Ochieng v Oduor & 4 others (Environment and Land Case Civil Suit E17 of 2021) [2025] KEELC 7022 (KLR) (16 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7022 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ENVIRONMENT AND LAND CASE CIVIL SUIT E17 OF 2021

AE DENA, J

OCTOBER 16, 2025

BETWEEN

ALFRED VICTOR OCHIENG ..... PLAINTIFF

AND

HESBON ODUOR ..... 1ST DEFENDANT

LUCAS ONYANGO OTIENO ..... 2ND DEFENDANT

AGGREY WIRE ODUOR ..... 3RD DEFENDANT

HESBON ODUOR & AGGREY WIRE ODUOR (SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JANE ACHIENG ODUOR) ..... 4TH DEFENDANT

DAVID OKONGO OPIYO ..... 5TH DEFENDANT

RULING

1. The applicant plaintiff seeks through Notice of Motion application dated 10th December 2024 a review and setting aside of the judgement delivered on 26/10/2023. The applicant also seeks leave for the firm of N. Nyaswenta & Associates Advocates to come on record on his behalf post judgement in place of the firm of Bruce Odeny & Company Advocates as well as stay of execution of the said judgment.

2. The application is premised on the grounds on its face and the depositions in the supporting affidavit sworn by Alfred Victor Ochieng.

3. The deponent states that there is new evidence being a survey report he commissioned and which will help the court be properly guided on matters of land, surveying, demarcation and titles issued relating to the suit property in issue. That the report shows the land alleged to have been given to the applicant does not exist at all. That the portion upon which the applicant has built his home Yenga/ Land parcel/848 does exist in the Surveyors' map but belongs to a dead person who transferred it to

a dead son. The two deceased do not belong to the lineage of Wire Kolweny. Hesbon has boldly and corruptibly acquired the parcel in front of his gate to frustrate and push the applicant out of his home.

4. It is further alleged that it was necessary to conduct the survey to establish facts on the ground since the Assistant Chief of the area had been compromised, by the 1-4th respondents. That the judgement of the High Court was based on a forged title Ugenya /Yenga/818 occasioning a glaring miscarriage of justice.

5. It is further deponed that the applicants previous lawyer failed to sermon key witnesses being the 1and registrar in Ukwala to authenticate ownership of Ugenya/yenga /878, purported to belong to the Elkana Ochieng. That the holding in trust of the property for the two brothers was so vital and an ingredient to the whole suit as one family has been left out and all the other family is doing is selling the land out without due regard to the ancestral wishes for the two brothers.

6. Thatthe letters of administration taken out in the year 2011 was done fraudulently and left out the family of Elkana Ochieng Wirea brother of Erasto Oduorwhich the court needs to reexamine. That great injustice has been meted out by way of procedural technicalities and the applicant urges the case be re-opened by way of setting aside the judgment. That there be an order for fresh and equal division of this ancestral land.

7. Thatthe judgement herein, stands to make the entire generation of Elk'ana Ochieng Wire suffer because of misrepresentation of facts, and a legal oversight or ineptness of the applicants previous counsel. That the applicant's case is arguable with high chances of success.

Grounds of opposition by the 2nd Respondent

8. The application is opposed vide grounds of opposition dated 6/02/2025 filed by the 2nd respondent. It is urged having filed a Notice of Appeal his right to review has been extinguished by dint of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the *Civil Procedure Act*. That the application is an afterthought and has not demonstrated irreparable loss to be suffered should stay not be granted.

Reply by 1st 3rd and 4th Respondents

9. The above respondents opposed the application by the replying affidavit sworn by Hesbon Oduor. It is deponed that judgment was delivered against the Applicant on the 26th of August 2023 and the suit was dismissed with cost to the 2nd and 5th Respondent. The Applicant filed a notice of appeal dated 27th October 2023, together with request letter for typed proceedings.

10. That having preferred the path of appeal on this matter, the choice to review the judgment after a period of one year and 2 months cannot stand.

11. It is asserted that a surveyor's report is a document that was easily accessible to the Applicant without due diligence hence the same is not capable of passing as new evidence. Further the report shows that the survey was done on land parcel number North Ugenya Yenga 1962 and 1543 which parcels of land were not subject of the suit land.

12. That the alleged shortcomings of the applicant previous advocate as alleged do not form grounds for review. That failure of the Applicant to produce evidence or join parties before or during trial despite having various opportunities is not a ground for a review of the judgment.

13. It is deponed that there was no award issued on the judgment on the 26th October 2023, save for costs which have never been taxed by either parties hence an order for stay of judgment cannot suffice.

14. It is urged there is no discovery of new and important matter or evidence to grant this application. The court is urged to dismiss the application.

5th Respondent Replying Affidavit

15. The 5th respondent David Okongo Opiyo avers vide his replying affidavit sworn on 29/03/2025 the applicant herein had time to file an application to re-open his case or arrest the court's judgment but failed to do so. That a party who through laziness, malaise or sheer lack of interest refuses to place before the court evidence cannot be allowed to run to the court for exercise of discretion and the courts cannot be summoned to come into the aid of the indolent and that equity frowns the indolent. The court is referred to several decisions including Hadkinson v Hadkison (1952) 2Al1 ER 567, Jacklyn Wanjira Njeru Vs. Equity Bank (Kenya) Limited and another (2020) eKLR. Further that it is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.

Supplementary Affidavit

16. The applicant responded further by way of supplementary affidavit sworn on 14/5/2025. I note that the same rehashes the depositions in the supporting affidavit to the application.

Submissions

17. The application was canvassed by way of written submissions. The applicants submissions are dated 2/06/2025, the 5th Defendants 20/03/2025. The 2nd, 1st 3rd & 4th Defendants submission were not in the CTS.

Analysis And Determination

18. I have considered the application , the responses thereto and the rival submissions of the parties. The following issues commend determination.

    1. Whether leave should be granted to the firm of N.Nyasweta & Associates to come on record.
    2. Whether the application is properly before this court
    3. Whether the application has met the threshold for grant of orders for review
    4. Who should bear the costs of this application

19. The application is filed under the provisions of Order 45 Rule 1 of the Civil Procedure Rules, The Environment & Land Court Act Sections 13, Rule 3,7 and section 19 and sections 1A,1B & 3A of the *Civil Procedure Act*.

Whether leave should be granted to the firm of N.Nyasweta & Associates to come on record.

20. Order 9 Rule 9 of the Civil Procedure Rules, 2010 provides for change of Advocates to be effected by order of Court or consent of parties to wit:

> "When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court —
>
> a. upon an application with notice to all the parties; or
>
> b. upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be"

21. It is not in dispute that the firm of N.Nyasweta & Associates are coming on record for the Plaintiffs after the judgement was delivered. In the present case Judgment was rendered on 26th October 2023 where there was a determination of the Court and therefore the provision of Order 9 Rule 9 were applicable herein.

22. 22. When is leave required? From the above provisions the law requires leave to be sought where there is no consent involving both the incoming advocates and outgoing advocate. I have not seen any such consent before me. Moreover, it appears this was not a contentious issue as the respondents never raised opposition in this regard. I will not belabor the point.

23. I will therefore allow prayer 2 of the application.

Whether the application for review is properly before this court

24. It is contended that besides the present application the applicant has filed a Notice of Appeal to the Court of Appeal. That a person cannot exercise both the right of appeal and review at the same time. That the right for review is effectively extinguished by the exercise of the right of appeal. The applicant has not addressed me substantively on this issue but has emphasized on the unfettered discretion of the court donated under the provisions of section 80 of the *Civil Procedure Act*. Being an issue of law it behooves the court to address it.

25. The above position was clarified and put to rest by the Court of Appeal in the case of Multi Choice (Kenya) Limited Vs. Wananchi Group (Kenya)Ltd & 2 Others (2020)eKLR . The Court of Appeal considered whether under Order 45, the filing of a Notice of Appeal to the Court of Appeal is or is not a bar to the filing of an application for review. I will highlight a few excepts from the judgement which are to the point on the provisions of section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, thus; -

> " Both provisions require no further elucidation as they are as clear as they can be; that a party will only be entitled to seek review, if he has not preferred an appeal or if there is no right of appeal. While the statement requires no explanation, the dispute is on the question of, when an appeal is "preferred"? Or put differently, is a notice of appeal an appeal?'

26. The Court of Appeal went further to state thus; -

> " It is the notice of appeal, evincing the aggrieved party's intention to challenge, in this Court the impugned decision, that gives jurisdiction to the courts to entertain applications under Rule 5(2)(b) and Order 42 rule 6(4),' respectively. For the purposes of the latter, an appeal to the Court of Appeal is "deemed to have been filed when under the Rules of that Court notice of appeal has been given". This is the only instance, as far as I am concerned, where the notice of appeal is treated as an appeal, yet strictly speaking, the two are distinct. It has been explained before that a notice of appeal will be treated as an appeal only for the very specific and limited purpose of enabling a party who has lost in the superior courts below to seek an order of stay of execution, or of proceedings, or an injunction before this Court.

27. The Court of Appeal also stated thus;-

> " An appeal is preceded by lodgment of a notice of appeal. If appeal is not instituted within the appointed time above, the notice of appeal will, by the provisions of Rules 83 and 84 be deemed to have been withdrawn or struck out, as the case may be.

> '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 illustrated 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. Conversely, the court will not hear an application for review when an appeal has been instituted under Rule 82 of this Court's rules.' Emphasis mine.

28. I have seen the Notice of Appeal dated 27th October 2023 attached to the 1st 2nd and 3rd defendants replying affidavit. The applicants do not deny that indeed they have filed a Notice of Appeal. I have no evidence from the Respondents that further action has been taken beyond the filing of the Notice of Appeal to institute the appeal as required under Rule 82 of the Court of Appeal Rules.

29. Applying the foregoing dictum and the facts before this court it is my finding that the applicant therefore is properly before this court. There is no appeal that has been instituted. In any event a Notice of Appeal for purposes of review proceedings is not an appeal.

Whether the application has met the threshold for grant of orders for review

30. I think this is the crux of the application. As rightly submitted by the applicant order 45 of the Civil Procedure Rules and Section 80 is the guiding law on review of judgement.

31. The right to apply for review is provided for under the provisions of Section 80 of the *Civil Procedure Act* read together with Order 45 of the Civil Procedure Rules.

32. Section 80 provides; -

    Any person who considers himself aggrieved-

    a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

    b. by a decree or order from which no appeal is allowed by this Act May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

33. Order 45, rule 1 provides for Application for review of decree or order 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.

(2) .....

34. The courts have in numerous instances expounded on the above legal provisions as follows;-

35. The Court of Appeal in Pancras T.Swai Vs. Kenya Breweries Limited (2014) eKLR cited by the applicant set out grounds for review as discovery of new and important evidence, mistake or error apparent on the face of the record or any other sufficient reason.

36. In the case of Republic Vs Medical Practitioners Board & Others exparte Geoffrey Muiruri King'ang'a (2021) KEHC 298 (KLR) commenting on the provisions of order 45 and section 80 of the *Civil Procedure Act*, Justice Odunga (as he then was) observed thus;-

> " 34. Two lessons can be gathered from the above provisions. One, it is manifest that section 80 gives the power of review while Order 45 sets out the rules. Two, the rules restrict the grounds for review by essentially laying down the jurisdiction and scope of review by limiting review to the following grounds:
>
> SUBPARA -a)
>
> Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
>
> b) On account of some mistake or error apparent on the face of the record, or
>
> c) For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.'

37. The learned Judge went further to elaborate as follows; -

> " 36. Paragraph (a) part of the rule deals with a situation attributable to the applicant, while paragraph (b) deals to an action attributed to the court which is manifestly incorrect or on which two conclusions are not possible. However, neither of them postulates a rehearing of the dispute. The fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case is not a ground for the review of such judgment. Where the order in question is appealable the aggrieved party has adequate and efficacious remedy so the court should exercise the power to review its order with the greatest circumspection.
>
> 37. There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error, where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the

face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out."

38. The court has also been referred to the case of Shanzu Investments Limited v. Commissioner for Lands (Civil Appeal No. 1OO of 1993) where the Court of appeal upheld its earlier decision in Wangechi Kimata & Another Vs. Charan Singh C.A. No. 8O of 1985 (unreported) where it was held:- Any other sufficient reason need not be analogous to the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by section 80 herein.

39. I will proceed to analyse the merits of the application based on the scope/criteria set out.

40. The first criteria is discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made. In the present application the applicant states he undertook a survey to confirm the status on the ground because the area chief had been compromised. The question for me is whether this document could not be produced by him in support of his case during the proceedings? Having been served with the pleadings the applicant had sufficient notice as to the claims being raised by his adversary and to therefore arm himself with the appropriate evidence to support his case.

41. It is my view that the above test has not been met. This is a matter where the applicant is evidently introducing fresh evidence after the case has been determined.

42. It is trite that review is not a forum to open a case or application for fresh argument. In this regard I'm guided by the Court Appeal dictum in DJ Lowe & Company Limited Versus Banque Indosuez Civil Appeal Nairobi 210 of 1998[UR] where the court cautioned against allowing new evidence in review applications as the same would amount to re-opening of a case. In the present case the applicants is reopening a case that is already decided upon by even suggesting addition of new parties.

43. I have further reviewed the applicants submissions under the titles 'survey Report 'and 'customary trust and the analysis. With due respect to Counsel for the applicant all the points raised border on faulting how the judgement was arrived at. The judgement is indicated to lean more on technicality. A number of questions are posed to the court to re-consider under the *law of succession Act*. The court is urged to ask itself and further examining the law on succession keenly to be persuaded that no lawful acts of the said Jane Achieng and or her successors should have been accepted by this Honorable court.

44. I will reiterate a review is not an appeal. Most of the issues raised are arguments that should seat at the Court of Appeal. Clearly based on the grounds raised the court cannot seat on appeal of its own decision.

45. Additionally having reviewed the grounds in their entirety I also do not see any sufficient reason to consider the application in favor of the applicant. This is a matter for appeal and not review.

46. Moreover the application does also not meet the requirement to have been filed within reasonable time. It is not in dispute that the impugned judgement was delivered 26/10/2023. The present application was filed on 10th December 2024 a period over 1 year. This is in my view is inordinate delay.

47. As to stay of judgement, this court agrees with the 1st 3rd 4th respondent there was no award issued on the judgment on the 26th October 2023, save for cost. If the costs have never been taxed there is no order to stay. In any event taxation is a lawful process.

48. I think I have said enough to demonstrate why the substantive orders sought in the application cannot issue. The upshot of the foregoing is that the applicant has not met the threshold for grant of orders for review including the setting aside of the judgement.

49. The application is hereby dismissed with costs to the respondents/ defendants who have participated in the application.

DELIVERED AND DATED AT SIAYA THIS 16TH DAY OF OCTOBER 2025.

HON. LADY JUSTICE A.E. DENA

JUDGE

16/10/2025

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

Mr. Musungu Holding Brief for Mr. Nyanswenta for the Applicant

No appearance for the Respondents

Court Assistant: Ishmael Orwa