



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC CIVIL CASE NO. E050 OF 2021

ROSELINE DANIEL.....1ST
PLAINTIFF

MONICA NDUNGE DANIEL *alias*
MONICA NDUNGE NZIOKA.....2ND
PLAINTIFF

MARY ZAKAYO *alias* MOLLY M.D. ZAKAYO.....3RD
PLAINTIFF

CAROL MUTETI *alias* CARO MUTETI.....4TH
PLAINTIFF

BRIGIT LOKO MUTISO.....5TH
PLAINTIFF

REGINA MWIKALI ONYUNA.....6TH
PLAINTIFF

FELISTAS MUSYOKA.....7TH
PLAINTIFF

ROSEMARY MWANZIA.....8TH
PLAINTIFF

VERSUS

JOSHUA MUTHAMA DANIEL.....1ST
DEFENDANT
FRANKLINE NZIOKA DANIEL.....2ND
DEFENDANT
PATRICK KYALO NZIOKA.....3RD
DEFENDANT

RULING

1. The subject of this ruling concerns applications filed by all the parties herein that touch on the outcome of the ruling rendered by this court on 13/11/2024 (**“impugned ruling”**). The one filed by the plaintiffs is dated 5/12/2024, whereas the one filed by the defendants is dated 26/01/2025. In filing their respective applications, both parties moved the court under several provisions of the law, and for the sake of good order, this court will shortly highlight the motions in a chronological order based on their respective date of filing. In doing so, it will also highlight the relevant responses thereto.
2. In their application dated 13/11/2024, the plaintiffs sought the following reliefs from this court: -

a. Spent.

b. THAT this honourable court be pleased to review the impugned ruling.

c. Spent.

d. THAT pending the hearing and determination of the main suit, the honourable court be pleased to reinstate and enforce the order dated 24/10/2023.

e. THAT pending the hearing and determination of the main suit, the honourable court be pleased to restrain the defendants from collecting rental income from Muputi/Kiima Kimwe/60 and Kalama Kiitinu/1573 to the exclusion of the plaintiffs.

f. THAT the costs of this application be provided for.

3. The motion is premised on the grounds set out on its face and on the 2nd plaintiff's supporting affidavit deposed on the instant date. In brief of both, she avers that: a) there is a prior order issued by this court dated 24/10/2024 directing that the proceeds of rental income from the properties known as **Muputi/Kiima-Kimwe/60** and **Kalama Kiitinu/1573** ("**suit properties**") be deposited in a joint account held in the names of the 2nd plaintiff and the defendants' advocates, b) the respondents have breached this order by unilaterally withdrawing funds from the joint account and failing to deposit further proceeds from the rental income into the said account; and

4. C) The defendants have, through their counsel on record, issued a letter dated 20/11/2024 directing the 2nd plaintiff to

withdraw the remaining funds from the joint account and transfer them to the defendants' personal bank account, d) this action, if not restrained, will render the plaintiffs unable to recover the funds or benefit from the estate, and, e) the plaintiffs have obtained critical new evidence, including minutes of a family meeting where the registration and management of the suit properties were agreed upon.

5. This motion is strenuously opposed by the affidavit of the 2nd defendant, sworn on 11/02/2025, where, in summary, he maintains that: a) the application is bad in law, incompetent, an abuse of the court process, ill-advised, an afterthought and brought with inordinate delay, b) the application is *res judicata* and the matters raised should be the subject of an appeal, c) there is nothing new and important which after the exercise of due diligence was not with the knowledge of the plaintiffs or could not be produced at the time the ruling was passed; and
6. Finally, d) there were no family minutes; the ones alluded to are forgeries and false, and the only subsisting family agreement was the one filed in the succession cause, which grant was confirmed and properties passed to rightful beneficiaries.
7. Turning to the defendants' application dated 26/01/2025, they sought the following reliefs from the court;

- a. THAT this honourable court be pleased to order that all the monies received from the defendants' rental houses that had been deposited in a joint account held in a/c no. 1320944698, Kenya Commercial Bank-Machakos Branch, between the firm of Joseph Mwangela & Company Advocates and Monica Ndunge Daniel, together with the accrued interest, be released to the defendants' bank account no. 01109749208300, Co-operative Bank-Machakos Branch.***
- b. THAT an order be issued to Kenya Commercial Bank-Machakos Branch to furnish a bank statement of A/C No. 1320944698 held by the plaintiffs since 14/10/2023 to date.***

8. The motion is supported by grounds on the face thereof and the affidavit of the 2nd defendant, sworn on 26/01/2025, where he states: a) according to an earlier court order, rent monies from the defendants' rental houses were ordered be deposited in a joint account between the firm of Joseph Mwangela & Co. Advocates and Monica Ndunge Daniel pending the hearing and determination of an application dated 20/9/2023 filed by the plaintiffs, b) the court has since pronounced itself on the matter and dismissed the application, and lastly, c) pursuant to the order, the funds are held with KCB-Machakos Branch a/c no. 1320944698.

9. In response, the 2nd plaintiff swore a replying affidavit on 02/04/2024, where she mainly addressed the merits of the main suit and not the application. Still, of significance, she avers that it would be a great miscarriage of justice and premature for the defendants to be allowed to withdraw and utilise the funds from the joint bank account as pleaded in their present application before the matters are dealt with and finalised.
10. As directed by the court, the parties' arguments were adequately canvassed by the written submissions that were received from the law firms of **Mss. I. N. Nyaribo & Co. Advocates** for the plaintiffs, dated 24/04/2025, and **Kamolo & Associates** for the defendants, dated 12/03/2025. In consequence, the counsels' arguments and provisions of the law and judicial precedents relied upon in presenting their rival submissions shall be considered by this court.

Preliminary issues, Issues for determination, Analysis and determination

11. In respect of the preliminary issues, as observed by the court from the record, some of the reliefs sought by the plaintiffs are a blatant abuse of the court process. For a start, the injunctive orders sought by the plaintiffs are *res judicata* as similar orders were sought in their application dated 20/09/2023, which was the subject of the impugned ruling. Furthermore, there is no order of 24/10/2023 capable of being enforced, as the impugned ruling vacated this order.

12. Thus, having dealt with the preliminary issues, and given careful thought to the applications, grounds, affidavits and rival submissions, the following issues arise for resolution and they shall be handled together: (a) **whether the plaintiffs have met the legal threshold to warrant the review of the orders issued in the impugned ruling**, and if not, (b) **whether the reliefs sought in the defendants' application should be allowed.**
13. In respect of the 1st issue, the pertinent provisions that govern the review of court decisions are encapsulated by **Section 80** of the **Civil Procedure Act** and **Order 45 Rule 1** of the **Civil Procedure Rules**. **Section 80** states that;

“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.”

14. Further, **Order 45 Rule 1 (1)** of the **Civil Procedure Rules** 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.”

15. The salient conditions brought out in **Order 45 Rule 1 (1)** of the **Civil Procedure Rules**, such as the discovery of new and important matter, mistake, and sufficient cause, have to be proved by an applicant, and in dealing with such applications, the court has to exercise its judicious discretion.
16. As concerns prevailing jurisprudence on the issue at hand, the recent court of appeal decision of **Nderitu & 6 others v**

Assests Recovery Agency [2024] KECA 1612 (KLR), which this court associates itself with, stated as follows on the grounds for review based on a new and important matter: -

“This rule allows the court to revisit its decisions in light of new and significant evidence that was not available during the original proceedings despite due diligence. It serves as an essential tool for ensuring that justice is not compromised by the unavailability of crucial evidence during the original trial despite due diligence. The primary ground for review under the said Order is the discovery of new and important evidence that could not have been presented earlier despite due diligence. 24. For the applicant, however, to benefit from this provision of the law, she or he must demonstrate that they exercised due diligence in trying to obtain the evidence during the original proceedings, meaning the evidence was genuinely not within their knowledge, grasp and or reach or could not be produced despite reasonable efforts. The court scrutinizes the applicant’s efforts to ensure that the claim of new evidence is legitimate and not a result of negligence or lack of effort. Additionally, the new evidence must be significant enough to potentially alter the outcome of the case, not trivial or merely

corroborative of existing evidence. The court further considers whether the new evidence could have led to a different judgment outcome, if it had been presented initially. See generally National Bank of Kenya Ltd vs. Ndungu Njau [1997] eKLR, Francis Origo & Another vs. Jacob Kumali Mungala [2005] eKLR and Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited [2014] eKLR.

25.To successfully apply for a review, the applicant must clearly specify the new evidence and how it was discovered, demonstrate its significance and potential to alter the outcome and provide proof that the evidence was not available at the time of the original proceedings despite reasonable efforts to obtain it.”

17. Accordingly, in the circumstances of this case, the 2nd plaintiff has pointed out that the basis for review is that there exists new and important matter and to substantiate this, she has availed a document from the Business Registration Services concerning the registration of Daniel Venture, which demonstrates that this document was availed to the plaintiffs on 19/03/2021 which was long before they filed their application dated 20/09/2023. Further, she availed minutes of certain meetings.

18. To this court's mind and as correctly submitted by the defendants' counsel, these documents fall far short of the threshold of **Order 45 Rule 1 (1)** of the **Civil Procedure Rules** as the plaintiffs have failed to demonstrate that after the exercise of due diligence, which was not within their knowledge these documents could not be availed to the court at the time when the impugned ruling was rendered. This is so as such an assertion has not been made in the 2nd plaintiff's affidavit; moreover, some of these documents are already contained in the plaintiffs' lists of documents, and the agreements show that some of the plaintiffs were allegedly participants therein. Therefore, it follows that these documents were well within their knowledge at the time of filing the application dated 20/09/2023. It is also observed that the application was filed inordinately late. In consequence, this court therefore finds that the plaintiffs' application has not met the legal threshold for review.
19. Concerning the 2nd issue, having found the threshold for review of the impugned ruling has not been met and supported by the fact that the orders given on 18/10/2023 and issued on 24/10/2024, were vacated by the impugned ruling, this court finds the defendants' application is merited.
20. The upshot is that the plaintiffs' application dated 5/12/2024 is not allowed, while the defendants' application dated 26/01/2025 is allowed as prayed. Costs shall be in the cause.

In the end, this court hereby issues the following final disposal orders;

- a. That the plaintiffs' application dated 5/12/2024 is hereby dismissed.**
- b. That all the monies received from the rental properties contained in Muputi/KiimaKimwe/60 and Kalama Kiitinu/1573 that had been deposited in a joint account held in a/c no. 1320944698, Kenya Commercial Bank-Machakos Branch, between the law firm of Joseph Mwangela & Company Advocates and the 2nd plaintiff, Monica Ndunge Daniel, together with the accrued interest, be released to the defendants' bank account no. 01109749208300, Co-operative Bank-Machakos Branch.**
- c. That Kenya Commercial Bank-Machakos Branch does furnish a bank statement to the defendants either jointly and/or severally from the date of operation of A/C No. 1320944698 held between the law firm of Joseph Mwangela & Company Advocates and the 2nd plaintiff Monica Ndunge Daniel to the date of this ruling,**
- d. That except with leave of the court, there shall be no further filing of applications in this matter.**
- e. That parties are hereby directed to comply with Order 11 of the Civil Procedure Rules fully.**

- f. That a mention date shall be given for purposes of pre-trial directions.***
- g. That costs shall be in the cause.***

Orders accordingly.

Delivered and Dated at Machakos this 21st day of October, 2025.

**HON. A. Y. KOROSS
JUDGE
21.10.2025**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

M/s Kanja Court Assistant.

M/s Moraa holding brief for Mr. Nyaribo for plaintiffs.

Mr. Kamolo for defendants.