Watamu Men Fridays Limited v Attorney General & 4 others (Environment & Land Case 104 & 4 of 2019 (Consolidated)) [2025] KEELC 4786 (KLR) (26 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4786 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 104 & 4 OF 2019 (CONSOLIDATED)

FM NJOROGE, J

JUNE 26, 2025

BETWEEN

WATAMU MEN FRIDAYS LIMITED ..... PLAINTIFF

AND

ATTORNEY GENERAL ..... 1ST DEFENDANT

CHIEF LAND REGISTRAR ..... 2ND DEFENDANT

DIRECTOR OF SURVEYS ..... 3RD DEFENDANT

REMO LENZI ..... 4TH DEFENDANT

SEVEN ISLANDS WATAMU LIMITED ..... 5TH DEFENDANT

RULING

1. This ruling is respect to a Notice of Motion application dated 28/1/2025 brought pursuant to Article 10, 25 (d), 47, 48, 50 & 159 (2) (d) of *the Constitution* of Kenya, 2010, Section 4(1) and (2) of the *Fair Administrative Action Act*, 2015, Section 1A, 1B, 3, 3A and 89 of the *Civil Procedure Act*, and Order 45 Rule 1 of the Civil Procedure Rules. The orders sought are: -

    1. Spent;
    2. Spent;
    3. Spent;
    4. That the Honorable Court be pleased to review, vary and/or set aside its ruling and orders issued on 18/12/2024;
    5. That the costs of this application be provided for.

2. The application was premised on the grounds enumerated at the foot of the motion and supported by the affidavit sworn by Roberto Lenzi on 28/1/2025. The deponent was apprehensive that should the ruling delivered on 18/12/2024 not be reviewed and set aside, he faces the risk of being committed to jail without being granted a fair hearing. He stated that his actions on behalf of the Applicant, which led to him being cited for contempt, were not a deliberate disobedience, rather an earnest attempt to comply with the Court's orders in Civil Appeal No 67 of 2016. He believed that prioritizing compliance with the said orders would resolve the issue of mapping Plot 103. He asserted that while the suit property was subdivided per the Court of Appeal's orders, there has been no transfers or further action to alter the suit property's physical or legal status.

3. The said Roberto filed a further affidavit which he swore on 7/2/2025, stating that there is an error apparent on the record to the extent that the Court failed to take into account the existence and implication of an already existing order of the Appellate Court delivered 18/2/2018, directing the 5th Respondent to rectify its title to apportion Plot 103.

4. The Plaintiff in ELC No. 4 of 2019 filed grounds of opposition dated 25/2/2025 set out as follows: -

    1. The application as drawn is mischievous and bad in law and is for dismissal;

    2. In ground 5 of the application of Roberto Lenzi, the applicant summarizes the grounds of the application for review that he will face imminent risk of being committed to jail without being afforded a fair hearing given his advanced age and current health condition would cause irreparable harm. This is not a ground for review;

    3. In paragraph 11 of the affidavit of Roberto Lenzi, the circumstances surrounding the implementation of Civil Appeal No. 67 of 2019 were known to he applicant when it mounted its defence to the application for contempt. It is not a discovery of a new matter and is irrelevant in an application for review;

    4. In paragraph 12 of the affidavit of Roberto Lenzi, the Title Deed marked RL-01 shows that it was issued in 2021. The application for contempt dealt with the actual entries to the land registry register. This is not a discovery of a new material or evidence as this was in the custody of the appellant;

    5. Paragraph 14 of the affidavit of Roberto Lenzi talks of him having acted lawfully. This is not a discovery of a new fact or material as required in an application for review;

    6. It is part of the court record that the applicant has filed a memorandum of appeal. This can be confirmed from the court portal. As a consequence, the court lacks jurisdiction;

    7. The application has no merit and should be dismissed with costs.

5. The Plaintiff in ELC No. 104 of 2019 filed grounds of opposition dated 28/2/2025set out as follows: -

    1. That the said application is otherwise frivolous, vexatious and an abuse of the process of this honourable court;

    2. That the application is incompetent and fatally defective since the order being sought to be reviewed is not attached to the application as required by law and the rules of procedure;

    3. That the application entails re-appraising of the evidence and re-analyzing of the decision to establish whether or not the applicant is guilty of contempt of court orders which is beyond the scope of review jurisdiction;

4. That there do not exist sufficient reasons to grant application for review and none of the grounds upon which the application is based justify it. The process of reasoning cannot be treated as an error apparent on the face of the record justifying the exercise of the power of review and that an erroneous order/decision cannot be corrected in guise of exercise of powers of review;

5. That the issues now raised by the applicant were known to the Applicant and appears in the defence of the contempt in the primary proceedings and as the court record stands;

6. That the applicant is clearly guilty of abusing the process of the Court through dilatory conduct, involving the filing of a multiplicity of applications and causes without diligence thereby needlessly dissipating the Court's time and undeserving to benefit from the discretion of the court;

7. That frivolity herein is confirmed by failure/refusal to annex the order, ruling dated 18th December 2024 as an exhibit to the application dated 28/1/2025 strongly suggesting it is a fishing expedition. The grounds being raised in the present application are not novel;

8. That the applicant cannot file appeal and review at the same time. The applicant filed and served the Plaintiff/Respondent on 19/12/2024 with notice of appeal dated 19/12/2024. The application is an afterthought bereft of merit and must equally fail;

9. That the said application lacks merit and the same ought to be dismissed with costs.

6. The application was canvassed by way of written submissions which I have keenly considered. I find that the issues arising for determination are: -

i. Whether in light of the fact that a Notice of Appeal has been filed this Court has jurisdiction to entertain an application for review;

ii. Whether the ruling delivered on 18/12/2024 should be reviewed and set aside.

7. The provisions which deal with review are Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.

8. Section 80 reads as follows: -

80. 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."

9. Order 45 rule 1(b) of the Civil Procedure Rules provides that certain requirements must be met in a review application. The said provision 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."

10. It is clear from the foregoing that the review remedy is only available to a party who is not appealing. It is thus important to define a party that is appealing. There are two contradictory decisions from the Court of Appeal addressing this question. In Kisya Investments Ltd -v- Attorney General and Another Civil Appeal No. 31 of 1995 the Court held that a party who has filed a Notice of Appeal cannot apply for review but if application for review is filed first, the party is not prevented from filing appeal subsequently even if a review is pending. The court in Kisya (supra) stated as follows:

" The correct position appears to us to be as set out by Sarkar on the Law of Civil Procedure, 8th Edition, where at page 1592 it is stated as follows:

"The crucial date for determining whether or not the term of 0.47 r. 1 are satisfied is the date when the application for review is filed. If on that date no appeal has been filed, it is competent for the Court to dispose of the application for review on the merits notwithstanding of the pendency of the appeal subject only to this that if before the application for review is finally decided, the appeal itself has been disposed of, the jurisdiction of the court hearing the review would come to an end.....Review application should be filed before the appeal is lodged. It if is presented before the appeal is preferred, court has jurisdiction to hear it although the appeal is pending. Jurisdiction of court to hear review is not taken away if after the review petition, an appeal is filed by any party. An appeal may be filed after an application for review, but once the appeal is heard, the review cannot be proceeded with.... A review application is incompetent after appeal is preferred."

11. In Yani Haryanto -v- E. D. & F. Man. (Sugar) Limited Civil Appeal No. 122 of 1992 (Unreported) the Court of Appeal was of the following view:

" The facility of review under Order 44 of the Civil Procedure Rules is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review.... A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from

the rules that follow upto and including rule 79. The other purpose, and which in our view is the real purpose for the provision of the facility of filing of a notice of appeal, is to enable the High Court to entertain an application for stay of execution before the appeal is filed under Rule 81 in this Court. Order 41 Rule 4 (1) of the Civil Procedure Rules deals with powers granted to the court appealed from (the High Court in this case) has been preferred.... The exception is the deeming of the appeal to be filed for the purposes of rule 4 of Order 41 only on the giving of the notice of appeal under the Court of Appeal Rules. Under the Court of Appeal Rules it is stated specifically that the appeal is instituted on compliance with the requirements prescribed in Rule 81 (1).

The above statement of law on this issue is in line with previous decisions of the court of appeal for Eastern Africa. The Court of Appeal for Eastern Africa in the case of Motel Scwetzer v Thomas Cunningham & Another (1955) 22 EACA 252, held that an appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 of the Eastern African Court of Appeal Rules, 1954." (emphasis mine)

12. Accordingly, what the above case demonstrates is that the mere filing of a notice of appeal does not preclude a party from seeking a review in the High Court. Until the appeal is formally instituted - by filing the record of appeal, paying the requisite fees, and lodging security - the High Court retains jurisdiction to entertain an application for review. A notice of appeal only indicates an intention to appeal and does not, by itself, amount to an appeal.

13. In my view, the Haryanto Case reflects the true legal position on the nature and effect of a notice of appeal. This is because a Notice of Appeal does not, in itself, constitute an appeal; rather, it is merely a formal notification of a party's intention to challenge a decision. As such, the mere act of filing a notice of appeal does not amount to an appeal for the purposes of review. The Supreme Court in Mbugua alias George Boniface Nyanja v Iqbal (Personal representative of the Estate of the Late Ghulam Rasool Jammohamed) (Miscellaneous Application 7 (E011) of 2021) [2021] KESC 41 (KLR) provides further clarity on the issue. The Court emphasized the procedural and jurisdictional importance of a notice of appeal, characterizing it as a critical initiating document. The Court in that case observed:

> "...A notice of appeal is therefore a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave. This Court in Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others, Application 16 of 2014, [2014] eKLR stressed that a notice of appeal is a jurisdictional pre-requisite."

14. From the foregoing, it is evident that the filing of a notice of appeal serves two primary purposes- first, it preserved the right of appeal pending the filing of a substantive record; second, it acts as a jurisdictional gateway to the appellate process. However, until the appeal is fully instituted, by filing the record of appeal, payment of requisite fees and compliance with the rules, the appeal is not deemed to be properly before the court.

15. It is, however, pertinent to note that a notice of appeal cannot be sustained where a party has already elected to pursue a review of the same ruling. The rationale is that a party cannot simultaneously pursue both an appeal and a review in respect of the same decision. The two remedies are mutually exclusive and cannot be invoked concurrently or sequentially. To do so would amount to an abuse of the court process.

16. Given that there is no evidence of any further step having been taken beyond the mere filing of the notice of appeal, I am satisfied that the applicant has not prosecuted the intended appeal. Consequently, the filing of the notice of appeal, in the absence of a substantive appeal or any further procedural action, does not bar the Court from entertaining the present application. Accordingly, I find that the present application is properly before this Court. I shall therefore proceed to determine the merits or otherwise of the same.

17. Order 45, produced above, sets out the rules which restricts the grounds for 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.

18. The ground relied on by the Applicant in this application is that there is an error apparent on the face of the record. Courts have held that the term "an error on the face of the record" means a mistake or an error, which is prima facie visible and does not require any detailed examination. In National Bank of Kenya -v- Ndungu Njau [1997] eKLR, the Court of Appeal held as follows:

> "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 that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

19. The Applicant argues that there exists an error apparent on the face of the record in the impugned ruling, in that the Court allegedly failed to consider the existence and legal effect of the Court of Appeal's order in Civil Appeal No. 67 of 2016. It is asserted that in that appeal, the Applicant was directed to rectify the title to reflect the excision of the portion identified as Plot 103 from the suit property known as Kilifi/Jimba/1125. However, a perusal of the impugned ruling reveals that the Court did take note of this issue, albeit by reference to Civil Appeal No. 81 of 2016. The substance of the matter appears to have been duly considered. In the circumstances, I am not persuaded that the Applicant has demonstrated an error apparent on the face of the record. The issues raised, in my respectful view, would more appropriately be ventilated on appeal rather than by way of review.

20. Having carefully considered the application, I find that it is entirely devoid of merit. the issues raised do not meet the strict and narrow threshold for review under Order 45 of the Civil Procedure Rules; what is presented before this court amounts to a disguised appeal. This Court cannot be invited to sit on appeal of its own decision in the form of review. Consequently, the application dated 28/1/2025 is dismissed with costs to the Respondents.

21. This matter shall be mentioned on 26th October 2025 for further directions.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 26TH DAY OF JUNE 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.