

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**ELC CASE NO. 130 OF 2020**

**KILIFI HOTELS LIMITED ..... PLAINTIFF/RESPONDENT**

**VERSUS**

**OMAR GUMA IBRAHIM ..... 1<sup>ST</sup> DEFENDANT/RESPONDENT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT / APPLICANT**

**RULING**

1. By the Notice of Motion dated 28<sup>th</sup> January 2025, the Chief Land Registrar (the 2<sup>nd</sup> Defendant/Applicant) prays for an order that this Honourable Court be pleased to review and/or set aside its judgment delivered on the 17<sup>th</sup> December 2024 and further direct that the matter be heard *de novo*.
2. The application which is supported by an Affidavit sworn by Mike Sengo, a Land Registrar in the 2<sup>nd</sup> Defendant's Office is premised inter alia on the grounds that:
  - i. **This suit was initiated by way of a Complaint dated 15<sup>th</sup> September, 2020 and the Plaintiff had sought among others a declaration that the Plaintiff is the rightful owner of the parcels of land known as L.R**

**No.10173 and LR No. 10174 as well as an order of injunction against the 1<sup>st</sup> Defendant.**

- ii. In its Statement of Defence, the 1<sup>st</sup> Defendant had denied the existence of the suit properties and further averred that he is the owner of the parcel of land LR No. 28432/2 which was the result of the consolidation of LR. No. 10173 and 10174;**
- iii. In its Statement of Defence, the 2<sup>nd</sup> Defendant categorically denied any allegation of fraud but confirmed that as per their records, the suit properties belong to the Plaintiff;**
- iv. The 1<sup>st</sup> Defendant did not file a Counterclaim claiming to be declared the rightful owner of the suit property nor did it plead that he was a bona fide purchaser for value;**
- v. Despite the absence of a Counterclaim, on 17<sup>th</sup> December 2024, the Learned Judge delivered a judgment dismissing the Plaintiff's suit with costs to the 1<sup>st</sup> Defendant who was declared to be a bona fide purchaser for value without notice;**

- vi. It is clear from the foregoing that there was an error apparent on the face of the record in that the 1<sup>st</sup> Defendant did not plead that he was an innocent purchaser for value.**
- vii. The decision declaring the 1<sup>st</sup> Defendant the rightful owner without a Counterclaim denied the parties before the court an opportunity to properly defend themselves during the hearing and violates the principles of natural justice;**
- viii. The 2<sup>nd</sup> Defendant/Applicant has been served with the judgment and has been under constant pressure from the 1<sup>st</sup> Defendant to rectify the register and the 2<sup>nd</sup> Defendant is apprehensive that if he is compelled to do so, there will be a miscarriage of justice;**
- ix. The balance of convenience weights in favour of the Applicant owing to the prejudice that will be occasioned to the Applicant;**
- x. The application has been brought without inordinate delay and therefore no real prejudice will be suffered by the Respondent if the application is allowed; and**

**xi. It is in the interest of justice that the prayers sought be allowed as prayed.**

3. Kilifi Hotels Limited (the Plaintiff) supports the application. In a Replying Affidavit sworn on its behalf by its Corporation Secretary Mercy K'Mberia, the Plaintiff associates itself with the position taken by the 2<sup>nd</sup> Defendant and avers that there is discovery of new and important matter of evidence which necessitates a review of the judgement.
4. The Plaintiff further avers that it has come across Malindi ELC. No. E003 of 2023 relating to the same subject matter where judgment was entered on 16<sup>th</sup> February 2023 and that the consent entered therein effectively extinguished the Plaintiff's and the 1<sup>st</sup> Defendant's title.
5. Omar Guma (the 1<sup>st</sup> Defendant) is opposed to the application. In his Replying Affidavit sworn on 3<sup>rd</sup> March 2025, the 1<sup>st</sup> Defendant avers that the Applicant has filed a similar application on the same grounds and that the same is pending determination before the Mombasa Court of Appeal being Civil Appeal No. E019 of 2025.

6. The 1<sup>st</sup> Defendant avers further that what the 2<sup>nd</sup> Defendant terms as an error apparent on the face of the record is a substantive issue going to the root of the judgment and one which if the Applicant is aggrieved with they should have challenged the same on Appeal.
7. I have carefully perused and considered the 2<sup>nd</sup> Defendant's application as well as the response thereto by both the Plaintiff and the 1<sup>st</sup> Defendant. I have similarly perused and considered the submissions and authorities placed before me by the Learned Counsels representing the parties herein.
8. By this application before the court, the Honourable the Attorney General representing the Chief Land Registrar who was sued as the 2<sup>nd</sup> Defendant herein has urged the court to be pleased to review and/or set aside its judgment delivered on 17<sup>th</sup> December 2024 and to direct that the matter be heard *de novo*. Interestingly, the 2<sup>nd</sup> Defendant is supported in his application by the Plaintiff while the 1<sup>st</sup> Defendant is opposed to the application.

9. Order 45 Rule 1(1) of the Civil Procedure Rules, 2010 pursuant to which the application is brought before the court sets out the grounds for review and 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.”**

10. Section 80 of the Civil Procedure Act, Cap 21 Laws of Kenya similarly provides for review as follows:

**“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.”**

11. Considering those provisions in ***Parliamentary Service Commission -vs- Martin Nyaga Wambora & Others (2018) eKLR***, the Supreme Court of Kenya quoted with approval the findings of the East Africa Court of Appeal in ***Mbogo & Another -vs- Shah (1968) EA*** and held as follows:

**“(31) Consequently, drawing from the case law above, particularly Mbogo and Another -vs- Shah, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:**

- i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.**
- ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court.**
- iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.**
- iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.**
- v. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and;**
  - a) as a result, a wrong decision was arrived at;**
  - or**

**b) it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”**

12. In the earlier case of ***National Bank of Kenya Limited -vs- Ndungu Njau (1997) eKLR***, the Court of Appeal considering the same provisions held as follows:

**“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for a review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceeded on an incorrect expository of the law and reached an erroneous conclusion of the law. Misconstruing a statute or other provisions of the law cannot be a ground for review.”**

13. In the matter before me, the 2<sup>nd</sup> Defendant has urged the court not only to review and set aside the judgement delivered herein but also to direct that the matter be heard *de novo*. It is

the 2<sup>nd</sup> Defendant's case that there was an error apparent on the face of the record in that the 1<sup>st</sup> Defendant in whose favour the judgment was delivered, had not pleaded that he was an innocent purchaser for value without notice and that despite that and the absence of a counterclaim, the judgment dismissed the Plaintiff's suit and declared the 1<sup>st</sup> Defendant a bona fide purchaser for value.

14. The 2<sup>nd</sup> Defendant went on to assert that the court's decision declaring the 1<sup>st</sup> Defendant the rightful owner without a counterclaim had denied both the Plaintiff and the 2<sup>nd</sup> Defendant an opportunity to properly defend themselves during the hearing and that the same had violated the principles of natural justice.
15. With respect, I did not think that those were grounds upon which an application for review could be premised. It was clear from the grounds of the application that the 2<sup>nd</sup> Defendant was merely dissatisfied with the decision of the Learned Judge on account of the fact that they considered the same to be erroneous. An application for review is however not an appeal

or a chance for the 2<sup>nd</sup> Defendant to re-argue their application before the same court.

16. In support of the application for review the 1<sup>st</sup> Defendant through its Corporation Secretary asserted that there was discovery of a new and important matter of evidence which, after the exercise of due diligence was not within its knowledge or could not have been provided by itself as at the time the decree was passed. The new evidence said to have been discovered was the existence of another case being Malindi ELC. No. E003 of 2023; Nimo Ahmed Abdi & Another -vs- Isaac Juma Obila & Another, which was said to relate to the same subject matter herein.
17. From the material placed before the court, it was apparent that judgement was entered by consent in the said matter on 16<sup>th</sup> February 2023. That was almost two (2) years before judgement was entered herein on 17<sup>th</sup> December 2024. It was not clear how the parties who entered the consent were related to the parties herein and how those orders affected these proceedings. And while the 2<sup>nd</sup> Defendant asserted that it was now in possession of new material from the Director of Survey,

no such evidence was exhibited in the Affidavit in support of the application.

18. Taking the totality of the circumstances herein, it was evident to me that this application was filed in abuse of the court process and in order to defeat the clear provisions of Section 80 of the Civil Procedure Act. From the material placed before the court, it was evident that the Plaintiff had on 10<sup>th</sup> January, 2025 with the knowledge of the 2<sup>nd</sup> Defendant lodged an Appeal against the judgement in the Court of Appeal at Mombasa being Mombasa Civil Appeal No. E019 of 2025. In the said matter, the Plaintiff has also sought an order of stay of execution of the judgement.
19. As a mere custodian of Land Records in this country, it was not clear to me what prejudice the office of the Chief Land Registrar stood to suffer if the judgment were to be executed to warrant the institution of this application. By filing this application herein some 18 days after the Plaintiff had lodged the Appeal, it was evident to me that both the Plaintiff and the 2<sup>nd</sup> Defendant were acting in concert to abuse the processes of this court. This court has a cardinal duty to stop its processes

from being abused through the filing of a multiplicity of similar applications.

20. Accordingly, I did not find any merit in the Motion dated 28<sup>th</sup> January, 2025. The same is dismissed with costs to the 1<sup>st</sup> Defendant.

**Ruling dated, signed and delivered in open court and virtually at Mombasa this 16<sup>th</sup> day of October, 2025**

.....  
**J.O. OLOLA  
JUDGE**

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Ms. Indesia holding brief for Bwire Advocate for the Plaintiff
- c) Mr. Kipkorir and Mr. Kiplangat Advocates for the 1<sup>st</sup> Defendant
- d) Mr. Waga Advocate for the 2<sup>nd</sup> Defendant/Applicant