



REPUBLIC OF KENYA



KENYA LAW
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**Ali v Dika & 2 others (Environment & Land Case E002 of 2022)
[2025] KEELC 5003 (KLR) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 5003 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT & LAND CASE E002 OF 2022**

**JO MBOYA, J
JUNE 26, 2025**

BETWEEN

FATUMA MOHAMMED ALI PLAINTIFF

AND

BORU DIKA 1ST DEFENDANT

HENRY KIMATHI 2ND DEFENDANT

**ADAM GITONGA NYAGA (AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF FESTUS NYAGA - DECEASED) 3RD DEFENDANT**

RULING

1. What is before me is the Notice of motion application dated 24th April 2025: brought pursuant to the provisions of Order 9 rule 9 Order 45 rule 1 of the civil procedure rules and sections 1A 1B 3 and 3A of the *civil procedure Act* chapter 21 laws of Kenya and wherein the 2nd defendant/ applicant [hereinafter referred to as the Applicant] has sought the following reliefs:-
 - i. That this application be certified urgent and heard ex-parte in the first instance.
 - ii. That pending the hearing and determination of this application inter partes, Leave be granted for the firm of M/s TMM Advocates to come on record for the 2nd Defendant/Applicant in place of M/s Maitai Rimita & Co. Advocates.
 - iii. That this Honourable Court be pleased to review its Judgment dated 2nd April 2025.
 - iv. That costs of this Application be provided for.
2. The instant application is premised on the various grounds which have been enumerated in the body thereof. In addition, the application is supported by the affidavit of Henry Kimathi [2nd defendant/ applicant] sworn on even date and to which the deponent has annexed a total of seven documents



including a copy of the judgment; copy of [sic] the written submissions and copy of the decree of the court sought to be reviewed.

3. The 1st and 3rd Defendants filed a replying affidavit and wherein same have opposed the application under reference. Suffice it to posit that the 1st and 3rd Respondents have averred that the subject application is a disguised appeal, albeit couched as an application for review. Furthermore, it has been averred that the issues being raised at the foot of the application are the issues which were well within the knowledge of the applicant and thus same do not [sic] constitute new and important evidence to warrant review either in the manner sought or at all.
4. The Plaintiff herein did not file any response to the application under reference. Moreover, learned counsel for the Plaintiff/ Respondent intimated to the court that same shall not be opposing the application under reference.
5. The application came up for hearing on the 20th May 2025 whereupon the advocates for the parties covenanted to canvass the application by way of written submissions. To this end, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions. Instructively, the 2nd Defendant/ Applicant and the Respondents duly filed their respective submissions. For good measure, the two [2] sets of written submissions are on record.
6. Having appraised the application; the response thereto and upon consideration of the written submissions filed by the respective parties, I come to the conclusion that the determination of the subject application turns on three [3] key issues, namely; whether the law firm of M/S TMM Advocates are properly on record and if not, whether the application beforehand is competent; whether the applicant has established and demonstrated a basis to warrant review or otherwise; and whether the application beforehand constitute an abuse of the due process of the court or otherwise.
7. Regarding the first issue, namely; whether the law firm of M/S TMM Advocates are properly on record and if not whether the application beforehand is competent, it is imperative to recall and reiterate that the 2nd defendant, on whose behalf the application is [sic] indicated to be brought, was duly represented by the firm of M/S Maitai Rimita & Co. Advocates up to and including the delivery of the Judgment. Suffice it to state that the 2nd defendant/ Applicant had a duly appointed firm of advocates on record.
8. It is worthy to highlight that even though the 2nd Defendant/ Applicant has the right to be represented by legal counsel of choice by dint of the Provisions of the Constitution, 2010; however, there is no gainsaying that where Judgment has been entered in a particular matter, no change of advocate can be effected and or undertaken without leave of the court.
9. Moreover, it is common ground that where any advocate seeks to come on record in place of a previous advocate/ firm of advocate after Judgment has been entered, such advocate is called upon to either file an application seeking leave to come on record and which application must thereafter be served on the outgoing advocate. Notably, upon service of such an application, the court would be called upon to grant leave in accordance with the law and thereafter pave way for the filing [effecting] notice of change.
10. On the other hand, the incoming advocate is also at liberty to procure and obtain the consent of the outgoing advocates and thereafter lodge the consent under reference together with a copy of the notice of change. Suffice it to underscore that upon lodgement of such consent, the court will be called upon to endorse the consent and thereafter constitute same as an order of the court thus giving was to effecting change of advocate. Pertinently, it is the endorsement/ adoption of the Consent [if any] that makes same part of the record of Court and not otherwise. [See the decision of the Supreme Court of Kenya in the case of Geoffrey Makana Asanyo and 3 Others versus Attorney General [2020] Eklr, where the Court held that a Consent only becomes an order of the Court upon adoption]



11. Suffice it to state that the foregoing procedures are well highlighted at the foot of Order 9 Rule 9 of the Civil Procedure Rules 2010. Given the significance of the said provisions in determining whether or not the firm of M/S TMM Advocates are lawfully on record, it becomes imperative to reproduce the said provisions.
12. The provisions of Order 9 Rule 9 of the Civil Procedure Rules [supra] stipulate thus:

[Order 9, rule 9.] Change to be effected by order of court or consent of parties.

 9. 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 by 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.
13. premised on the foregoing provisions, there is no gainsaying that it was incumbent upon the law firm of M/s TMM Advocates to procure and obtain leave of the court before effecting [read, filing] change of advocate. However, it is apparent that no such leave was ever obtained beforehand.
14. Other than the foregoing, it is also important to state that the law firm of TMM Advocates was at liberty to file a composite application containing the limb seeking for leave of the court to come on record in place of the outgoing advocates. However, in the event that a composite application was filed [like the one beforehand] then it behoved the incoming advocate to prosecute the limb of leave to come on record beforehand. For good measure, the limb of the application seeking to come on record ought to have been prosecuted at the onset before venturing to address the merits/ substance of the application pertaining to the substantive reliefs.
15. To this end, it is apposite to take cognizance of the peremptory provisions of Order 9 Rule 10 of the Civil Procedure Rules, 2010.
16. The said provisions provide as hereunder:-
 10. An application under rule 9 may be combined with other prayers, provided the question of change of advocate or party intending to act in person shall be determined first.
17. Suffice it to state that though the incoming advocate filed a composite application and wherein same sought leave to come on record, the said limb of the application was never canvassed and disposed of at the onset. Notably, the entire limbs of the application were canvassed at the same time and thus by the time the subject matter came up for ruling, no leave had been granted in favor of the incoming advocate.
18. In the absence of leave being granted in favour of the incoming advocate, there is no gainsaying that the said advocates cannot therefore be seized of the requisite locus standi to mount, maintain and or prosecute the application dated 24th April 2025. Quite clearly, the application under reference is premature, incompetent and stillborne.
19. Other than the fact that no leave was sought and or obtained beforehand, it is also important to outline that the application under reference is also muddled up and inherently contradictory. I say this because in the body of the application, the relief[s] being sought are on behalf of the 2nd defendant applicant,



yet the application is crafted by the firm of M/S TMM Advocates, advocates for the 1st Defendant/Applicant.

20. I am alive to the fact that the 1st defendant herein is represented by the law firm of M/S Kiautha Arithi & Co. Advocates. Moreover, during the entire proceedings, including the delivery of Judgment, the said firm of advocates has remained on record. In this regard, it is evident that the application is equally negated by the inherent contradictions that are discernible in the body thereof.
21. In view of the foregoing, I come to the conclusion that the application beforehand [namely the application dated 24th April 2025] is premature, incompetent and thus legally untenable.
22. Before concluding on this issue, I beg to reference the decision of the Court of Appeal in the case of Opiyo, Chairperson [§ 5 others v Migori County Assembly § 6 others \(Civil Appeal E174 of 2023\)](#) [2024] KECA 529 (KLR) (14 May 2024) (Judgment), where the Court underscored the need to comply with Rules of procedure and timeline[s] in the following manner:
 44. In the present case, as the learned Judge pointed out, the appellants were late in filing their substantive judicial review application. They may well be right that the delay was excusable, and was, perhaps, even caused by the court registry. In such a situation, however, the appropriate recourse for a litigant cannot be to ignore the court or a rule-based time limitation by simply terming it a “technicality”. The proper recourse would be to approach the court under a certificate of urgency seeking for extension of time to make the filing. At the very least, a litigant in that position ought to file a contemporaneous application seeking the court’s permission to deem the application filed late, as properly filed.
 45. In the present case, the appellants did not as much as seek oral leave to have the application dated 15th March, 2023 deemed to be regularly filed. There are outer limits to the organic plasticity purchased by the existence of Article 159(2)(c) of the [Constitution](#)– and the circumstances here find that limit:

Article 159(2)(c) of the [Constitution](#) cannot be cited to aid a litigant who explicitly fails to timeously abide by the court’s direction without seeking the court’s discretion to extend time. On this score, therefore, we would agree with the learned Judge.

23. Whereas the Court of Appeal was considering the question of extension of time to validate the application for judicial review that had been filed out of time, the ratio decidendi flowing from the decision supra is to the effect that a party/ litigant cannot disregard the rules of procedure with abandon.
24. Furthermore, the need to comply with and adhere to the rules of procedure was also expounded by the Court of Appeal in the case of Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2013] eKLR where the court stated thus;

“A five-judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of Mumo Matemu Vs. Trusted Society Of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012 as follows;

“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the [Constitution](#) and the overriding objective principle under Section 1A and 1B of the [Civil Procedure Act](#) (Cap 21) and Section 3A and 3B



of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases.”

25. Turning to the second issue, namely; whether the applicant has established and or proved the requisite ingredients to warrant review, it is important to state that the subject application is premised on the existence of an error and or mistake apparent on the face of record; and the discovery of new and important evidence, namely; the sale agreement dated 30th November 2009] which was neither tendered nor produced before the court.
26. I beg to start with the alleged error and or mistake apparent on the face of the record. What is contended to be the error and or mistake apparent on the face of the judgment is the fact that the court found and held that the applicant had not filed written submissions or better still, that no submissions by the applicant were traceable to the court tracking system. To this end, the applicant now posits that had the court taken into account the submission, the court would probably have reached a different conclusion. In this regard, the Applicant seeks to impeach the Judgment of the Court on the basis of [sic] not consideration of the Written submission[s].
27. I beg to state that the contention by the applicant herein is built on quicksand. Firstly, the submissions were either filed onto the court’s tracking system or not filed. Either way, the court is only tied to the submissions that are filed and available on the court record.
28. Secondly, even assuming that the court did not consider the said submissions, the failure to take cognisance of such submissions cannot by and of itself constitute a basis to warrant review. For good measure, there exists a plethora of cases that have been heard and determined on the basis of pleadings and evidence, albeit without submissions [see the decision of the court of appeal in the case of Daniel Toroitich Arap Moi versus Mwangi Stephen Mureithi 2014 eKLR; Nganga and Another versus Owiti and Another [2008]1KKLR [EP]749.] [See also Rose Ngande Kathathi versus Francis Kivuva[2020]eklr].
29. The other aspect that is contended to premise the existence of an error and or mistake apparent on the face of record is the failure by the court to appreciate/ comprehend the relationship between plot no. 7918/128/J1 on one hand and plot no. 7918/128. In particular, it has been submitted that the court failed to appreciate that plot no. J 1 arose from the sub-division of plot number 7918/128.
30. Additionally, it has been submitted that the court failed to take note of the surveyor’s report filed in court on the 16th June 2017 and which is reported to have been produced in evidence by PW2. In my understanding, the applicant herein is seriously impugning the understanding, apprehension and interpretation of the evidence that was tendered before the court. Simply put, the Applicant is stating that the Court mis-construed the evidence on record and reached an erroneous conclusion.
31. Nevertheless, it is important to underscore that this court exhaustively addressed the question of plot number 7918/128 on one hand and plot number 7918/128/J 1 and thereafter the court held that the applicant herein did not demonstrate that same had purchased plot no 7918/128/J1 so as to be able to convey same to the Plaintiff/ Respondent.
32. The court may [sic] not have properly appreciated the relationship between the two plots, but what is apparent in the body of the Judgment is that the issues under reference were well highlighted, considered and adjudicated upon. In the event that there was a misapprehension; misconstruction; or misapplication of the evidence and the law, such misapprehension constitutes an erroneous exposition of the law and not an error or mistake.



33. Furthermore, it is important to underscore that there is a difference between an error and mistake apparent on the face of the record on one hand and an erroneous view [erroneous exposition of the law] and a mere error. Whereas the former lends itself to review, the latter can only be remedied by way of an appeal to the Court of Appeal and not otherwise.
34. To my mind, the applicant herein is being disingenuous in filing the subject application and disguising same as review, yet what is being sought is an invitation to this court to re-engage with the factual dispute afresh.
- Simply put, the applicant is seeking to have a second bite on the cherry in an endeavour to better his case.
35. I am afraid that the applicant herein cannot be allowed to convert an application for review into an appeal and thereafter seek to call upon the court to upset its own decision. In my humble view, the invitation like the one beforehand would amount to an absurdity. Same is antithetical to the Rule of Law.
36. In the case of *Pancras T. Swai v Kenya Breweries Limited* [2014] KECA 883 (KLR) the Court of Appeal expounded on the scope of an application for review and the clear dichotomy between an error and mistake on the face of record; and an erroneous exposition of the law.
37. For coherent, the court state thus,
29. It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly, faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are *factus officio* and have no appellate jurisdiction.
- 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 limbs therein stated or “for any sufficient reason.” The appellant did not bring his application within any of the limbs nor did he show that there was any sufficient reason for review to be granted. As repeatedly pointed out in various decisions of this Court, the words, “for any sufficient reason” must be viewed in the context firstly of Section 80 of the *Civil Procedure Act*, Cap 21, 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. In *Sarder Mohamed v. Charan Singh Nand Sing and Another* (1959) EA 793, the High Court correctly held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.
38. Turning to the limb as pertains to the discovery of new and important evidence, it is important to highlight that what is touted as new and important evidence is the sale agreement dated 30th November 2009. Suffice it to state that the issue of the same agreement was elaborately addressed by this court in the Judgment. It is instructive to highlight the contents of paragraphs 89 to 99 of the Judgment wherein this court observed that the failure to tender and produce the sale agreement under reference impacted on the claim by the applicant.



39. In addition, the court ventured to consider the import and legal implications of the doctrine of *nemo dat quod non habet*; as well as the provisions of Section 3[3] of the *Law of Contract Act*, Chapter 23, Laws of Kenya.
40. To my mind, an applicant seeking to underpin an application for review on the basis of new and important evidence, must venture forward and demonstrate that the said new and important evidence was not within his possession and or custody at the time of delivery of the judgment or order sought to be reviewed. Moreover, it is also incumbent upon such an applicant to demonstrate that same exercised due diligence but could not produce [sic] the new evidence.
41. The law as it pertains to the ground of discovery of new and important evidence has been elaborated in various decisions. Instructively, a party cannot succeed on this ground as a matter of right or for the mere asking. Pertinently, such a party must lay before the court plausible reasons and or explanation to warrant exercise of the court’s discretionary powers. [see *Otieno Ragot & Co. Advocates versus National Bank of Kenya 2020 eKLR*; and *Paul Misoro Orago vs City Council of Nairobi 2017 eKLR*].
42. Next is the issue of whether the application constitutes an abuse of the due process of the court. What constitutes abuse of the due process of the court was highlighted by the Supreme Court in the case of *Rutongot Farm Ltd v Kenya Forest Service & 3 others (Petition 2 of 2016) [2018] KESC 27 (KLR) (19 September 2018) (Ruling)* where the court stated thus,
- “The concept of ‘abuse of the process of the Court’ bears no fixed meaning, but has to do with the motives behind the guilty party’s actions; and with a perceived attempt to manoeuvre the Court’s jurisdiction in a manner incompatible with the goals of justice. The bottom line in a case of abuse of Court process is that, it “appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak to be beyond redemption...”
- Beyond that threshold, lies an unlimited range of conduct by a party that may more clearly point to an instance of abuse of Court process.”
43. Back to the instant matter. The applicant herein tendered and produced contradictory evidence as pertains to sic [the plot] same allegedly purchased; the contradictions under reference are well highlighted in the Judgment of the court.
44. Nevertheless, after discerning the material discrepancies and the contradictions, the applicant herein is now back in court and same is seeking to deploy the observations and the reasoning of the court to procure review. Such kind of conduct as the one espoused by the applicant constitutes an abuse of the due process of the court. Same is tantamount to fishing.
45. Before concluding on this issue, it is instructive to take cognisance of the ratio decidendi of the supreme Court of Kenya [the apex court] in the case of *Outa v Okello & 3 others (Petition 6 of 2014) [2017] KESC 25 (KLR) (24 February 2017) (Ruling)*, where the apex Court stated thus:
- “95. “We have unambiguously held that an application for review is not meant to afford the losing party an opportunity to re-litigate or re-open a matter merely because such party is unhappy with the outcome. The Applicant is asking this Court to sit in appeal over its own Judgment. We have unequivocally stated that the Supreme Court lacks jurisdiction to entertain a second appeal to itself. Once the Court has heard and determined an appeal from the Court of Appeal, it becomes *functus officio*. The Judgment stands until such time, if



at all, that it is departed from in a future case or, reviewed, within the confines that we have clearly outlined.”

46. In a nutshell, I come to the conclusion that the application beforehand fits within the corners of what constitutes a classic abuse of the due process of the court. [See Muchanga Investment Limited versus Safaris Africa [unlimited] Limited 2009 eKLR].

Final Disposition

47. Flowing from the analysis contained in the body of the Ruling, it must have become crystal clear that the instant application is not only premature and incompetent, but same is also bereft of merit[s]. The application courts' dismissal.
48. In the premises, the final orders that commend themselves to the court are hereunder:
- i. The Application dated 24th April 2025; be and is hereby Dismissed.
 - ii. Cost of the Application be and are hereby awarded to the 1st and 3rd Defendants/ respondents only.
 - iii. The Costs in terms of clause[ii] shall be agreed upon and in default, be taxed by the Deputy Registrar.
49. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 26TH DAY OF JUNE 2025

OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].

JUDGE

In the presence of:

Mutuma/Mukami – Court Assistant

Mr. Mwendwa Tyson for the Applicant

Mr. Ndungu for the Plaintiff /Respondent

Ms. Kerubo holding brief for Mr Kiautha Arithi for the 1st and 3rd Respondents.

