

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT NAIROBI
ELC NO. 414 OF 2010
AS CONSOLIDATED WITH ELC NO. 415 OF 2010

**AGNES WAMBUI KIRITU DECREE HOLDER/
RESPONDENT**

**ALICE WANGUI MWANIKI ... DECREE HOLDER/
RESPONDENT**

VERSUS

**MILELE VENTURES LTD ... JUDGMENT
DEBTOR/RESPONDENT**

TWO ZERO SIX RUIRU

**DEVELOPERS LIMITED INTENDED INTERESTED
PARTY**

RULING

1. Before this court for determination is the Intended Interested Party's Notice of Motion application dated 18th March 2025, brought pursuant to **Order 45 Rule 1** of the **Civil Procedure Rules** and **Section 80** of the **Civil Procedure Act**, seeking the following orders.

- a. This Honourable Court be pleased to review and set aside its ruling dismissing the Applicant's joinder application on the grounds that its interests could be addressed by the Defendant.*

b. This Honorable Court be pleased to enjoin the Applicant as an Interested Party in the proceedings.

c. Costs of this application be provided for.

d. Such further and other relief as this Honourable Court may deem just and expedient in the circumstances.

2. The application is premised on the grounds set out on its face and is supported by the Affidavit of Benson Njuguna, a Director of the Proposed Interested Party.
3. It is the Applicant's case that vide a ruling delivered on 6th March 2025, this Court dismissed its application for joinder on the basis that its interests could be addressed by the Judgment Debtor.
4. Mr. Njuguna contended that the said ruling is tainted by an error apparent on the face of the record, in that the Defendant cannot adequately represent or protect the Applicant's interests in these proceedings. According to him, the Applicant's interests are distinct and separate from those of the Judgment Debtor, thus necessitating its direct participation in the matter.
5. The Applicant's director further asserted that this Court erroneously found that the Applicant's joinder would require the setting aside of the judgments of the Court of Appeal and this Court. Mr. Njuguna maintained that he does not seek to

reopen or revisit those judgments, but only to participate in the current application before this Court. He averred that the Applicant's interest in the suit property was acquired post-judgment, and was therefore not subject to prior adjudication.

6. It was his deposition that the Decree Holders have, through the Notice of Motion dated 20th March 2023, moved the Court to revoke his title without affording him an opportunity to be heard, contrary to the rules of natural justice and the provisions of **Article 50** of the **Constitution**. He stated that unless joined, he stands to suffer irreparable harm as his property rights are threatened without being accorded a fair hearing.
7. The Applicant has also deponed that the issues raised in the present application are of great public interest, as they relate to land ownership and the protection of the purchasers' interests. He asserted that, following a lawful subdivision of the suit property, numerous families purchased several portions from the Proposed Interested Party, only for allegations of fraudulent dealings to arise. In his view, his joinder will mitigate any prejudice to the Proposed Interested Party's interest in the land.
8. Through Grounds of Opposition dated 4th April 2025, the 1st Decree Holder opposed the application. She stated that, in addition to applications filed before this Court and the Court of Appeal, the Intended Interested Party had filed Milimani

Chief Magistrates Court Civil Suit No. MCELC No. 12925 of 2021.

- 9.** In that matter, it was averred, the Chief Land Registrar prepared and filed a report to the effect that the title document relied upon by the Intended Interested Party, being Title No. IR No. 28318/2243 has never been registered and did not appear in the lands records.
- 10.** It was her position that the same fraudulent and forged document was being relied upon by the Intended Interested Party in the present application. She urged that the application be dismissed with costs.
- 11.** In a Replying Affidavit dated 14th April 2025 and sworn by Alice Wangui Mwaniki, the 2nd Decree Holder, she averred that the Applicant's contention that the ruling of 6th March 2025 contained an error apparent on the face of the record, is ill-advised and untenable. She argued that an error on the face of the record is self-evident and does not require elaborate argument to establish, and that a misconstruction of the law does not constitute a ground for review.
- 12.** 2nd Decree Holder stated that the Applicant's claim characterized the ruling as erroneous, which would require a long, drawn-out reasoning process, thereby failing the test for an error apparent on the face of the record.
- 13.** She further averred that the application for joinder of the Proposed Interested Party was res judicata and amounted to

an abuse of the process of the Court. According to her, the substantive issues in the matter had already been determined, rendering this court functus officio. She stated that a decree has been extracted and the only stage remaining issue was execution. She contended that the application for joinder was therefore dead *ab initio*, as litigation has to come to an end.

- 14.** Ms. Mwaniki further stated that the Proposed Interested Party had no claim in the decreed property, nor any identifiable interest therein, as evidenced by the Chief Land Registrar's report dated 17th July 2024. It was deposed that the report indicated that I.R. No. 18993 LR No.28318/2243, the land claimed by the Proposed Interested Party, had not been registered in the Land Records.
- 15.** She contended that the Proposed Interested Party lacked the locus standi to institute the application and urged that the same be struck out.
- 16.** In a Further Affidavit dated 16th May 2025, Benson Njuguna, reiterated that the Intended Interested Party held a valid proprietary interest in L.R. No. 28318/2243, having purchased it bona fide for value and without notice of any encumbrance. He annexed a copy of the Certificate of Title issued to Two Zero Six Ruiru Developers Limited as well as a certified copy of the transfer and sale agreement executed between the company and the original holder, Milele Ventures Limited.

- 17.** He contended that the Chief Land Registrar's Report did not invalidate the Applicant's title. He denied the report's contents and maintained that, at most, it stated that the property had not been registered in the Lands records. He argued that such omission was purely administrative and did not extinguish the Proposed Interested Party's proprietary rights under the law.
- 18.** He stated that the Proposed Interested Party had consistently followed up with the Ministry of Lands to regularise and update the records, but the process had been delayed due to institutional inefficiencies. He maintained that the allegation of a fraudulent or forged title was defamatory, unsupported by any forensic evidence and that no competent court or investigative body had made an adverse finding of forgery.
- 19.** Mr. Njuguna further deponed that the Proposed Interested Party had conducted official land searches from the Ministry of Lands in respect of the subject property and adjacent parcels, confirming ownership and occupation. He averred that the property had been substantially developed, with permanent and ongoing structures and annexed photographs showing fencing, access roads and occupation as evidence of possession and investment.
- 20.** He stated that the doctrines of *functus officio* and *res judicata* did not apply to the Applicant who had not been a party to the original proceedings, has not been heard on its

claim and whose proprietary interest in the property was yet to be adjudicated.

Submissions

- 21.** Counsel for the Applicant/Proposed Interested Party, relying on the provisions of **Section 80** of the **Civil Procedure Act** and **Order 45 Rule 1** of the **Civil Procedure Rules**, submitted that the application was anchored on the ground of an error apparent on the face of the record. Counsel placed reliance on ***Nyamogo & Nyamogo Advocates vs Kogo [2001] EA 173***, where the Court defined the scope of an error apparent on the face of the record.
- 22.** It was Counsel's submission that the error was fundamental as it mischaracterised the relationship between the parties. According to Counsel, the Judgement Debtor no longer had any proprietary interest in the suit land following its transfer to the Applicant, and therefore lacked the standing or capacity to advocate for or protect the Applicant's rights.
- 23.** Counsel further submitted that the Applicant was not a party to the original proceedings, yet the Decree Holders had moved to revoke its title through subsequent execution processes and applications, without affording it an opportunity to be heard.
- 24.** It was argued that this amounted to a breach of **Article 50(1)** of the **Constitution** which guarantees the right to a fair hearing. Reliance was placed on the case of ***Judicial***

Service Commission vs Speaker of the National Assembly & Another [2013] eKLR and Yego vs Tuiya [1986] KLR 726.

25. On the Respondents' contention that the matter was res judicata and that the court was functus officio, it was contended that the doctrine of functus officio does not bar the court from determining interlocutory applications post judgment, especially where such applications do not disturb the final decree but are meant to protect third party's interests. Counsel relied on the case of **John Florence Maritime Services Ltd & Another vs Cabinet Secretary for Transport & 3 others [2015] eKLR.**
26. Counsel further submitted that **Article 159(2)(d)** of the **Constitution** enjoins the court to administer justice without undue regard to procedural technicalities, while **Sections 1A** and **1B** of the **Civil Procedure Act** reinforce the obligation to facilitate the just, expeditious and proportionate resolution of civil disputes.
27. In response, Counsel for the Decree Holder/Respondent submitted that the application was incurably defective on three main grounds: first, that there was no error apparent on the face of the record; second that the court was functus officio on the questions of ownership of the land and joinder of parties; and third, that the prayers sought were barred by the doctrine of res judicata.

- 28.** Counsel relied on the principles governing review as codified under **Section 80** of the **Civil Procedure Act** and **Order 45 Rule 1** of the **Civil Procedure Rules**, and on the definition of an error apparent on the face of the record, as set out in **National Bank of Kenya Limited vs Ndungu Njau [1997] KECA 71 (KLR), Draft and Develop Engineers Limited vs National Water Conservation and Pipeline Corporation Civil Case No. 11 of 2011** and the decision by the Supreme Court of Uganda in **Edison Kanyabwera vs Pastori Tumwebaze (2005) UGSC 1.**
- 29.** Counsel submitted that although an error apparent on the face of the record must be ascertained on a case-to-case basis, it must be plain for all to see and should be easily ascertained without a long drawn reasoning process.
- 30.** It was his position that the issues raised by the Applicant did not meet the test for an error apparent on the face of the record and were not capable of determination on review.
- 31.** On functus officio, Counsel submitted that in a Judgment delivered on 25th February 2015, Hon. Justice L.N. Gacheru decreed that the Decree Holders were entitled to 5 acres and 35 acres of LR No. 10916 IR No. 19200 respectively. It was argued that, having rendered judgment, the court had become functus officio, and the application for joinder by the Proposed Interested Party could not be entertained. Counsel relied on the case of **John Gilbert Ouma vs Kenya Ferry Services Limited [2021] KEHC (KLR).**

- 32.** With respect to joinder, Counsel submitted that the Court has already pronounced itself on the matter in its ruling of 6th March 2025, wherein the prayer for joinder was dismissed. It was argued that a post-judgment application is confined to matters relating to review, execution or stay of the judgment and that a prayer for joinder at that stage was improperly before the Court. Reliance was placed on **Basi vs Yasi & 5 Others [2025] KEELC 2941 (KLR)**.
- 33.** Counsel further submitted that a court of competent jurisdiction had already pronounced itself on the true ownership and status of the suit land in favour of the decree holders. Any further issues arising from the same land and between the same parties, it was argued, were barred by the doctrine of res judicata, which seeks to prevent endless litigation of matters already adjudicated.
- 34.** Reliance was placed on **Section 7** of the **Civil Procedure Act** and the Supreme Court decision of **Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others [2014] KESC 53 (KLR)**.
- 35.** Finally, it was submitted that all transactions between the Applicant and the Judgement Debtor took place in 2019, at a time when the Judgement debtor had no title to pass in respect of the 5 acres and the 35 acres, which had already been decreed to the Decree Holders.

Analysis and Determination

36. Having considered the Motion, responses and submissions, the issues that arise for determination are as follows:

- a. Whether the prayer for review is merited; and*
- b. Whether the application for joinder is res judicata.*

37. The parameters within which this court may exercise its jurisdiction to review its decisions are clearly circumscribed by statute. **Section 80** of the **Civil Procedure Act** clothes the court with power to review its own orders, while **Order 45 Rule 1(1)** of the **Civil Procedure Rules, 2010** provides the procedural framework for the exercise of that power. For clarity, **Section 80** of the **Act** stipulates 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 judgment to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

38. **Order 45 Rule 1** of the **Civil Procedure Rules, 2010** which sets out the conditions that must be satisfied before a party can successfully invoke the court’s review jurisdiction, provides as follows:

“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 judgment to the court which passed the decree or made the order without unreasonable delay.”

- 39.** From the foregoing provisions, it is evident that while **Section 80** of the **Civil Procedure Act** donates to the court the substantive power to review its own decrees and orders, it is **Order 45** of the **Civil Procedure Rules, 2010** that defines the jurisdictional boundaries and prescribes the grounds upon which such power may be invoked. These grounds are restricted to: discovery of new and important matter or evidence; mistake or error apparent on the face of the record; and any other sufficient reason.

40. In the present application, the Applicant invokes the ground of error apparent on the face of the record. The concept of such error has received judicial attention in numerous decisions. In ***Kenya Trypanosomiasis Research Institute vs Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs) [2019] eKLR***, the Court of Appeal restated its jurisprudence on the subject, observing as follows:

“This Court in *Muyodi vs Industrial and Commercial Development Corporation & Another [2006] 1 EA 243* described an error on the face of the record as follows:

“In *Nyamogo and Nyamogo v Kogo [2001] EA 174* this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is 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 or 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 also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

41. This position was also stated by the Ugandan Court of Appeal in the case of *Apollo Waswa Basude & 2 others (As administrators to the Estate of the late Sepiriya Rosiko) vs Nsabwa Ham, Civil Appeal No 288 of 2016,* where the court at para 310 stated thus;

“...an error apparent on the face of the record is one that is evident and its incorrectness does not require any extraneous matter by way of proof. It is so manifest and clear that no court of law exercising its judicial power would allow it to remain on the court record. This error may be either of fact or of law...”

- 42.** The Plaintiff's case, as presented, is that the ruling of this court delivered on 6th March 2025 is tainted with an error apparent on the face of the record. In particular, the Plaintiff challenges this court's finding that the Proposed Interested Party's interests could be sufficiently represented by the Defendant/Judgment Debtor. According to the Applicant, such a determination overlooked the distinct nature of the Proposed Interested Party's stake in the matter.
- 43.** The Applicant further argues that this court fell into error in holding that his joinder would necessitate the setting aside of the judgments previously rendered by both the Court of Appeal and this court. It is the Applicant's position that he has not sought to reopen or impugn those judgments, but merely seeks to be joined in the ongoing proceedings so as to ventilate his interest in the application presently before the court.
- 44.** By way of background, the Decree Holders instituted these proceedings against the Judgment Debtor seeking specific performance arising from the latter's breach of agreements for the sale of land. After hearing the two suits, judgment was delivered on 25th February 2014, wherein the court found that the Plaintiffs were entitled to five (5) acres and thirty-five (35) acres respectively, to be excised from the suit property.
- 45.** That decision was subsequently upheld by the Court of Appeal, which further clarified that the portions awarded to

the Plaintiffs were to be carved out of Land Reference No. 28318/15.

- 46.** The proceedings presently before this court are at the execution stage. Pursuant to an order issued on 25th January 2018, the Judgment Debtor was directed to carve out the decreed portions and to execute all the requisite instruments within the timelines stipulated therein, failure to which the Chief Land Registrar was to execute the same.
- 47.** It is in that context that the Decree Holders moved the court by way of an application dated 20th March 2023, which remains pending determination. In that application, they seek the revocation and annulment of titles to one hundred and six (106) properties, on the grounds that the titles were procured by the Judgment Debtor fraudulently and through a corrupt scheme, in blatant contravention of the orders of this court made on 3rd February 2011 and 8th September 2010.
- 48.** Those orders had been duly registered against Title No. LR 28318/15, expressly prohibiting any sale, transfer, or disposal of any portion of the land. Among the properties targeted in that application is LR No. 28318/2243, whose ownership is now claimed by the Intended Interested Party.
- 49.** It was against the backdrop of the said application that the Intended Interested Party moved this court, by way of an application dated 29th April 2024, seeking to be joined in these proceedings. In a ruling delivered on 6th March 2025,

this court declined the application for joinder, holding that the title relied upon by the Intended Interested Party had been issued to it on 13th March 2019, during the pendency of these proceedings.

- 50.** The court reasoned that the question of whether the suit property was available for disposition could appropriately be answered by the Judgment Debtor, and not by the Intended Interested Party. Further, the court observed that granting the joinder would inevitably have the effect of reopening and unsettling the judgments of this court and of the Court of Appeal, thereby occasioning a re-litigation of issues that had been determined.
- 51.** Upon consideration, it is evident to this court that what the Intended Interested Party terms as an error apparent on the face of the record is, in substance, a challenge to the merits of the court's determination. Such a challenge properly lies in an appeal, and not in an application for review.
- 52.** The question of whether the Judgment Debtor could adequately represent the interests of the Intended Interested Party was one that required a process of judicial reasoning, in respect of which more than one view could reasonably be taken. It follows that the matter does not disclose a self-evident error on the face of the record capable of redress through review.
- 53.** Similarly, the court's observation that joinder of the Proposed Interested Party would unsettle the judgments of this court

and the Court of Appeal was a substantive finding flowing from an assessment of the implications of joinder. It cannot, therefore, be recast as an error on the face of the record. To do so would impermissibly stretch the scope of review beyond its settled limits.

54. The Court of Appeal in **National Bank of Kenya Limited vs Ndungu Njau [1997] KECA 71 (KLR)** was emphatic that:

“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 a sufficient ground for 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 exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

55. Guided by the foregoing pronouncement, it is plain that the grievances raised by the Applicant, fall squarely within the province of appeal rather than review.

56. The upshot of the foregoing analysis is that the Applicant’s prayer for review is devoid of merit.

57. The final issue for determination is whether the prayer for joinder of the Intended Interested Party is res judicata. The doctrine is anchored in **Section 7** of the **Civil Procedure Act**, which provides that:

“No court shall, try, any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or issue in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

58. The doctrine is founded on the principle of finality in litigation, which protects parties from repeated claims over the same subject and upholds the authority of judicial decisions.

59. The test for res judicata is now settled. As stated in **Bernard Mugo Ndegwa vs James Nderitu Githae & 2 Others [2010] eKLR**, and subsequently affirmed by the Supreme Court in **John Florence Maritime Services Limited & another vs Cabinet Secretary for Transport & Infrastructure & others [2021] KESC 39**, the doctrine applies where: the matter in issue is identical in both suits; the parties are the same, or litigating under the same title;

the title or claim is the same; the court that determined the former matter was competent; and (v) the earlier decision was final.

- 60.** In the present matter, it is contended that this application is res judicata on the ground that a similar application for joinder by the Intended Interested Party dated 29th April 2024 was disposed of vide this court's ruling delivered on 6th March 2025.
- 61.** The issue of joinder of the Intended Interested Party was squarely raised and conclusively determined in this court's ruling delivered on 6th March 2025. Vide this ruling, this court declined the Intended Interested Party's request to be joined in these proceedings.
- 62.** The said ruling has not been set aside, reviewed, or overturned on appeal. To allow the Applicant to raise the same issue in the present application would amount to re-litigation of a matter already adjudicated, contrary to the express terms of **Section 7 of the Civil Procedure Act**.
- 63.** It follows therefore that the secondary prayer for joinder of the Intended Interested Party is res judicata.
- 64.** In the result, the application dated 18th March 2025 by the Applicant/Intended Interested Party is without merit and is hereby dismissed with costs.

Dated, signed and delivered virtually in Nairobi this 9th day of October, 2025.

O. A. Angote
Judge

In the presence of;

Mr. Ochieng for prof. Ojienda (S.C) for 2nd Decree Holder

Mr. Jaleny for 1st Decree Holder

Mr. Wachira for Applicant/Intended Interested Party

Mr. Thuita for Defendant/Judgment Debtor

Court Assistant: Tracy

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