**Mbulo & another v Nyamwaya (Environment and Land Appeal 3 of 2023) [2025] KEELC 6473 (KLR) (30 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6473 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**

**ENVIRONMENT AND LAND APPEAL 3 OF 2023**

**FO NYAGAKA, J**

**SEPTEMBER 30, 2025**

**BETWEEN**

**GEORGE OTIENO MBULO ..... 1ST APPELLANT**

**MICHAEL ODHIAMBO MBULO ..... 2ND APPELLANT**

**AND**

**BENEDICT OWUOR NYAMWAYA ..... RESPONDENT**

***(Being an Appeal from the Ruling of Hon. C.N. Ndegwa delivered on 5th September 2023 in Migori CMCC Case No. 362 of 2014)***

## JUDGMENT

1. This appeal arises from a ruling on the Notice of Motion dated 14th June 2023 in the trial court where the Appellant sought the following orders;
    1. ...Spent
    2. ...Spent
    3. That this Honourable Court be pleased to review its judgment of the 21st December 2015 and substitute it with an order dismissing, or striking out the plaintiff's suit.
    4. That costs of the application be in the cause.
2. In his affidavit, George Otieno Mbulo deponed that the trial court had no jurisdiction to entertain the suit as the Magistrates Court Act came into force on 2nd January 2016. He urged that due to the apparent error on the face of the record, the court ought to strike out the suit and thus he sought the review of the judgement. He went into the particulars of the case and urged the court to allow the application.

3. The application was opposed vide a Replying Affidavit dated 6th July 2023, sworn by Benedict Nyamwaya. He urged that the matter was heard and determined on merit. Further, that it had been 7 years and therefore the Applicant was guilty of laches. That the court was functus officio and the applicant was asking the court to sit on appeal on its own decision. He urged the court to dismiss the application with costs.

4. Upon considering the pleadings, responses thereto and the relevant submissions, the trial court dismissed the application vide a ruling delivered on 5th September 2023.

5. Being aggrieved with the decision of the trial court, the appellant instituted the present appeal vide the memorandum of appeal dated 13th September 2023 premised on the following grounds;

    1. That the learned Magistrate misdirected himself as to the conditions to be met before an application for review of judgement is allowed.

    2. The Learned Magistrate erred in fact by failing to take into account and to consider the evidence adduced on behalf of the Appellants.

    3. The Learned Magistrate erred in law and fact by finding that the application for review herein, only raised questions of law as to the jurisdiction of the court then as at 2nd December, 2025.

    4. The Learned magistrate erred in law by failing to give findings on the issues raised by the Appellants, particularly:

        a. That there was an error apparent on the face of record given that the court had solely relied on a non-existent document/exhibit while delivering its judgment of 2nd December, 2025.

        b. There was an error on the face of record given that the court had no jurisdiction to hear and determine the matter as at 2nd December, 2015, which is a sufficient reason for review.

    5. There was sufficient ground for review given that the Honourable Court issued orders without taking into consideration who is on occupation of the suit property.

    6. There was an error on the face of record in that the suit was statute barred as at the time of delivery of the judgement, which is a sufficient reason for review.

    7. The learned magistrate failed to appreciate the submissions of the learned counsel for the appellants albeit the ruling delivered therein did not take into consideration of the submissions of neither party.

    8. That the learned Magistrate misdirected himself by failing to appreciate that land matters are emotive matters that require final determination on merit.

    9. The learned magistrate misdirected himself by hurriedly delivering the ruling therein ex-parte, the same day, when the matter was only coming up for mention to confirm filing of submissions.

    10. The learned magistrate misdirected himself by summarily dismissing the Appellants' request for leave to file further submissions, only to hurriedly deliver its ruling the same day

    11. In all the circumstances of the case, the findings of the learned Magistrate are insupportable in Law or on the basis of the evidence adduced.

**Hearing of the Appeal**

6. The parties filed submissions on the appeal.

**Appellants Submissions**

7. The appellant filed submissions dated 5th May 2025. On whether the magistrate misdirected himself as to the conditions to be met before an application for review of judgment is allowed, the appellant submitted that the trial court failed to consider the conditions to be met before an application for review of judgment. Further, that from the ruling, there are no reasons tendered by the court to explain why the Application for review was dismissed.

8. Counsel for the Appellant submitted the conditions for review are as set out in Section 80 of the *Civil Procedure Act* which gives this Court the power review its own orders when an application has been made by an aggrieved party, the Defendants/Applicants in this case. Additionally, that Order 45 Rule 1 of the Civil Procedure Rules is the law that provides under what circumstances a court can be called upon to review its own decisions. Counsel urged that the Application for review was premised on the ground that there are mistakes and errors apparent on the face of the record and that there are also sufficient reasons that call upon this court to review the latter order.

9. Counsel urged that the trial court had discretion to determine whether there are sufficient grounds to warrant review of the judgment dated 21st December, 2015. He cited the case of Wachira Karani v Bildad Wachira (2016) eKLR on the definition sufficient cause and further, urged that sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. Citing the case of Nairobi City Council V Thabiti Enterprises Limited (1997) eKLR, counsel urged that the trial court failed to consider the set conditions for granting an order for review before dismissing the said application.

10. On whether the learned magistrate erred in law, by failing to give findings on the issues raised by the Appellants, counsel submitted that the court failed to determine whether there was an error on the face of the record. That despite the evidence provided in the Application dated 14th June, 2023, and the submissions dated 11th August, 2023, the court failed to make a finding on the issue. He urged that the trial court acted whimsically or misdirected itself in reaching the decision it made to dismiss the Application for review. Counsel submitted that the trial court hurriedly proceeded to dismiss the Appellants' Application for review without taking into consideration the evidence marked as annexure GOM 4 and GOM 5 in the Application. Further, that in the impugned ruling, there is no analysis given on the evidence presented, leaving the Appellants in limbo as to whether their evidence was merited or not.

11. Learned counsel submitted that in the trial court that there was an error apparent on the face of the record at page 16 of the judgment dated 2nd December, 2026 where the court referred to a land control board consent that was neither included in the plaintiffs list of documents nor produced as an exhibit. Further, that the court at page 18 of the said judgment of 2nd December, 2016, so guided by the non-existent exhibit, the court proceeded to make a finding that the consent was evidence of transfer of the suit property from the Defendant's grandfather, Achar Amuom to the plaintiff herein.

12. Also, counsel reproduced the appellants submissions in the trial court and citing the case of Stephen Wanyoike Kinuthia (Suing on behalf of John Kinuthia Marega (deceased) v Kariuki Marega & another (2018) eKLR, urging that the error, as espoused by the applicant at the trial court was an obvious and a patent mistake and not something that can be established by a long drawn process. Additionally, the fact that the court mistakenly relied on non-existent land board consent to arrive at its decision was a

sufficient reason to review its judgment dated 21st December, 2015. Counsel cited the case of Supreme Court in Application No. 8 of 2017, Parliamentary Service Commission v Martin Nyaga Wambora & others [2018] eKLR and urged that the error by the trial court in its judgment of 2nd December, 2015 was self-evident, and did not require a lengthy argument or process of reasoning to identify.

13. Counsel submitted that the Learned Magistrate erred in law and fact by finding that the application for review only raised questions of law as to the jurisdiction of the court then as at 2nd December, 2015. He reiterated that the learned magistrate erred in law by failing to give findings on the issues raised by the Appellants.

14. Learned counsel urged that the learned magistrate misdirected himself by hurriedly delivering the ruling dated 5th September, 2023, ex-parte, the same day when the matter was only coming up for mention to confirm filing of submissions. He submitted that the Appellants had requested to file rejoinder submissions during the mention in the morning, only to be shocked that a ruling was already delivered on that same afternoon. That the said ruling delivered in favor of the Respondent was made in the absence of the Appellants, whose evidence was not taken into consideration. He cited the case of Mathew Kangora v Maretee Kotha (2016) eKLR and urged that the facts, evidence and the law are for granting of the prayers sought by the Appellant. He prayed the Court allows the instant appeal.

**Respondents' Submissions**

15. He cited the definition of a judgement at Black's Law Dictionary, 6th edition at page 950 and submitted that the doctrine of functus officio was considered by the Court of Appeal in Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited) [2014] eKLR citing the same. Further, that the foregoing principle is trite and settled law and applies only when judgment is yet to issue, since a Court becomes functus officio after delivery of a Judgment. Counsel additionally placed reliance on the case of Menginya Salim Murgani v Kenya Revenue Authority [2014] eKLR and the Supreme Court case of Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR in this regard. Counsel additionally stated that Section 99 of the *Civil Procedure Act* provides exceptions to the doctrine of functus officio, reproducing the provisions therein, and citing the case of John Gilbert Ouma v Kenya Ferry Services Limited [2021] eKLR in this regard.

16. Further, learned counsel cited Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules on Review and submitted that the Appellant is inviting this court to review evidence on record, the law and make a new determination. That an Application to review a judgment is time bound just as the timelines to lodge an Appeal, The timelines to file a review had lapsed and with it the jurisdiction of this court came to an end by way of effluxion of lime. The Appellant had 30 days from date of judgment to file for review. To seek review of a judgment seven years later because of fear of execution is purely opportunistic and abuse of the court process especially when reasons for delay are not fronted. Further, that the Appellant has not sought for extension of time. In any event, the Applicant was represented by counsel and must have been advised accordingly.

17. He urged the court to find that the trial court longer had jurisdiction to deal with the matter being functus officio and due to effluxion of time. He cited the case of Risk Africa Innovatis Limited v Smartmatic International Holdings B.V.A & 3 others (Civil Appeal (Application) E008 of 2022) | 2022| KECA 427 (KLR) (4 March 2022) (Ruling) where the court highlighted the need to observe judicial timelines as then are pegged to the jurisdiction of the court. Further, that the Application was an afterthought that came way too late, the court should disregard it.

18. He submitted that the Appellants fault the trial court for delivering a ruling on the same day that the matter came up for mention to confirm filing of submissions. Both parties had complied and filed submissions and the court directed that the ruling shall be delivered that very afternoon. Counsel cited the provisions of Article 48 of *the Constitution* that access to justice should not be impeded, as well as Article 50(1) of *the Constitution* on the right to a fair hearing. He urged that the sentiments of the Appellant lie to be properly addressed through an appeal but they are to approach the court as they cannot explain the inordinate delay of seven years since Decree was issued. He urged that the instant appeal is without merit and that it be dismissed with costs.

**Analysis and Determination**

19. The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of Gitobu Imanyara & 2 others Vs Attorney General [2016] eKLR. It was held as follows;

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

20. In Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR the Court held as follows;

> " This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

21. The main issue that arises for determination is; Whether the trial court erred in dismissing the Appellants' Application for Review. Attendant to the main issue is, who to bear the costs of the appeal.

    a. Whether the trial court erred in dismissing the Appellants' Application for Review

22. The law regarding review of orders or decree or judgments or rulings is clearly stipulated in the laws of Kenya. Section 80 of the *Civil Procedure Act* provides 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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

23. To give effect to the statutory provision above the Rules Committee enacted the detailed procedure under Order 45 of the Civil Procedure Rules, 2010. Order 45 Rule 1 of the Rules provides as follows:-

    45 Rule 1 (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 review of judgement to the court which passed the decree or made the order without unreasonable delay.

24. As can be seen, a clear reading of the above provisions shows that Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit 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 there is a requirement that the application has to be made without unreasonable delay.

25. It has been held severally that "any other sufficient reason" is a ground that is analogous to the grounds stated previous to the subrule. It should be one that is out of the blue or like a wild joker card. It must be a card which is a 'sister' to the playing cards that are in the pack. Anything in form of a reason which is completely outside of them or far placed should be rejected.

26. The application which was dismissed was premised on the grounds that there were glaring errors on the face of the record. The specific error that the appellant alludes to is that the trial court did not have jurisdiction to entertain the suit due to the fact that the Magistrates Court Act came into effect ton 2nd January 2016.

27. An 'error on the face of the record' has been discussed extensively in various decisions by the courts. In Nyamogo & Nyamogo v Kogo (2001) EA 170, the court rendered itself as follows:-

> " An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un-definitiveness 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."

28. Jurisdiction cannot be considered an error apparent on the face of the record as it is a matter that requires a drawn out argument in order to establish the same. The entire suit had been heard and determined and therefore, if there have adssdsdds , Therefore, to relegate the issue of jurisdiction to one of error on the face of the record would be an abuse of the court process. Jurisdiction is more suited as a ground of appeal and therefore, I am in agreement with the trial courts' decision in this regard.

29. This court notes that in the Memorandum of Appeal, the appellant has stated that the trial court erred in considering jurisdiction as the only ground that the application was premised upon. But I have perused the application and the 21 grounds which are more or less a statement of the facts as per the affidavit than actual grounds and I note that the appellants had alleged that the suit was also time barred. The issue of limitation of time is also an issue of jurisdiction and therefore, there is no error on the face of the record that was made by the trial court in determining that the application was premised on jurisdiction.

30. Additionally, the Appellant urged that there were sufficient reasons for review of the decision of the trial court. Indeed, it is a provision of Order 45 of the Civil Procedure Rules that a court can review a decision on the basis of sufficient cause. In the case of Sadar Mohamed vs Charan Singh and Another (1963) EA 557, it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two, for example error on the face of the record and discovery of new matter.

31. Mulla in the Code of Civil Procedure, while writing on Order 47 Rule 1 of the Civil Procedure Code of India, the equivalent of our Order 45 Rule 1, states that; the expression 'any other sufficient reason'...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.

32. Having considered the grounds that the appellant premised the application for review upon, I find that none of the grounds amount to sufficient reason or an error on the face of the record, within the rules. The trial court did not err in any way, shape or form in its decision.

33. Having considered the record of appeal, the pleadings and the submissions tendered herein, I find that the appeal lacks merit. The same is dismissed in its entirety with costs to the respondent.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM THIS 30TH DAY OF SEPTEMBER 2025.**

**HON. DR. IUR NYAGAKA**

**JUDGE**

In the presence of:

Court Assistant: Lola

Gordon Ogolla Advocate for the Appellant

Owino h/b for Abisai Advocate for the Respondent