order 45 Rule 1 of the *Civil Procedure Act* as it had been barred by provisions of Order 45 Rule 6 thereof. In the premises, I agree with the appellant that the trial court could not determine a second application for review.

26. However, as stated earlier, apart from invoking provisions of Oder 45 Rule 1 of the Civil Procedure Rules, the respondent also invoked provisions of 1A, 1B and 3A of the *Civil Procedure Act*

27. Sections 1A and 1B provide for the overriding objective of the *Civil Procedure Act*, being a just, expeditious, proportionate and affordable resolution of disputes and the duty of the court in furthering the overriding objective as follows;

1A. Objective of Act

1. The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
2. The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).



3. A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

[[Act No. 6 of 2009](#), Sch.]

1B. Duty of Court

For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

- a. The just determination of the proceedings;
- b. The efficient disposal of the business of the Court;
- c. The efficient use of the available judicial and administrative resources;
- d. The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

28. On the other hand, section 3A empowers the court to apply its inherent power to make orders to meet the ends of justice and the same provides as follows;

3A. Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

29. Therefore, the role of the court in the resolution of civil disputes is to facilitate the just, efficient and timely disposal of court proceedings at an affordable cost and apply suitable technology. Inherently, the court is an icon and pillar of justice and should not hesitate to intervene in situations where there is an apparent injustice, that is why its first duty is to ensure a just resolution of disputes. Courts are not merely courts of law but are also courts of justice.

30. In the instant case, the core of the respondent's complaint was that the ruling of 27th September 2023 was as a result of denying him his unalienable right to be heard before being condemned. The right to be heard is a basic human right that is non-derogable and which existed since ancient times before the current civilization. That right has now been codified in Article 50 of [the Constitution](#) which provides as follows;

Fair hearing.

50.

- (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
- (2) Every accused person has the right to a fair trial, which includes the right—
 - a. to be presumed innocent until the contrary is proved;



- b. to be informed of the charge, with sufficient detail to answer it;
- c. to have adequate time and facilities to prepare a defence;
- d. to a public trial before a court established under this Constitution;
- e. to have the trial begin and conclude without unreasonable delay;
- f. to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
- g. to choose, and be represented by, an advocate, and to be informed of this right promptly;
- h. to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
- i. to remain silent, and not to testify during the proceedings;
- j. to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
- k. to adduce and challenge evidence;
- l. to refuse to give self-incriminating evidence;
- m. to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;
- n. not to be convicted for an act or omission that at the time it was committed or omitted was not—
 - i. an offence in Kenya; or
 - ii. a crime under international law;
- o. not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;
- p. to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and



- q. if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.
- (3) If this Article requires information to be given to a person, the information shall be given in language that the person understands.
- (4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.
- (5) An accused person—
 - a. charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and
 - b. has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.
- (6) A person who is convicted of a criminal offence may petition the High Court for a new trial if—
 - (a) the person’s appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and
 - (b) new and compelling evidence has become available.
- (7) In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.
- (8) This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.
- (9) Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.

31. Therefore, where a court has been made aware that its decision was made without availing opportunity to one of the parties to be heard, it has an inherent power to correct such violation of a right by granting that opportunity to the party whose right has been violated. I do not think that provisions of Order 45 Rule 6 would be the basis of denying a party the opportunity to be heard. Under Order 51 Rule 15 of the Civil Procedure Rules, the court has jurisdiction to set aside an order made ex parte.

32. As the order of 14th November 2023 was made ex parte and thereby denied the respondent an opportunity to be heard, I find and hold that the trial court had jurisdiction to determine the



application dated 27th September 2023 on the basis of its inherent power to make orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The court had jurisdiction to set aside orders of 23rd May 2023

33. I now turn to the second issue, which is whether the application dated 27th September 2023 was merited, in other words whether it was sight for the trial court to set aside the decision of 23rd May 2023, and upon hearing the application dated 20th April 2024, the trial court was right to find that that application was not merited. Having found that the decision of 23rd May 2023 was made ex parte without giving the respondent an opportunity to be heard, I find and hold that the respondent was not accorded a fair hearing and that was a good reason to set aside those orders as that was in violation of the respondent's right.
34. On whether the application dated 20th April 2023 met the threshold for review, in that application the appellant sought an order to set aside orders of 13th October 2022, which orders allowed the plaintiff to produce title deed and greencard in regard to the suit property as exhibits. They further sought that the said documents be marked for production so as to be produced by the District Land Registrar.
35. The power to grant review is provided for in section 80 of the [Civil Procedure Act](#) and the conditions upon which review can be granted are in Order 45 Rule 1. The said provisions provide as follows;

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.”

Order 45 rule 1(b) 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.”

36. Essentially, the above provisions show that Section 80 gives the power of review while Order 45 sets out the rules. The latter restricts the grounds for review by limiting review 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 of the application, there is a requirement that the same has to be made without un reasonable delay.
37. In the case of *Nyamogo & Nyamogo v Kogo* [2001] EA 170, the court discussed what constitutes an error apparent on the face of the record, and stated as follows:-
- “An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a 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 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 possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”
38. In the case of *Republic v Advocates Disciplinary Tribunal Ex parte Appollo Mboya* (2019) e KLR the court was of the view that a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. Further, it was held that review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.
39. In the instant case, the basis for the prayer for review in the application dated 20th April 2023 was that on 13th October 2022, the court allowed the respondent to produce in evidence, the title and green card without calling the Land Registrar to produce the same when the authenticity thereof was in question as the plaintiff was then facing criminal charges of forgery in Eldoret Criminal Case No. 4874 of 2016.
40. Having considered the application, it is clear to me that the appellants did not base their application on allegation of new evidence, error apparent on the face of the record or sufficient reason. The appellant was clear that the application dated 20th April 2023 was on the basis that he was aggrieved with the decision of 13th October 2022. This court has relooked at the proceedings of 13/10/2022, which show that on the said date, the matter came up for hearing and both parties were ready to proceed with the hearing. The respondent then presented his evidence and upon producing the title deed, there was objection from the appellants’ counsel over production of the same on the basis that there were criminal charges against the respondent who insisted that the Land Registrar should be the one to produce the document. The court did not allow the objection and ordered the production of the title deed. The respondent further produced the greencard and no objection was raised in regard thereto. The case proceeded and on 20th April 2023 is when the appellants sought review; which was 6 months after the decision complained of of 13th October 2022.
41. Firstly, there was inordinate delay in seeking review as a period of six months had passed. Secondly, none of the elements in Order 45 rule 1 was pleaded or proved. Thirdly, the appellant’s objection on



the production of the greencard was overruled after both parties had been heard on merit, yet the appellants sought review on the same grounds advanced on 13th October 2023. Since as stated by the appellants, they were unhappy with the decision of 13th October 2025 overruling their objection on the production of the title deed, their only recourse lay in appeal as the application dated 20th April was merely a disguised appeal. They ought to have appealed against the decision of 13th October 2022 as a review does not lie where a party disagrees with the court's position on an issue.

42. In the premises I am satisfied that the appellant's application dated 20th April 2024 lacked merit and the same was properly and rightly dismissed by the trial court.
43. The upshot is that I find no merit in the appeal, which I hereby dismiss with costs to the respondent.
44. As this matter has been in court for trial for 9 years and seeing the parties' penchant for filing application after application, I direct that this matter shall be determined before the trial court within six (6) months of this judgment.
45. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 30TH DAY OF JUNE, 2025

A. NYUKURI

JUDGE

In the presence of;

Ms. Omuya holding brief for Mr. Nyambegere for the appellant

Mr. Shadrack Muse Andai the respondent in person.

Court Assistant: M. Nguyai

