

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ELC MISC. APPLICATION NO. E028 OF 2024

JAMES K. CHEPKONGA 1ST
APPLICANT/RESPONDENT

BENJAMIN K. RUTO 2ND
APPLICANT/RESPONDENT

BENEDETA JEPKEMBOI KIPTUM.3RD
APPLICANT/RESPONDENT

SIMION K.A. BII 4TH
APPLICANT/RESPONDENT

LUCY C. KURUI (Suing as the Administrator of the Estate of
DANSON CHEMJOR) 5TH
APPLICANT/RESPONDENT

VERSUS

FRANCIS KIPLAGAT CHERUIYOT

(Sued as the Administrator of the Estate of

JOSEPH KURUIYOT SITIENEI) ...1ST RESPONDENT/APPLICANT

JOHN KIBET KWAMBAI..... 2ND
RESPONDENT/APPLICANT

MARTIN CHERONO CHEPTARUS..3RD
RESPONDENT/APPLICANT

RULING:

1. Vide a Notice of Motion dated 28th April, 2025, the Applicants sought the following orders: -
 - i. Spent.
 - ii. Spent.
 - iii. THAT the honourable court be pleased to stay, review, vary and set aside orders dated 16th December, 2024.
 - iv. THAT costs of this Application be provided for.

2. The application is based on the 4 grounds thereof and the Supporting Affidavit sworn by Francis Kiplagat Cheruiyot, the 1st applicant herein, on 28.04.2025, on his own behalf and on behalf of his co-applicants.
3. The Applicant acknowledged that the respondents were adjudged owners of the suit properties vide Eldoret CMCC Award No. 8 of 2003 on 05.03.2003. He avers that the instant suit was filed in June, 2024 after 21 years, on the strength of the said award seeking for eviction even though the statutory period within which to enforce the said decree had long lapsed.
4. It is his contention that the 12-year statutory period for the enforcement of a decree had long lapsed and thus the same was time barred and could not be enforced.
5. He deponed that the issue of limitation and jurisdiction of the court to entertain the matter as filed was discovered between March and April, 2024 upon conducting inspection of the register of the suit properties at the Ministry of Lands and Physical Planning.
6. He thus maintained that there was an apparent error on the face of the record in the issuance of the orders dated 16.12.2024 by the fact that the applicants/respondents failed to disclose to the court that the time for execution had

long lapsed since the matter had been filed 21 years after the adoption of the award in Eldoret CMCC No. 8 of 2003.

7. They further argue that the applicants'/respondents' rights over the suit land had been extinguished by operation of law for failing to enforce the decree within the statutory period and that they have been living on the suit land for over 50 years without interruption.
8. It was his contention that the application had been filed expeditiously and in the best interest of justice and thus urged the court to allow the same with costs.
9. When the application came up for inter-partes hearing on 20.05.2025, Mr. Korir holding brief for Mr. Kigen, sought time to enable them file and serve their response to the application. Leave was consequently granted of 5 days for the applicants/respondents to file and serve their responses.
10. The Respondents filed a Replying Affidavit sworn on 20.08.2025 by the 1st Respondent, on his own behalf and on behalf of his co-respondents, in response to the application.
11. This court however notes that the said Replying Affidavit was filed out of the leave period of 5 days granted. Be that as it may, in light of Article 50 and 159 of the Constitution which

places a duty on this court to serve substantive justice, I will admit the same and deem the same as properly filed.

12. The 1st respondent dismissed the application as one without basis, frivolous and an utter abuse of the court process and maintained that the applicants have dragged them in a number of courts for over 21 years.
13. It was his contention that the court delivered its ruling on the 16.12.2024 and the same was not appealed against. That the applicants instead filed an application for stay of execution, which was subsequently dismissed vide the ruling issued on 20.03.2025 and which was also never appealed against.
14. He therefore avers that the instant application is a delaying tactic employed by the applicants to prevent them from assuming possession of the suit property despite the ruling expressly ordering and/or directing them to vacate the suit parcel within 14 days from the date of the ruling on 16.12.2024.
15. He went on to state that 14 days from 16.12.2024 lapsed on the 30.12.2024 but the applicants are yet to cede vacant possession of the suit land. He thus contends that the applicants are in contempt of the court orders issued on the 16.12.2024 and should therefore not be granted the

discretionary orders in the nature sought in the instant application.

16. In conclusion, he urged the court to dismiss the application with costs.
17. The application was canvassed by way of written submissions. The 1st and 3rd applicants filed their submissions dated 25.07.2025 together with authorities while the respondents filed their submissions dated 20.08.2025 together with authorities which I have read and considered.
18. Having carefully considered the grounds in the application, the supporting affidavit and the annexures thereto, the replying affidavit together with the rival submissions in totality, it is my considered opinion that the sole issue arising for determination is whether the applicants have proved their case to warrant the review and/or setting aside of the Ruling delivered on 16th December, 2024.
19. The grounds for review and/or setting aside of an order of the court are now well settled. Section 80 of the Civil Procedure Act as read with Order 45 Rule 1 of the Civil Procedure Rules outline the statutory provisions for the grant of orders of review.

20. Section 80 of the Act empowers the court to make orders for review while Order 45 Rule 1 of the Civil Procedure Rules establishes the jurisdiction and limits of review based on discovery of new and important matters or evidence, mistake or error on the face of the record and/or any other sufficient reason and the application must be made without unreasonable delay.

21. Order 45 rule 1 provides as follows: -

“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 judgement to the court which passed the decree or made the order without unreasonable delay.”
(emphasis mine)

22. The Court of Appeal in the case of **Sanitam Services (E.A.) Limited V Rentokil (K) Limited & Another (2019) eKLR**, held that: -

“Jurisdiction to review a judgment or order of a court is donated by Section 80 of the Civil Procedure Act and Order 45 Civil Procedure Rules. By those provisions of law any person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or is aggrieved by a decree or order by which no appeal is 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 - a person who fits within those categories may apply for a review of judgment or to the court which passed the decree or made the order and this should be done without unreasonable delay”.

23. It is the applicants’ ground for review that there was an error apparent on the face of the record. It is their contention that

the present suit was filed after 21 years on the strength of an Award and/or Decree issued on 05.03.2003 vide Eldoret CMCC Award No. 8 of 2003.

24. Section 4(4) of the Limitation of Actions Act provides as follows:-

“4(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due..”

25. They argued that at the time of filing the suit, the 12-year statutory period for the enforcement of a Decree had long lapsed and the suit was thus time barred, a fact which the applicants failed to disclose to the court.

26. In defining what amounts to an error apparent on the face of the record, the court in the case of **Chandrakhant Joshibhai Patel -v- R [2004] TLR, 218** held as follows: -

"...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions."

27. From the facts of the case and the definition in the above case, the question that therefore arises is whether the allegations made by the applicants are merited to warrant the setting aside and review of the orders of the court as issued on 16.12.2024.
28. I have carefully looked at the application dated 07.06.2024 together with the ruling of this court (by my predecessor, Hon. E. Obaga J.) of 16.12.2024. Both the grounds in the application and the supporting affidavit reiterated the fact that the Award on which the orders sought were premised upon, had been issued on 05.03. 2003. That the said Award was issued by the Kapseret Land Disputes Tribunal and adopted as an order of the court vide Eldoret CMCC Award No. 8 of 2003.
29. It is therefore not true that the said fact was never disclosed to the court by the applicants/respondents as alleged by the applicants herein.

30. It is not in dispute that there were several other suits filed by the respondents/applicants herein in various courts touching on the suit properties herein. These cases included: - High Court Misc. Application No. 140 of 2003, HCCC No. 31 of 2004 which was transferred to the Environment and Land Court and it became ELC No. 141A of 2012, ELC Misc. Application No. 9 of 2019 (formerly Misc. Application No. 140 of 2003 and ELC Case No. 105 of 2020.
31. My predecessor, Hon. E. Obaga J. in the ruling dated 16.12.2024, at paragraph 17 reiterated the history of litigation between the parties over the suit parcels as captured in his decision in Cheruiyot (Suing as the legal administrator of the Estate of Joseph Kiruiyot Sitienei vs Ruto & 2 Others (Environment & Land Case No. 105 of 2020) [2023] KEELC 17205 (KLR) (16th March 2023) (Judgment).
32. Associating myself with the abovementioned decision on what amounts to an error apparent on the face of the record, it is my considered opinion that the applicants' contention does not fall within the threshold of what amounts to an apparent error on the face of the record. Both the application and the ruling duly addressed the fact that the orders sought were pursuant to an order of the court vide Eldoret CMCC Award No. 8 of 2003. It cannot therefore be said that there was an obvious and patent mistake on the part of the respondents herein or the court in its ruling.

33. Moreover, the applicants deponed at paragraph 7 of supporting affidavits that they discovered the issue of limitation between March & April, 2024 when they conducted an inspection of the register of the suit property at the Minister of Lands & Physical Planning. It is therefore evident that at the time of filing the application on 12th June, 2024, they were fully aware of the said facts and had the opportunity to raise the same in the Replying affidavits but failed to do so.
34. Further, the assertion by the respondents/applicants herein that the applicants'/respondents' rights over the suit properties have since been extinguished by operation of the law is entirely unfounded and is akin to invoking the orders under Order 37 of the Civil Procedure Rules on account of their alleged 50 years' possession of the suit parcel through the backdoor.
35. In addition, I wish to point out that the application dated 07.06.2024 sought eviction orders under section 152 of the Land Act and the impugned ruling was therefore limited to the issue of eviction orders and not on ownership. This fact was reiterated at paragraphs 25 and 26 of the ruling dated 16.12.2024.

36. As held in the case of *Shah v Mbogo* (1967) EA 116, an order for review and/or setting aside is discretionary in nature and such discretion ought not to be exercised in favor of an undeserving party.
37. In view of the foregoing, it is the finding of this court that the applicants have not satisfactorily demonstrated any mistake or error apparent on the face of the record or any other sufficient reason to warrant the review of the orders of this court issued on 16/12/2024 as sought.
38. In closing, I have noted from a perusal of the court record that the applicants herein filed a Notice of Appeal dated 18.12.2024 seeking to appeal against the entire ruling issued on 16.12.2024. It is necessary to emphasize that the said ruling is also the subject of review in the instant application.
39. Order 45 Rule 1(a) of the Civil Procedure Rules provides that review is available to a person aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred. In essence therefore, this implies that the option for review is an alternative to the option for an appeal and thus, an appeal and review cannot be filed concurrently against the same ruling and order of 16.12.2024.

Costs:

40. On the issue of costs, the general rule is that costs shall follow the event unless the court directs otherwise. In this case, having held that the applicants have failed to prove their claim for review to the required standard, I find that the respondents are entitled to costs.

Conclusion:

41. In view of the foregoing, I accordingly find that the Notice of Motion Application dated 28th April, 2025 is **not merited** and is hereby dismissed with costs to the applicants/respondents.
42. It is so ordered.

DATED, SIGNED and DELIVERED in ELDORET this 9TH day of OCTOBER, 2025.

**HON. C. K. YANO
ELC, JUDGE**

Ruling delivered in the presence of: -

Mr. Collins Kigen for Respondents.

Ms. Kibet holding brief for Mr. Kibii for the Applicants.

Court Assistant - Laban