



**Ngoge v Isanda & 2 others (Environment and Land Case 99 & 6 of 2016
(Consolidated)) [2025] KEELC 6921 (KLR) (9 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6921 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 99 & 6 OF 2016 (CONSOLIDATED)**

OA ANGOTE, J

OCTOBER 9, 2025

BETWEEN

GRACE AKINYI NGOGE PLAINTIFF

AND

JOHN ABUYA ISANDA 1ST DEFENDANT

MARY NJOKI FUNDI 2ND DEFENDANT

NAIROBI CITY COUNTY 3RD DEFENDANT

RULING

Background

1. Before this court for determination is the 1st and 2nd Defendants'/Applicants' Notice of Motion application dated 25th June, 2024 brought pursuant to the provisions of Article 50(1) of *the Constitution* of Kenya, 2010, Section 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* and Orders 45 Rules 1, 3(2), 5 and 51 Rule 1 of the Civil Procedure Rules, seeking the following reliefs:
 - i. That this Honourable Court be pleased to review vacate and/or set aside its judgment and or orders delivered on the 4th May, 2023.
 - ii. That the Honourable Court if so pleased to review its judgment do order for a re-trial of this matter within specific timelines.
 - iii. That the Honourable Court be pleased to summon the Chief Land Registrar, Nairobi Central Registry to produce official land records in their custody pertaining to L.R NBI/Block 63/643 the suit property herein for authentication and verification by the court.
 - iv. That the 1st and 2nd Defendants'/Applicants be allowed by an order of this court in the interim to undertake minimum repairs and roof the suit property to preserve it from further waste



and deterioration as a result of heavy rains and sunshine pending the final determination of this suit.

- v. That the 1st and 2nd Defendants be granted an opportunity by this Honourable Court to access and fence off the suit property to protect it from intruders and vandals who have invaded the property twice and made away with the construction materials and fittings worth thousands of shillings thereby occasioning them heavy losses.
 - vi. That costs of this Application be provided for.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of John Abuya Isanda, the 1st Defendant with leave of the 2nd Defendant of an even date.
 3. He deponed that on 4th May 2023, this court delivered judgment in favour of the Plaintiff. Following the judgment, the Plaintiff issued a notice requiring them to vacate the suit property to facilitate her intended takeover and subsequent sale.
 4. The 1st Defendant averred that they have made substantial investments in the suit property, including the construction of a twin six-storey residential apartment, which was nearing completion at the time injunctive orders were issued; that the development has cost them over Kshs 30 million and that in contrast, the Plaintiff has made no investment in the property.
 5. According to Mr. Isanda, after being threatened with eviction from the suit property, they returned to court and filed a Motion seeking stay of execution pending appeal, which the court duly granted and that upon further scrutiny of the verified and certified record of plot owners for the Jamuhuri Phase II Scheme, they discovered that the Plaintiff's name does not appear as the registered owner of Plot No. 81.
 6. Instead, it was deposed, the records indicate that the plot was originally owned by one Julia Makundi Isoyi, who subsequently sold and transferred it to David Onsongo Obure and that Mr. Obure later sold and transferred the property to them.
 7. Mr. Isanda deponed that the allotment letter originally issued to Julia Makundi has never been challenged by the Plaintiff before this court. He further noted that in several matters previously determined by this court concerning the Jamuhuri Phase II Scheme, the same verified list of plot owners and allottees has consistently been relied upon as a reference and authoritative guide; that he has carried out investigations and due diligence which show that the Plaintiff's title deed or certificate to the suit property is fraudulent, and a forgery and that an official search of the suit property held by the Plaintiff revealed that the same has no record at the Nairobi Central Land Registry.
 8. Upon discovery of the foregoing, he deponed, they wrote to the Chief Land Registrar at Ardhi House to confirm the particulars on record regarding L.R No NBI/BLOCK 63/643 and whether the Plaintiff was the registered proprietor of the said property; that the response from the Chief Land Registrar indicated that he has no record of the Plaintiff's title documents and that it is only the 1st and 2nd Defendants' document i.e lease, application for registration of the lease, allotment letter and payment receipts which were on record pertaining the suit property.
 9. It was deposed that on further inquiry from the former director, legal affairs, Nairobi City County, Mary Ngechi Ng'ethe, as to whether she prepared the lease to the suit property, she denied the same and asserted that her signature on the Plaintiff's lease document is forged.



10. Mr Isanda urged the court to relook into the matter. He contends that the property is in severe disrepair and there have been complaints from concerned neighbours and the county government has declared the building a health hazard and threatened to prosecute them if they don't repair the building.
11. It was deposed that before them, the county previously charged David Onsongo Obure, the property's previous owners of building without approved plans. He contended that the county government would not have approved their papers if it doubted ownership of the suit property.
12. The Plaintiff/Respondent swore a Replying Affidavit in opposition to the Motion on the 14th September, 2024. She deposed that this court is functus officio in the present matter and should not heed to the invitation to re-open the matter having rendered its judgment and that the 1st and 2nd Defendants have filed an appeal before the Court of Appeal challenging the decision herein contrary to the principle that a party cannot pursue an appeal and a review simultaneously.
13. She contended that further, the Motion has been brought in a manner that offends the provisions of the Civil Procedure Act and there are no new facts which were not in the knowledge of the Defendants that could not have been brought to the attention of the court during trial; that the averments are a rehash of the matters raised during trial and which were duly considered and that there is no basis upon which the Defendants can seek a new hearing. Further, that the Motion has been brought inordinately late being more than one year after the judgment.
14. Ms. Ngoge stated that she has always been in possession of the suit property and that an injunction was issued by the court in her favour in July 2016. She further asserted that the final determination of the dispute directed the Defendants to remove all their belongings and in her view, the Defendants cannot reasonably expect to retain any presence or items on the suit property while awaiting the outcome of the appeal.
15. In support of the Motion, Mr Benson Ndegwa Gichohi, a senior Administrative Officer at the 3rd Defendant swore a Replying Affidavit on the 14th March, 2025. He deposed that the records held by the 3rd Respondents' planning department show that John Isanda Abuya and Mary Njoki Fundi are the allottees of the suit property having purchased the same from the original allottee J.M Isoyi and that the letter of allotment in the Plaintiff's possession did not emanate from them.
16. Mr Gichohi stated that neither the 3rd Defendant nor any of its officers, agents or employees has ever prepared a lease for the suit property in favour of the Plaintiff and the lease purportedly issued by it is fraudulent and that any subsequent title issued by the lands registry is a forgery and is irregular.
17. At the time the alleged lease was prepared, it was deposed, the allotments were being issued by the City Council of Nairobi and that it was a requirement that all leases drafted by the City Council's legal department-conveyancing section be duly executed by the Director of Legal Services who was at the time Ms Mary Ngechi Ngethe.
18. According to Mr Gichohi, as advised by Counsel, discovery of new and important evidence constitutes a valid ground for seeking review and in the context of the current Motion, the inclusion of newly discovered documentation and witness testimony that corroborates the claims outlined in the supporting affidavit significantly strengthens the argument for irregularities and challenges the validity of the Plaintiff's title.
19. He urged that the Motion has been brought within a reasonable time and the court's intervention is necessary to avert a situation which compromises the 1st and 2nd Defendants' right to property.



20. The 1st and 2nd Defendants, through John Isanda, filed a Further Affidavit on the 23rd September, 2024. He deponed that the court is not functus officio as regards the hearing of this matter as it can review and retry a matter and that the Plaintiff misled the court by presenting forged title documents during her evidence to get a judgment in her favour which she did not deserve.
21. He stated that both appeal and review are available legal avenues through which the 1st and 2nd Defendants may pursue their case, and it is within their discretion to elect the most appropriate option. He explained that the present Motion has been prompted by the emergence of new evidence that was not within their knowledge at the time the matter was heard.
22. Additionally, he emphasized that he was gravely ill and had suffered a stroke during the hearing, rendering him unable to fully comprehend the proceedings. He maintained that the Plaintiff has never been in possession of the suit property, and if she claims to have been, she may be referring to a different property.

Submissions

23. The 1st and 2nd Defendants/Applicants' advocate filed submissions on the 1st November, 2024. Counsel submitted that this court's jurisdiction to review its decision is found in Section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1(b) of the Civil Procedure Rules.
24. Pursuant to the foregoing, it was submitted, the review remedy is only available to a party who although has a right of appeal, is not appealing upon demonstration of new and important evidence which after the exercise of due diligence, was not within his knowledge, mistake or error apparent on the face of the record or any other sufficient reason.
25. Reliance in this regard was placed on the cases of Tokesi Mambili and Others vs Simion Litsanga [2004] eKLR, Republic vs Advocates Disciplinary Tribunal Ex-parte Apollo Mboya[2019]eKLR, Stephen Githua Kimani vs Nancy Wanjira Waruingi [2016]eKLR.
26. Counsel submitted that there is new and important evidence warranting review of the decision of the court, to wit, the title adduced by the Plaintiff is an outright forgery, and as such, the judgment was obtained through fraud. It is asserted that the Plaintiff has totally failed to respond to the averments and allegations of fraud as presented in the judgment.
27. Counsel stated that as held in Sarder Mohamed vs Charan Singh Nand Singh & Anor [1959] E.A 793, the court has unfettered discretion to make such order as it thinks fit on review and the omission of any qualifying words in the section was deliberate. It was submitted by counsel that in Ajit Kumar Rath vs State of Orisa & Others, 9 Supreme Court Cases 596 at page 608 the court held that any other sufficient reason must be analogous to those specified in the rule.
28. Reference was also made to the cases of John Mukuha Mburu vs Charles Mwenga Mburu [2019]eKLR, Julius Kibiwott Tuwei vs Reuben Argut & 7 Others [2022]eKLR, Richard K. Bunei & 8 Others T/A Geo- Estate Development Service vs Lorien Ranching Co Ltd & 199 Others [2017]eKLR.
29. In opposition, the Plaintiff's counsel filed submissions on 7th December, 2024. Counsel submitted that review is provided for under Section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 and 2 of the Civil Procedure Rules requiring the establishment of discovery of new and important matters or evidence, mistake or error apparent on the face of the record or any other sufficient reason.
30. Reliance was placed on the cases of Hosea Nyandika Mosagwe & 2 Ors vs County Government of Nyamira[2022]Eklr, Pancras T Swai vs Kenya Breweries Limited[2014]eKLR, Sarder Mohamed vs



Charan Singh Nand Sing and Anor[1959]E.A 793 and Ajit Kumar Rath vs State of Orisa & Others, 9 Supreme Court cases 596 at Page 608.

31. Counsel submitted that this court is functus officio and should resist the invitation to re-open the matter for fresh litigation. Further, that the 1st and 2nd Defendants have filed an appeal before the Court of Appeal challenging the decision of this court and are as such simultaneously pursuing the two processes which is improper and constitutes an abuse of the process of the court. Further still, it was submitted, the Motion has been brought inordinately late.
32. It was submitted that the 1st and 2nd Defendants should not burden the court with a Motion that seeks to encourage them to leave their belongings and goods on private property; that the assertion that the 1st Defendant was ill and as such unaware of the nature of the proceedings is unmerited and that the record will show that the court duly accommodated him.
33. In any event, it was submitted, an Applicant who wishes to canvass the issue of mental state has to do so within the parameters of the *Mental Health Act*. It was urged that the Motion is unmerited and should be dismissed.
34. The 3rd Defendant filed submissions on the 30th May, 2025. Counsel submitted that Section 80 of the *Civil Procedure Act* as read with Order 45 of the Civil Procedure Rules gives this court jurisdiction to review its judgments.
35. It was submitted that in *Outa v Okello & 3 Others (Petition 6 of 2014) [2017] KESC 25 (KLR) (24 February 2017) (Ruling)*, the Supreme Court affirmed that it may, in the exercise of its inherent powers, either upon application by a party or on its own motion review any of its Judgments, Rulings, or Orders in exceptional circumstances to serve the ends of justice.
36. Counsel submitted that the court aforesaid clarified that such exceptional circumstances are limited to instances where the Judgment, Ruling, or Order was obtained through fraud or deceit, the Judgment, Ruling, or Order is a nullity, for example, where the court lacked jurisdiction, the court was misled into issuing the Judgment, Ruling, or Order under the mistaken belief that the parties had consented to it, or the Judgment or Ruling was based on a repealed law or a deliberately concealed statutory provision.
37. It was submitted that in the context of the current Motion, the inclusion of newly discovered documentation and witness testimony that corroborates the claims outlined in the 1st and 2nd Defendant's Supporting Affidavit significantly strengthens the argument for irregularities and challenges to the validity of the Plaintiff's title.
38. This new evidence, it was submitted, is of such importance that it has the potential to alter the outcome of the case if it had been presented during the original proceedings, thereby warranting a review of this court's judgement
39. The 1st and 2nd Defendants/Applicants filed further submissions on the 14th May, 2025 which I have considered.

Analysis and Determination

40. Having considered the Motion, responses and submissions, the issues that arise for determination are:
 - i. Whether the Motion is competent and if so?
 - ii. Whether the Motion is merited?



41. The Plaintiff/Respondent seeks to impugn the present Motion on two grounds. First it is contended that this court is functus officio and second, it is urged that as the 1st and 2nd Defendants are pursuing an appeal, the option of review is not available to them.
42. The doctrine of functus officio embodies the legal principle of finality, ensuring that once a court has fully rendered its decision, it has exhausted its jurisdiction over that matter.
43. Discussing the same, the Supreme Court in *Raila Odinga & Others Vs. IEBC & Others* [2013] eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in “The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law” (2005) 122 SALJ 832 in the following words:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

44. It is indeed trite that once a court has determined a matter, it exhausts its jurisdiction over the same. Nonetheless, like with all principles, there are exceptions. These were highlighted by the Court in *Mombasa Bricks & Tiles Ltd & 5 Others vs Arvind Shah & 7 Others* [2018] eKLR, thus:

“I understand the doctrine, like its sister, the res-judicata rule to seek to achieve finality in litigation. It is a way of a court saying, ‘I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level’. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits.

It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes. As was held by the court of Appeal in *Telkom Kenya Ltd vs John Ochanda*, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file... There are several proceedings that can only be undertaken after judgment and not before. The following are just but examples; Application for stay; Application to correct the decree; Application for accounts; Application for execution including garnishee applications; Applications for review; Application under section 34 of the Act.

If one was to accede to the position taken by the judgment debtor that the court is functus officio then it would mean that the provisions of law providing for such proceedings are otiose or just decorative and of no substance to the administration of justice.”

45. Indeed, an application for review forms part of the matters that the court is vested with jurisdiction to undertake after judgment.
46. On the next aspect, it is conceded by the 1st and 2nd Defendants that they have filed a Notice of Appeal. They however state that contrary to the Plaintiffs’ assertion, this does not preclude them from pursuing an application for review.



47. The law governing the framework of review is set out in Section 80 of the *Civil Procedure Act*, Cap 21 and Order 45, Rule 1(1) of the Civil Procedure Rules, 2010. Section 80 of the Act provides 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.”

48. Whereas Order 45 Rule 1(1) of the Civil Procedure Rules, 2010 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.”

49. It is clear from the foregoing that the avenue of review is only available to a party who, although has a right to challenge the decision in question by an appeal, is not appealing or to whom there is no right of appeal. In other words, a person cannot concurrently exercise the right of appeal and review.

50. This position was affirmed by the Court of Appeal in *Multichoice (Kenya) Ltd vs Wananchi Group (Kenya) Limited & 2 Others* [2020] eKLR which observed that:

“It is now an accepted view that both the Civil Procedure Rules and the Court of Appeal Rules did not contemplate the simultaneous proceedings of review and appeal before two different courts at the same time. Where a party has filed an appeal but subsequently wishes to apply to the court from which the appeal came to review the decision impugned, that party must, in the first place withdraw the appeal.”

51. So what constitutes an appeal for purposes of review proceedings? In the case of *Kisya Investments Ltd vs Attorney General & another* [1996] eKLR the court held that:

“The principal and the only ground of appeal urged before us was that the first defendant having filed a Notice of Appeal which was struck out it cannot by a subsequent application made thereafter proceed by way of a review.

.....A review application is incompetent after appeal is preferred.”



52. Taking a similar position, the Court of Appeal in *Multipurpose Co-operative Society Ltd vs Serser & 3 others* (Civil Appeal 160 of 2018) [2023] KECA 441 (KLR) (14 April 2023) (Judgment) noted:

“We have given anxious consideration to that decision. It appears to suggest that even though an appellant had filed a Notice of Appeal, it would still be open to him to file an application for review, provided that he had not yet pursued the option of the appeal to its logical conclusion.

To our minds, that implies that it is open to the appellant to commence the process of appeal, and then take a pause, so that he could pursue the option of a review first. That would imply that the appellant had the two options (of review and of an appeal) running concurrently. Yet the court did not conclude that both options cannot be pursued concurrently or one after the other.

In the case of *Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited* [2020] eKLR, this Court expressed itself thus; Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed it would then pursue the appeal. It was gambling with the law and judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place. There can be no place for review once an intention to appeal has been intimated by filing a notice of appeal. (See: *Kamalakshi Amma vs A. Karthayani* [2001] AIHC 2264) The respondent’s application for review was thus incompetent, hence the court did not have jurisdiction to grant the orders sought under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.” We are persuaded that this is the correct position in law. We say so because a party who had filed a notice of appeal is permitted to invoke the provisions of Rule 5(2)b of the Court of Appeal Rules; the reason for that is that the said party is deemed to have lodged an appeal. Conversely, a party who had not yet lodged a notice of appeal cannot seek an order either for stay of execution or an injunction, pending the hearing of his appeal, because he would not have instituted the appeal. Accordingly, when the appellant filed a notice of appeal, it is deemed to have instituted an appeal: and as soon as that happened, it was not open to the appellant to seek review of the judgment from which the appeal or the intended appeal accrued from. It is therefore, our finding that the learned Judge cannot be faulted for dismissing the appellant’s application for review, on the grounds that the same was not available, since it was filed in contravention of Order 45 rule 1(a).”

53. In contrast, the Court of Appeal in *Yani Haryanto vs E. D. & F. Man. (Sugar) Limited* Civil Appeal No. 122 of 1992 held:

“...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.”

54. Affirming this position, the Court of Appeal in *Multichoice (Kenya) Ltd vs Wananchi Group (Kenya) Limited, Communications Commission of Kenya & Kenya Broadcasting Corporation (Civil Appeal 368 of 2014) [2020] KECA 633 (KLR) (Civ) (22 May 2020) (Judgment)* stated:

“To construe the provisions of Order 45 and to answer the question, whether a notice of appeal is an appeal, the court has to do so with reference to all the relevant provisions

This brings me to the crux of the first limb of this appeal, at which point it is apposite to state that as far my reading of the authorities in this field goes, there has never been any major inconsistencies in interpretation of Order 45, both by the High Court and this Court. Save for the case of *Kisya Investments Ltd, (supra)*, all the rest of the decisions cited to us by both sides are actually in agreement, as I will shortly illustrate by the review of sampled decisions, including those cited in the appeal; that the court has jurisdiction to entertain an application for review where only the notice of appeal has been lodged.

...While it cannot be denied that *Kisya Investments (supra)* case has been followed in some cases, it is equally true that the predominant position by the courts is that the mere filing of the notice of appeal will not bar a party from taking out an application for review. I endorse that as the correct position.”

55. Where there appears to be differing positions by the Court of Appeal as demonstrated hereinabove, the court is entitled to adopt either position. To that end, the court adopts the view in *Multichoice Kenya (supra)*. Accordingly, the court finds that the filing of a Notice of Appeal does not preclude the Appellant from seeking review. The court therefore rejects the Plaintiff’s objection on this ground.

Whether the Motion is merited?

56. As aforesaid the statutory provisions governing review are Sections 80 of the *Civil Procedure Act* as read with Order 45 of the Civil Procedure Rules. Section 80 confers upon the court the power to review its own decisions, while Order 45 defines the scope of that jurisdiction, limiting it to instances where there is discovery of new and important matter or evidence, an apparent error or mistake on the face of the record, or any other sufficient reason.

57. Discussing this, the Court of Appeal in *Benjoh Amalgamated Limited & another vs Kenya Commercial Bank Limited [2014] eKLR* observed that:

“In the High court, both the *Civil Procedure Act* in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review.”

58. By way of a brief background, the Plaintiff instituted the present suit seeking inter-alia permanent injunctive orders restraining the 1st and 2nd Defendants from trespassing on the property known as L.R Nairobi/ Block 63/643(suit property) and eviction orders seeking to have the aforesaid Defendants evicted therefrom.

59. The Plaintiff’s case was that she is the registered proprietor of the suit property. She stated that unknown individuals trespassed onto her property, pulled down her fence and begun erecting an iron



sheet fence on the property. While investigating the trespass, she was confronted with a representative of the 1st and 2nd Defendants asserting that the plot belonged to them.

60. In response, the 1st and 2nd Defendants opposed the suit vide a Statement of Defence and Counterclaim dated 9th April 2018. They averred that any documentation granting the Plaintiff ownership of the suit land was obtained fraudulently and cannot stand the test of scrutiny and that they are entitled to develop the said plot as they acquired the same from its previous owners after paying the full purchase price.
61. The matter proceeded for hearing upon which it was the finding of the court that the Plaintiff had established her case as against the Defendants and judgment was rendered in her favour.
62. Moving to the pre-requisites for review, the court will first consider whether the Motion has been brought without unreasonable delay as this is a crucial aspect pursuant to Order 45 Rule 1 of the Civil Procedure Rules. This was buttressed by the Court of Appeal in the case of Francis Origo & another vs Jacob Kumali Mungala [2005] eKLR when it held thus:

“...most importantly, the applicant must make the application for review without unreasonable delay.”
63. What constitutes unreasonable delay is a matter of fact dependent on the circumstances of the case. The judgment in question was delivered on 4th May, 2023 whereas the present Motion was filed on the 25th June, 2024, approximately 13 months later. Upon a careful consideration of the Affidavit in support of the Motion, the court notes that no attempts have been made to explain the delay in filing the Motion. This period is unexplained and inordinate.
64. Nonetheless, the court will move on to the next ambit for purposes of completion.
65. The Plaintiffs’ Motion for review is based on the grounds of discovery of new and important evidence. Speaking to this limb, the court in Nasibwa Wakenya Moses vs University of Nairobi & another [2019] eKLR, stated as follows:

“A review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was passed. The underlying object of this provision is neither to enable the court to write a second Judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial.”
66. Similarly, the court in Charles Kimaita Mwithimbu & Another vs Edward Mutua M’ Mwithiga [2016] eKLR stated as follows:

“...It is not enough to merely state that there has been a discovery of new and important matter or evidence. You must show that, at the time of the decree, the new and important matter or evidence which has now been discovered, was not within your knowledge or could not have been produced even after exercising due diligence at the time of the decree. This strict proof is a requirement of the law. See the proviso to Order 45 Rule 3 (2) of the Civil Procedure Rules...This threshold is meant to prevent attempt by unscrupulous parties to reopen lost cases with aim of mending the weak areas which were exactly the Achilles of the lost case.”



67. This position was affirmed by the Court of Appeal in *Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited (supra)* where the learned judges stated:
- “Order 45 Rule 3(2) provides that an application for review shall, ‘...not be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be adduced by him when the decree was passed or made without strict proof of such allegation.”
68. The 1st and 2nd Defendants contend that after judgment, they carried out investigations which have revealed that the Plaintiff is not the legitimate owner of the suit property and the title deed or certificate of title that she holds is a forgery.
69. They have adduced the purported evidence which they assert demonstrated the same. They state that the availability of the aforesaid documents constitutes new and important evidence warranting the courts’ review of its judgment.
70. The court has considered the same vis the principles laid out with respect to the aspect of discovery of new and important information. The jurisprudence laid out hereinabove makes it clear that a party cannot seek a review merely because additional evidence has become available after judgment. They must demonstrate that they had exercised all reasonable diligence and still could not access or produce the material evidence.
71. Considering the 1st and 2nd Defendant’s contentions in this regard, it is noted that the legitimacy of the Plaintiff’s title to the suit property was the premise of their Counterclaim. They maintained in the suit as they do now that the Plaintiff’s title is fraudulent. Indeed, the 3rd Defendant states now, as it did at the trial that the 1st and 2nd Defendants are the legitimate owners of the suit property. All this was considered by the court. Ultimately the court found that the Plaintiff’s title had not been impugned.
72. The 1st Defendant deponed that after judgment had been delivered, they conducted further investigations which revealed new information which they now present to the court, to wit, a list of Jamhuri phase I plot owners dated 10th February, 1998, court decisions of 2009, 2015, search of the property, letter to Chief Lands Registry dated 4th December, 2023 and affidavit from Mary Ngeche dated the 14th June, 2024.
73. Looking at this information, the court does not consider that it meets the threshold of newly discovered evidence. It consists of information that, with reasonable diligence, could have been accessed and introduced during the trial and inquiries that should have been made prior to or during the pendency of the proceedings.
74. Further, there is no demonstration that any of those documents were previously unknown, unavailable, or beyond the reach of the Defendants through the exercise of ordinary inquiry. Or that that the documents were otherwise confidential, restricted or inaccessible through due diligence.
75. As to the assertion that the 1st Defendant was unwell during the hearing, it bears noting that by the time a matter proceeds to hearing, all parties are expected to have assembled and presented their evidence. Illness, without more, does not excuse a party from the obligation to prosecute their case with diligence or from disclosing material evidence in a timely manner.
76. In any event, no medical evidence was produced to support the claim of incapacity during the relevant period. This argument, therefore, cannot form a valid basis for reopening the case.



77. Further, it bears emphasizing that by the time a matter proceeds to hearing, the pre-trial phase will have concluded and all parties are expected to have disclosed and filed all their evidence. There is no indication that the alleged illness prevented the 1st Defendant from procuring or presenting the material now relied upon.
78. Consequently, it is the conclusion of the court that this attempt to introduce new material is, in essence, a belated effort to have a second bite at the cherry. As emphasized by the Court of Appeal in *Gerald Kithu Muchange vs Catherine Muthoni Ngare & Another* [2020] eKLR:
- “The applicant wants to have a second bite of the same cherry, and he cannot be permitted to do so.....Litigation must come to an end somehow and it cannot be conducted on the basis of trial and error.”
79. With regard to the reliance placed on the Supreme Court decision in *Outa v Okello & 3 Others* (supra), the court finds that such reliance is misplaced. The Supreme Court in that matter was addressing the scope of its own review jurisdiction, which is distinct from the review jurisdiction exercisable by this court pursuant to Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules and in this regard, under the parameters for the limb of discovery of new and important evidence.
80. As to the plea for entry into the suit property to undertake works, the court considers that in the circumstances, permitting the same will be tantamount to granting possessory and proprietary rights through the backdoor, contrary to the outcome of the litigation. This plea is thus misconceived and untenable.
81. In the end the court finds the Notice of Motion dated 25th June, 2024 to be unmerited. The same is 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 Morara for 1st and 2nd Defendants/Applicant

Mr. Willis Otieno for Plaintiff/Respondents

Ms Maganda holding brief for Mr. Owour for 3rd Defendant/Respondent

Court Assistant: Tracy

