



REPUBLIC OF KENYA



**Lelei v Bittok & another (Environment and Land Case 414 of 2012)
[2025] KEELC 6569 (KLR) (29 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6569 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND CASE 414 OF 2012
JM ONYANGO, J
SEPTEMBER 29, 2025**

BETWEEN

KIMUTAI LELEI PLAINTIFF

AND

HOSEA BITTOK 1ST DEFENDANT

**THE MANAGEMENT COMMITTEE KAPSERET BONDENI SELF HELP
GROUP 2ND DEFENDANT**

RULING

1. The 1st Defendant/ Applicant has moved this court vide a Notice of Motion Application dated 13th May 2024 seeking the following Orders:
 1. Spent...
 2. That the ruling delivered by this court on 25th February 2020 be reviewed to the extent that the OCS, Lagas police station be ordered to provide police security to Paul K. Ole Yaile T/a Nasioki Auctioneers for the purposes of peace and order during the process of eviction of the plaintiff his agents, employees and/or servants and/or servants in Pioneer/ngeria Block 1 (EATEC)113.
 3. That costs be in the cause.
2. The Application was premised on the grounds on the face of it and supported by the affidavit of Hosea Bittok sworn on even date.
3. It is the Applicant's assertion that while he sought to enforce the orders of this court, he was informed by both the County Commander and the Officer Commanding Police Division (OCPD) that eviction orders must be addressed to the Officer Commanding Station (OCS) who is mandated to release officers to give effect to such decrees.



4. The Applicant submits that the error was inadvertently introduced by his former counsel while drawing the eviction application, and he earnestly seeks a review of the orders granted.
5. The Application was met with opposition by the Plaintiff/ Respondent's replying affidavit deponed on 20th May 2024.
6. The application was heard orally on 22nd May 2024 and both parties made their respective submissions.
7. Having given due consideration to the application, the supporting and supplementary affidavits with their annexures, the replying affidavit filed in opposition, together with the oral submissions of the parties, and having reflected upon the governing law, the Court discerns the following issue for determination:

Whether the Applicant has laid a proper basis in law to justify review of the eviction orders

Analysis and Determination

8. Before I delve into the crux of the matter, I take note of the Respondent's contention that that the Applicant was previously represented by the firm of Kamau Lagat & Company Advocates and the assertion that the Applicant has never sought leave to act in person.
9. It is noteworthy that the Applicant filed a Notice to Act in Person on 19th December 2023. Did the notice comply with the provisions of the law?
10. The Respondent submits that Order 9 Rule 9 of the Civil Procedure Rules precludes the Applicant from filing the instant Application and terms it as a nullity.
11. Order 9 Rule 9 of the Civil Procedure Rules, 2010 provides for change of Advocates to be effected by order of Court or consent of parties to wit:

“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 without an 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.”
12. The import of this provision is that, once judgment has been rendered, a party cannot unilaterally dispense with counsel or introduce new counsel without the leave of the Court or the requisite consent. The rule is designed to safeguard the integrity of proceedings post-judgment and to prevent confusion as to who bears professional responsibility for the conduct of the case.
13. However, there are instances where failure to comply with Order 9 Rule 9 does not affect the core dispute in question or prejudice either of the parties. This position was adopted in *Tobias M. Wafubwa v Ben Butali* [2017] eKLR where the Court of Appeal held:

“We would go further to add that, provided that where the failure to comply with the rule 9 did not undermine the jurisdiction of the court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then, Article 159 of *the Constitution* and the overriding principles could be called upon to aid the court to dispense substantive justice through just, efficient and timely disposal of proceedings. A similar approach was invoked in the case of *Boniface Kiragu Waweru vs James K. Mulinge*



[2015] eKLR where in addressing the issue of non-compliance with order 9 rule 9 this Court observed thus;

“All in all we are not persuaded that non-compliance with Order III rule 9A of the Civil Procedure Rules was meant to make the following proceedings incompetent or a nullity, efficacious as the provision was meant to be. Indeed all times, the set procedures ought to be followed or complied with. However, we find that non-compliance, in the present matter, did not go to the root of the proceedings. The non-compliance we may say, was procedural and not fundamental. It did not cause prejudice to the appellant at all...”

... In declining to dismiss the appeal on account of a procedural technicality, we are satisfied that the learned judge did not in any way misdirected herself.”

14. In essence, non-compliance with Order 9 Rule 9 of the Civil Procedure Rules is not fatal but a venial omission which could be cured under Article 159 (2) (d) of *the Constitution* and the oxygen principles of the *Civil Procedure Act*.
15. In the present matter, the Respondent has not demonstrated any prejudice suffered by reason of the Applicant filing a Notice to Act in Person without strict adherence to the procedure set out in Order 9 Rule 9 of the Civil Procedure Rules.
16. The defect, while technical, does not touch on the jurisdiction of this Court nor does it go to the root of the dispute. What is before the Court is an application to correct a clerical error in the extracted order so that the decree of the Court may be enforced.
17. To strike out such an application on a mere procedural misstep would be to elevate form above substance, contrary to Article 159(2)(d) of *the Constitution* and the overriding objectives of the *Civil Procedure Act*.
18. Justice demands that the Court address the merits of the application rather than shut the door on the Applicant on account of curable procedural lapses.
19. Having thus disposed of the preliminary question of representation, I now turn to the central question before the Court of whether the Applicant has established a proper legal foundation to warrant a review of the eviction orders.
20. This inquiry calls for an examination of the grounds advanced, the circumstances surrounding the alleged error by former counsel, and the principles governing the Court’s power of review.
21. Section 80 of the *Civil Procedure Act* provides as follows:
 - 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.”
22. Order 45 of the Civil Procedure Rules provides the procedure and the conditions that an applicant must satisfy in an application for review. It provides:

“(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.

(2) A party who is not appealing from a decree or order may apply for 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.”

23. Thus, Order 45 establishes that a party seeking review must, first, be a person aggrieved by a decree or order; second, demonstrate that no appeal has been preferred against that decree or order; and third, show that the application falls within the recognized grounds for review.
24. The law recognizes such grounds to include discovery of new and important matter or evidence which, despite due diligence, was not within the applicant’s knowledge at the time the decree was passed; a mistake or error apparent on the face of the record; or any other sufficient reason which would justify the Court in revisiting its own decision. It is against these settled requirements that the Applicant’s case must be examined.
25. In *Mramba & 45 others v St Elizabeth Academy - Karen Limited & 2 others* [2024] KEELC 5728 (KLR) the Court, while considering the scope of review, drew guidance from the Supreme Court of India in *Ajit Kumar Rath v State of Orisa & Others* (1999) 9 SCC 596 at Page 608 where the Court stated:
- “the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression ‘any other sufficient reason’ ... means a reason sufficiently analogous to those specified in the rule”
26. Kenyan jurisprudence as distilled in *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR, echoes the same restrictive approach and lays out the following principles:
- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
 - ii. The expression “any other sufficient reason” appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
 - iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
 - iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.



- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ judgment of a coordinate or larger Bench of the tribunal or of a superior court.
 - vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.
 - vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/ tribunal earlier.
 - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
 - ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
 - x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.”
27. Applying these principles to the instant application, two points are decisive. First, the misnaming of the officer to be served was not a matter of argument; it is a plain clerical defect in the order extracted for execution. Such a defect is properly characterised as an error apparent on the face of the record.
 28. Second, the defect caused material prejudice. The Applicant was prevented from enforcing a valid court order because the officers presented with the order took the view that it was not addressed to the proper officer. That prejudice goes to the very efficacy of the judgment.
 29. Accordingly the Applicant’s complaint falls within the compass of review as conceived by Order 45. It is not an invitation to rehear contested issues. It is a request to correct a visible and consequential mistake that defeats the purpose of the decree.
 30. In present circumstances, I am satisfied that the threshold for review has been met. The defect in the extracted order was not a matter of judicial reasoning but a clerical error that obstructed enforcement of the decree.
 31. To leave it uncorrected would render the judgment of this Court hollow and incapable of execution. Justice therefore requires that the order be rectified to reflect the proper officer mandated to give effect to the decree.
 32. The upshot is that the Application dated 13th May 2024 is allowed with costs.
- It is so Ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, AT THIKA THIS 29TH DAY OF SEPTEMBER 2025

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J. M. ONYANGO

JUDGE

In the presence of:

Mr Kiprop for Mr Wambua Kigamwa for the Plaintiff

Hosea Bitok (1st Defendant) present in person

Court Assistant: Hinga

