

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ELC MISC. APPLICATION NO. E028 OF 2025
IN THE MATTER OF THE ENVIRONMENT AND LAND COURT
ACT
AND
IN THE MATTER OF THE CONSTITUTION OF KENYA 2010
AND
IN THE MATTER OF MCELC NO. 9 OF 2019: STEPHEN
ODHIAMBO DICKSON V SAM HAWALA AT CHIEF
MAGISTRATES COURT AT SIAYA
SAM HAWALAAPPLICANT
VERSUS
STEPHEN ODHIAMBO DICKSON.....
RESPONDENT
RULING

1. What is placed before this court is a Notice of Motion application dated 19th August 2025 seeking the following orders:
 - i. SPENT
 - ii. This Honorable court does exercise its supervisory jurisdiction and inherent power and discretion in

revision of the ruling and order by Hon. Wambani (C.M), Siaya Law Courts, made on 13th March 2025.

- iii. That the honorable court does exercise discretion in revision of the judgment and orders of the court delivered on 30/09/2024.
 - iv. That costs be provided for.
2. The application is premised on the grounds on its face and the supporting affidavit of Sam Hawala. Rehashing the orders sought above it is deponed that the court rendered an ex-parte judgment in this matter on the 19.9.2024 and a decree issued. That the matter proceeded for hearing and determination by way of formal proof, the applicant sought leave and filed a defense. That despite the matter proceeding by way of formal proof, the applicant had an inalienable right preserved to take part in the hearing and even cross examine the plaintiff in this matter which the court ought to have preserved and protected. The defense was not considered
3. It is averred that subsequently the applicant moved the court to grant it leave and consider its defense on record which the court declined and or ignored to consider. That equally, the applicant moved the court to have him take part in the matter but the court declined on the grounds of his applications being res judicata. Further that the applicant had his matter heard ex-parte, judgment rendered and it

would be impractically impossible to lodge an appeal. It is asserted that this court intervenes by invoking its supervisory jurisdiction over the subordinate court and for promotion of public interest and public confidence in the manner administration of justice is done.

Replying Affidavit

4. The application is opposed vide the affidavit sworn on 26/8/2025 by Stephen Odhiambo Dickson. It is deponed that the applicant has not come to court with clean hands and the application is termed interlia a gross abuse of the court's process meant to delay the respondent from realizing the fruits of his judgment and decree.
5. It is urged that the only option for the applicant is to appeal the judgement to the Environment & Land Court and apply for stay of execution or injunction under Rule 5 (2) (B) of the Court of Appeal Rules. Additionally, the lower trial court further delivered its ruling established itself to be res judicata.
6. The respondent depones he tried to reach out to the applicant to try and solve the matter post judgment amicably but to no avail, only learning that the said applicant and his advocates have moved the Honourable Court for non-realizable orders vide the current miscellaneous application. The respondent had since

proceeded to enforce the judgment having found it difficult to engage with the applicant.

7. That the applicant should not hide behind Article 159 (2) (d) of the Constitution as he has all along been well represented by counsels. The court is referred to the case of **Zacharia Okoth O v Edward Akong'o Oyugi & 2 others [2014] eKLR** and **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR**.
8. It is also stated that an appeal challenges the merits or correctness of a judgment (such as errors in interpretation of the law, the Constitution or facts), whereas review challenges the process or limited errors like a mistake apparent on the face of the record, or discovery of new evidence, not the correctness of the decision. It must be confined to the scope and ambit of Order 44 Rule 1 [now Order 45]. The mere fact that a court reached a wrong conclusion on law or facts is not a ground for review. The remedy is to appeal. Reference is made to the case of **National Bank of Kenya v Ndungu Njau [1997] Eklr**.

Submissions

9. The application is canvassed by way of written submissions. The applicants submissions are dated 10/9/2025 and the respondents 15/09/2025. Briefly the Applicant submits interalia that the trial court and every court ought to exercise judicial discretion judiciously. He relied upon the

case of **Patriotic Guards Ltd vs James Kipchirchir Sambu(2018)eKLR.**

10. The respondent rehashed the depositions and authorities cited in the replying affidavit. Further that the matter was res judicata and the court was functus officio guided by the Court of Appeal holding in **Telcom Kenya Ltd vs John Ochanda (suing on his own behalf and on behalf of 996 former Employees of Telcom Kenya Ltd (2014) Eklr.**

ANALYSIS AND DETERMINATION

11. I have considered the application, the response thereto, rival submissions together with the myriad of authorities relied on and find the main issue of determination is whether the orders sought by the applicant should issue.
12. The gist of the application is very clear. The applicant seeks a revision of the ruling and order by Hon. Wambani (C.M), Siaya Law Courts, made on 13th March 2025. He also seeks a revision of the judgment and orders of the court delivered on 30/09/2024.
13. The application has been brought under the provisions Sections 1A, 1B and 3A of the Civil Procedure Act, Order 51 rule 1, Articles 40, 165(6)(7) 162(2), 159(2) of the Constitution of Kenya and Section 13 of the Environment and Land Court Act.

14. Article 165(6)(7) of the Constitution stipulates as follows:

6)The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

15. Article 40 is on the right to property and its protection. Article 159(2) exhorts Courts to administer substantive justice without undue regard to technicalities and section 3A of the Civil Procedure Act is on the inherent powers of the court.

16. The subject of the prayer for review is the ruling dated 13th March 2025 which I have read. The applicant has deponed that the purpose of the application is to have this court recall the impugned decisions made by the trial court for purposes of revision and issuance of appropriate directions and orders. The applicant is aggrieved and has invoked the above constitutional provisions.

17. The first question that arose in my mind is whether the court could properly recall the decisions, revise them and make directions in the manner approached by the applicant?
18. My first port of call for guidance would be the provisions of Civil Procedure Act and its attendant Rules.
19. Review is provided under the provisions of Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules as follows;-

Section 80 provides; -

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.

20. Order 45, rule 1 provides for Application for review of decree or order as follows;-

“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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2)

21. The applicant depones that the lower court in exercising its discretion Sections 1A, 1B and 3A of the Civil Procedure Act, Articles 10 (b), (c), 25(d), 27 (1), 48, 50 of the Constitution of Kenya, 2010, abrogated its role and ousted the applicant unjustifiable from the seat of justice and he has now been highly prejudiced. That the trial court misapplied the very basic tenets of the rules of justice that the right to fair trial

and the benefit and protection of the law shall be afforded to all. That the trial court proceeded to try a land matter vide formal proof when the applicant had demonstrated beyond doubt that he was desirous to defend his suit. The orders of the court issued were not judicious and or anchored on the rule of law by failing to uphold the Constitution of Kenya, 2010.

22. Do the above grounds stand out as grounds for review? My answer is in the negative as clearly, they are grounds for appeal and not review. The court is guided and emboldened by the case of **National Bank of Kenya v Ndungu Njau [1997] eKLR**, cited by the respondent , where the Court of Appeal stated thus;-

“A review is not an appeal in disguise. It must be confined to the scope and ambit of Order 44 Rule 1 [now Order 45]. The mere fact that a court reached a wrong conclusion on law or facts is not a ground for review. The remedy is to appeal.”

23. I respectfully agree with the submission that an appeal challenges the merits or correctness of a judgment (such as errors in interpretation of the law, the Constitution or facts), whereas review challenges the process or limited errors like a mistake apparent on the face of the record, or discovery of new evidence, not the correctness of the decision.
24. The court takes cognizance of the fact that the Constitution is the supreme law of the country. But I must add that the

habit of parties hiding under constitutional provisions to circumvent prescribed applicable rules must be discouraged. In this regard I find guidance from the following decisions;-

25. In **Godfrey Paul Okutoyi & Others vs. Habil Olaka & Another (2018) eKLR** Chacha, J held that:-

“It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional Petition.Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”

26. Indeed the Court of Appeal in the case of Uhuru Muigai Kenyatta vs Nairobi Star Publication Limited [2013] eKLR made the following observation:-

“....it is an established practice that where a matter can be disposed of without recourse to the constitution, the constitution should not be involved at all.....the courts will not normally consider a constitutional question unless the existence of a remedy depends on it. If a remedy is available to the applicant under some

other legislative provision, or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition a breach of the declaration of rights.....”

27. In Communications **Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others [2014] eKLR** where Supreme Court in defining the principle of constitutional avoidance had stated thus;-
- “The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court (Kentridge AJ), articulated the principle of avoidance in his minority judgment as follows [at paragraph 59]: I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”
28. While the current application is not clearly stated as a constitutional petition it is anchored substantively on constitutional provisions. Based on the foregoing clearly the application is not properly before this court and must be struck out.
29. The application dated 19th August 2025 is hereby struck out. I grant costs to the respondent.

Delivered and Dated at Siaya This 22nd Day of October 2025

**HON. LADY JUSTICE A.E. DENA
JUDGE**

22/10/2025

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Oduol for the Applicant

No appearance for the Respondent

Court Assistant: Elisha Mboya