Mwaniki v (Secretary) & 3 others () Sued as the officials of Kibarage Slums Association); Kenya Railways Corporation & another (Intended Interested Party) (Environment and Land Case 91 of 2020) [2025] KEELC 7134 (KLR) (15 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7134 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE 91 OF 2020

CA OCHIENG, J

OCTOBER 15, 2025

BETWEEN

JOSEPH BAKER KIAMBA MWANIKI ..... PLAINTIFF

AND

DAVID NYAGA (SECRETARY) ..... 1ST DEFENDANT

ABDI GODANA DIDA (CHAIRMAN) ..... 2ND DEFENDANT

SHAWN FRANCIS WAMBUA (YOUTH LEADER) ..... 3RD DEFENDANT

SIMON MWAURA (MEMBER) ..... 4TH DEFENDANT

) SUED AS THE OFFICIALS OF KIBARAGE SLUMS ASSOCIATION

AND

KENYA RAILWAYS CORPORATION ..... INTENDED INTERESTED PARTY

NATIONAL LAND COMMISSION ..... INTENDED INTERESTED PARTY

RULING

1. What is before Court for determination is the Defendants' Notice of Motion application dated the 20th March 2025 where they seek the following Orders:

    a. Spent.

    b. Pending hearing and determination of this application, the Honourable Court be pleased to discharge, vary, vacate and or set aside the judgement delivered on the 16th day of September,2021 before Justice BM Eboso.

c. Pending hearing and determination of this application, the Honourable Court be pleased to review the judgement delivered on 16th September 2021 before Justice BM Eboso.

d. Pending hearing and determination of this application, the Honourable Court be pleased to join Kenya Railways corporation as an Interested party.

e. Pending hearing and determination of this application, the Honourable Court be pleased to join the National Land Commission as an interested party in the matter.

f. Pending hearing and determination of this application, the Honourable court be pleased to stay execution of any decree stemming from the judgement delivered on the 16th day of September 2021 before Justice B.M Eboso.

g. Spent.

h. Cost of this application be provided for.

2. The application is premised on grounds on its face and on the supporting affidavit of John Mwangi, the Chairperson of Kibarage Slums Association where he deposes that the Association took possession of the suit property and has remained thereon for about seven (7) decades.

3. He contends that in its judgement of 16th September 2021, the Court relied on averments made by the Plaintiff that he was granted the suit property for a term of 99 years from 1st July 1977 and found in his favour. He argues that from a Survey Report by the 2nd Intended Interested Party through their letter ref KR/M-3/5/15 dated December 2022, it confirms that the 1st Intended Interested party has never surrendered nor granted the suit property to anyone or any institution, thus the said land belongs to the 1st Intended Interested Party. Further, that the survey amounts to new evidence that would not have been presented before this Court before judgement was delivered even with reasonable due diligence.

4. The 1st Intended Interested Party filed an affidavit in support of the motion, sworn by Duncan Mwangi, its Principal Land Surveyor. He avers that the suit property is contained in Survey Plan 147/35 (Director of Survey Records) and that the area is occupied by Kibarage slum dwellers and is part of the original Nairobi-Kikuyu railway alignment in Plan No. 115P-2-1 dated 1946. He contends that it is further illustrated in the Nairobi and environs topo-cadastral map sheet No. 148/4/1 as old railway alignment. Further, that the section of the railway line was later realigned to the current Nairobi-Dagoretti-Kikuyu route. He avers that much of the land along the alignment was later alienated and allocated to private entities by the Commissioner of Lands but there are no records in the 1st Intended Interested party's custody indicating or confirming surrender of the corridor to the Government for allocation in lieu of the current route.

5. He avers that an analysis of survey records (FR 147/35) containing the suit property, among others, shows the resultant plots partly encroached on the old railway alignment and the remainder of the railway alignment is occupied by the Defendants. He confirms that there have been previous efforts by the 2nd Intended Interested Party to regularize settlement in the Defendants' favour and a report it prepared indicates that LR No. 209/9002/3 encroaches on the old railway alignment by 0.230 ha.

6. He states that in March 2025, the State Department for Housing and Urban Development notified the 1st Intended Interested Party of the Government's plan to implement housing and associated infrastructure development along the aforementioned section.

7. The application is opposed by the Plaintiff who contends that after judgment was issued herein in his favour declaring him the lawful proprietor of LR No. 209/9002/2 and 209/9002/3 comprised

in Grant No. IR 324481, the Defendants unsuccessfully filed an application for stay, in which they contended that they had filed a Notice of Appeal, and drafted a Memorandum of Appeal thus having invoked the appellate jurisdiction of the Court of Appeal, the review jurisdiction of this Honourable court is not available to them. Further, that the application has been made almost four years after the judgment of the Court in the matter and they have failed to proffer a cogent explanation for the inordinate delay.

8. He reiterates that the application does not meet the criteria for review under Order 45 Rule 1 of the Civil Procedure Rules. Further, that the Defendant is seeking to introduce a new course of action under the guise of new evidence, which is an attempt to reopen litigation in a matter already conclusively determined by this Court. He insists that joinder of parties is not available to a party during review thus the Defendant's attempt to introduce new parties to the matter is irregular and an abuse of the court process.

9. The application was canvassed by way of written submissions.

Submissions

10. The Defendants submit that they have met the legal threshold for review under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. They deny lodging any appeal against the impugned decision of Hon. Judge Eboso. Further, that the survey report of February 2023 by the 2nd Intended Interested part qualifies as new evidence as it was unavailable to them at the time of hearing and judgement of the suit. They further submit that neither the 1st nor the 2nd Intended Interested Parties' were parties to the original proceedings thus their exclusion precluded the possibility of obtaining the Survey report, which now reveals that the impugned judgement may have been obtained on the basis of incomplete or inaccurate material facts by the Plaintiff, thereby occasioning a miscarriage of justice.

11. It is their submission that being an association, the delay in filing the application arose from the practical realities of decision making as its members who are large in number had to be consulted. Further, that it was also occasioned by the time required to obtain the survey report from the 2nd Interested Party.

12. It is also their submission that the Plaintiff will not suffer any prejudice that outweighs the public interest ensuing that land vested in a public institution is not unlawfully or erroneously alienated. Further, that allowing the judgement would confer rights over public land to a private individual without lawful title. To support their averments, they relied on the following decisions: Jaber Mohsen Ali & Another v Pricillah Boit & Another E & l No. 200 of 2012 [2014] eKLR and Republic v Administrative Review Board & 2 Others [2018] eKLR.

13. The 1st Intended Interested party in its submissions urges the court to take into account the new and important evidence outlined in its replying affidavit and grant the orders sought.

14. On his part, the Plaintiff reiterates that review jurisdiction of this court is not available to the Defendants having invoked the jurisdiction of the Court of Appeal pursuant to the Notice of Appeal dated 23rd September 2021 and the Memorandum of Appeal dated 29th September 2021. The Plaintiff urges the court to take judicial notice that during trial, the Defendants filed a Counterclaim seeking title to the suit property under the doctrine of adverse possession, thereby admitting that he holds a valid title thus they are estopped from challenging its validity. Further, that the alleged new evidence is an attempt to reopen the case and change the character of the suit.

15. To support their averments, they relied on the following decisions: Mputhia v M'miriti [2025] KEHC 756(KLR), Bernard Ndungu Mbugua v Nairobi Water & Sewerage Company Limited [2021] eKLR; Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR; Jacinta Wairimu Njoroge v Julia Wanjiru & 4 Others [2015] eKLR; China Road and Bridge Corporation Kenya v Ecorite Mining Company Limited & 6 Others [2021] eKLR; Rubina Ahmed & 3 Others v Guardian Bank Ltd [2019] eKLR; George Kamau Kimani & 4 Others v County Government of Transnzoia & Another [2016] eKLR and Paul Mwaniki v National Hospital Insurance Fund Board of Management [2020] eKLR.

Analysis and Determination

16. Upon consideration of the instant Notice of Motion including the respective affidavits and rivalling submissions, at this juncture the only issue for determination is whether the Court should review the judgement delivered on 16th September, 2021 and if the intended Interested Parties should be joined in this suit.

17. I note all the prayers in the instant Notice of Motion application appear to be spent save for the prayer for costs as they are sought pending hearing and determination of this application. Be that as it may, I will deal with the aforementioned issues.

18. As to whether the Court should review the impugned judgement. The Defendants have sought for review of the impugned judgment claiming there is a Survey report which was not taken into consideration as it was received after the judgement. The Plaintiff argues that this Court has no jurisdiction to entertain the application as the Defendants invoked the jurisdiction of the Court of Appeal by filing a Notice and Memorandum of Appeal respectively. The Defendants on their part maintain that they have not filed an Appeal.

19. In the case of Yani Haryanto v. E. D. & F. Man. (Sugar) Limited Civil Appeal No. 122 of 1992 favourably cited by Judge Odunga in HA v LB [2022] KEHC 2886 (KLR), the Court of Appeal stated that:

> " The facility of review under Order 44 of the Civil Procedure Rules is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review. A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including rule 79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed...What rule 4 (1) of Order 41 of the Civil Procedure Rules prescribes for is an exception to the rule relating to the actual filing of the appeal which is rule 81 (1) of the Court of Appeal Rules. The exception is the deeming of the appeal to be filed for the purposes of rule 4 of Order 41 only on the giving of the notice of appeal. Therefore despite the lodging of a notice of appeal the court has jurisdiction to entertain an application for review... An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 and the inclusion of a memorandum of appeal."

20. The same court made similar pronouncements in Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR.

21. Based on the facts before me while associating myself with the decisions cited noting that there is no proof that a Record of Appeal was filed in the Court of Appeal, I find that this Court has jurisdiction to deal with the instant application for review.

22. On review, Section 80 of the *Civil Procedure Act* gives this Court jurisdiction to determine an application for review and provides 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."

23. Order 45 of the Civil Procedure Rules, provides as follows on review:

> " (1) Any person considering himself aggrieved;
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> 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) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

24. The Court of Appeal stated as follows in Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2019] eKLR;

> " ....An order for review is restricted to parameters set out by the law.."

25. In this instance, the Defendants claim that they have discovered new evidence that was not available to them during hearing. I note the Defendants now claim the suit land is public yet they had even filed a Counterclaim claiming the said land through adverse possession, yet it is trite that one cannot seek the said orders in respect to public land. Before admitting new evidence while exercising its review jurisdiction, the Court of Appeal stated as follows in Karanja v Murigi [2025] KECA 517 (KLR):

> " Such evidence must be credible, material to the case, and not merely confirmatory of what was already presented."

26. I note the Defendants seem to seek for reopening of the suit, including new parties and adducing fresh evidence. The Plaintiff contends that the delay in filing the application is inordinate and ought not be excused. The Defendants claim that it took long for the survey to be completed by the 2nd Intended Interested Party and that since it is a group, consultations amongst its members took long. I note the instant application was filed over 3 years after judgment was issued herein. In Afapack Enterprises Limited v Punita Jayant Acharya (Suing as the Administrator of the Estate of the late Suchila Anatrai Raval) [2018] eKLR the Court of Appeal observed as follows:

> " It is also an important requirement that the application for review should be made without unreasonable delay...."

27. In the foregoing, while associating myself with the decisions cited and relying on the legal provisions cited, I find that the Defendants have not provided plausible reasons on why they failed to seek a review much earlier. Further, I find that they have not proffered sufficient cause to warrant the Order for review. I opine that the discovery of new and important matter or evidence was only done post judgement in December 2022. I hence find that they have not established the parameters for review and the delay in bringing the instant application is inordinate. I hence decline to grant the orders as sought.

28. As to whether the 1st and 2nd Intended Interested Parties can be joined in this suit post judgement. On joinder post judgement, in the case of Republic v Nairobi City County Council Assembly & another; Musumba & 4 others (Exparte Applicants) [2025] KEHC 5656 (KLR), it was held that:

> " ....parties seeking to be enjoined must do so before determination, and must demonstrate the following- that they have a direct interest in the subject matter; and that their presence is necessary for the court to effectively and completely adjudicate the matter. Therefore, if the case has already been concluded, there is no ongoing process to join and therefore the timely application for orders of joinder would still not be available."

29. I note the intended interested parties have not demonstrated the interest they have over the subject matter herein. Further, they have not indicated how their presence is necessary to enable the court reopen and determine the matter. In my view, since this suit was concluded more than three years ago, I find that their seeking to join this proceedings is untimely irregular and unnecessary and will decline to allow it.

30. In the foregoing, I find the instant Notice of Motion application unmerited and will dismiss it with costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF OCTOBER, 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Muchiri for Ambrose Waigwa for Applicant

Court Assistant: Joan