Masinde v County Government of Busia (Environment and Land Petition E001 of 2023) [2025] KEELC 5785 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5785 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT AND LAND PETITION E001 OF 2023

BN OLAO, J

JULY 31, 2025

BETWEEN

PHILIP JOHN WANYAMA MASINDE ..... PETITIONER

AND

COUNTY GOVERNMENT OF BUSIA ..... RESPONDENT

RULING

1. The Applicant herein (Philip John Wanyama Masinde) moved to this Court vide his Petition dated 20th November 2023 in which he impleaded the County Government of Busia (the Respondent) complaining about a violation of his constitutional rights alleging that the Respondent had destroyed his premises on the land parcel No Busia/Municipality/166 (the suit property). He therefore sought judgment against the Respondent in the following terms:
    1. A declaration that the Respondent has violated his rights under Article 47 of *the Constitution*.
    2. An order for compensation of the Petitioner in the sum of Kshs.5,000,000 being the value of his destroyed properties.
    3. The Respondent be condemned to pay the costs of the Petition.
    4. Any other relief that this Honourable Court may deem fit to grant.
2. The Petition was opposed and the Respondent filed a replying affidavit in which it denied having destroyed the Petitioner's property or that the same was valued at Kshs.5,000,000 and in any event, the said premises had been constructed on a public road.
3. Having considered the Petition, this Court delivered a judgment on 14th November 2024 and partly allowed the Petitioner's claim by making the following disposal orders:

1. The claim for an order to compensate the Petitioner with the sum of Kshs.5,000,000 being value of his destroyed properties is declined.

2. The claim for a violation of the Petitioner's rights under Article 47 of *the Constitution* is allowed and an award is made for Kshs.150,000.

3. As the Petitioner has only partly succeeded, he is entitled to half of the costs of the Petition.

4. No appeal appears to have been filed against that judgment.

5. The Applicant has now approached this Court vide his Notice of Motion dates 17th December 2024 and which is anchored on the provisions of Sections 1A, 3A and 80 of the *Civil Procedure Act* as well as Order 45 of the Civil Procedure Rules. He seeks the following orders:

    a. That the judgment of this Court delivered on 14th November 2024 as regards disposal order number 1 be and is hereby reviewed and or set aside.

    b. That the Honourable Court be pleased to re-hear the issue and allow the Petitioner to avail evidence that the building was constructed and completed in 1961 and the survey plan being used by the Respondent was developed in the year 1974.

    c. That costs of this application be provided for.

6. The Motion is based on the grounds set out therein and supported by the Applicant's affidavit of even date.

7. The gravamen of Motion is that the Applicant is the proprietor of the suit property which was previously known as South Teso Market Busia Plot No 21 and had been allocated to one Dominico Ochude on 30th October 1956 who was then issued with a permit to construct a hotel to be completed on or before 24th august 1961. The Petitioner purchased it and constructed a hotel and was later issued with a certificate of lease. Later, the then Busia Municipality developed it's cadastral boundaries which cut through the suit property and as a result, the Respondent demolished part of his developments being guests rooms, two shops and four toilets and also converted a portion thereof into a public road without compensating him. That by error, the Petitioner's then counsel forgot to annex the report prepared by Landscan Associates Company Ltd Eldoret to the Petition which would have shown that the cadastral boundaries created in 1974 had cut through his buildings on the suit property which existed before the survey. Inadvertently, his then counsel annexed an attachment to the report being a survey plan depicting the ground survey but not the whole report. The existence of his buildings before the preparation of the physical development plan was essential for a fair determination of this Petition. That this Court has the power to review this judgment for sufficient reasons and since this Petition proceeded by way of written submissions, he did not have the advantage of testifying orally in Court and consequently, he could not have known that the report had been omitted from the documents filed.

8. The following documents are annexed to the Motion:

    1. Copy of the judgment delivered herein on 14th November 2024.

    2. Copy of building permit issued to Dominico Ochude to construct a hotel on Busia plot No 21 on 24th August 1961.

    3. Copy of Letter of Allotment issued to the Petitioner on 13th August 1991.

4. Report and valuation for parcel No Busia Municipality/166 dated 11th July 2023.

5. Survey report for the land parcel No Busia Muncipality/166 dated 17th March 2023 and prepared by Landscan Associates Company Ltd Eldoret.

6. Copy of certificate of lease dated 22nd October 1991 and issued to the Petitioner in respect of the land parcel No Busia Municipality/166.

7. Copy of survey plan for Busia/Municipality/166

9. In response, Vincent Wanjala the Respondent's Chief Officer for Lands Survey and Housing filed a replying affidavit dated 7th February 2025 in which he deponed, inter alia, that the application is misconceived and raises no sufficient grounds to warrant a review of the judgment herein. It is frivolous, bad in law and a gross abuse of the Court process since the firm of Bogonko Otanga & Company Advocates is not properly on record for the Applicant as it has not complied with provisions of Order 9 Rule 9 of the Civil Procedure Rules. That the report cannot be produced after the judgment has already been delivered as to do so will be introducing new issues yet Order 45 of the Civil Procedure Rules was not intended to aid an indolent party who is looking for evidence after the judgment. The Applicant's excuse that he did not file the said report because the Petition was disposed off by way of submissions is mind boggling and an insult to this Court as nothing barred him or his counsel to file any document in support of his case. That the Applicant's deposition that the physical development of the town plan came into existence when his building was already in place cannot be true. The issue of whether or not the Applicant's building had encroached on public land reserved for a public road was considered at length in paragraphs 14 to 19 of the judgment and the Applicant's allegations that the survey plan disregarded his building which was in existence since 1959 cannot be true because the survey plan will always consider what existed before and what is currently on the ground and more importantly, it is always done according to the law. What is important is that the survey was done to open up the public road and it matters not if the building existed since 1959 and the issue is whether it was on the public road. In the judgment, the Court found that the Applicant's building had encroached on the public land meant for a road reserve and so the report will not change anything and this application is an academic exercise and a total waste of the Courts time. Litigation has to come to an end.

10. The Court directed that the Motion be canvassed by way of written submissions.

11. The same were filed by Mr Otanga instructed by the firm of Bogonko, OtangA & Company Advocates for the Applicant and by MR Mabachi for the County Attorney Busia on behalf of the Respondent.

12. I have considered the Motion, the rival affidavits and annextures thereto as well as the submissions by counsel.

13. Before I delve into the gist of the Motion, the Respondent has in paragraph 5 of the replying affidavit raised the issue that the Applicant has not complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules. That provision reads:

    9: "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 advocates or party intending to act in person as the case may be."

It is clear that the intent of the above provision is to arrest the mischief where some litigants, after obtaining judgment and at the execution stage, or at the point of filing their bills of costs, abandon their advocates with the intention of denying them their fees. The Applicant was represented by the firm of R. E. Nyamu & Company Advocates upto 14th November 2024 when the judgment herein was delivered. He has now engaged the firm of Bogonko, Otanga & Company Advocates who have filed this application. Riding on that fact of change of advocate after judgment, counsel for the Respondent, and citing the cases of *S. K. TARWADI -V- VERONICA MUEHLEMANN C.A. CIVIL APPLICATION NO 47 of 2019* [2019 eKLR], *LALJI BHIMJI SHANGANI BUILDERS & CONTRACTORS -V- CITY COUNCIL OF NAIROBI H.C.C. NO 1230 of 1997* [2012 eKLR] and Monica Moraa -V- Kenindia Assurance Co Ltd H.C.C.C No 43 of 1999 [2012 eKLR] has submitted as follows in paragraph 10 of his submissions:

10: "In the instant case, the Petitioner's advocates have not complied with the said order that is to say, they have not sought leave of Court through an application to be allowed to represent the Petitioner nor have they presented a consent on the same hence we urge the Court to apply the above law and or principles by striking out the application. Notably the Petitioner's advocate has not even bothered to give an explanation for the failure to comply with the said order in his submission. This is an admission of his failure to comply with the law and we urge the (sic) not to take it lightly. Equally, if there is any consent presented before the Court, the same will be an afterthought that need to be disregarded because the same ought to have been sought before filing of the application."

14. Counsel for the Applicant made no submission on that issue.

15. I have however looked at the record and noted that by a Consent Order dated 17th December 2024 and which is the same date of the Motion, the firm of R. E. Nyamu & Company Advocates as well as the firm of Bogonko, Otanga & Company Advocates filed a consent allowing the latter to come on record for the Applicant in this matter. Although the date on which the said consent was filed is not clear, the Motion itself was filed on 18th December 2024 and since it is duly signed by both counsels, the mischief sought to be addressed by the provisions of Order 9 Rule 9 of the Civil Procedure Rules is well cured. The firm of R. E. Nyamu & Company Advocates would not have signed the said consent if they had any objection to the firm of Bogonko, Otanga & Company Advocates coming on record for the Applicant. I am persuaded that the said consent order was filed at the same time with the Motion. In that case, there was no need for the Applicant to file any application envisaged under the provision of Order 9 Rule 9(a). I am not therefore persuaded by the submission that the consent is an afterthought. I am satisfied that the firm of Bogonko Otanga & Company Advocates are properly on record for the Applicant.

16. I shall now consider the merits or otherwise of the Motion which seeks the remedy that the judgment delivered on 14th November 2024 be reviewed and/or set aside. The Applicant has invoked the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 of the Civil Procedure Rules 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."

On the other hand, Order 45 Rule 1(1) of the Civil Procedure Rules provides as follows:

(1) "Any person considering himself aggrieved -

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay. Emphasis mine.

Section 80 of the Act provides for the power of the Court to review it's decree or order while Order 45(1) sets out the rules that govern such review.

17. As is clear from the above, a party seeking the remedy of review of a decree or order must meet the following grounds:

1. Demonstrate that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced when the decree or order was made, or;

2. Show that there has been some mistake or error apparent on the face of the record; or

3. Provide any other sufficient reason; and

4. Make the application without unreasonable delay.

18. The judgment sought to be reviewed was delivered on 14th November 2024. This Motion was filed on 17th December 2024 only a month later. While there is no definition of what amounts to unreasonable or inordinate delay in the statutes, the Court will no doubt be guided by the circumstances obtaining in each case. In this case, taking into account the fact that the Applicant had to seek the services of another counsel no doubt having been dissatisfied with his previous counsel, I do not consider the delay of one month to be unreasonable in the circumstances. Indeed, in paragraph 28 of his supporting affidavit, the Applicant has deposed thus:

28: "That I have had to obtain my file from my former advocate together with judgment and engage another counsel for advise on the way forward."

I am persuaded that the Motion was field without unreasonable delay given those circumstances.

19. As to the grounds upon which the review of judgment is being sought, the Applicant has not cited any "new and important matter or evidence". He certainly could not rely on that as a reason because the report which he now seeks to introduce has always been within his possession and knowledge. He blames his previous counsel for failing to produce it among his documents. He has also not cited any "mistake or error apparent on the face of the record." To qualify as a ground for review of a decree or order, such "mistake or error" must be self-evident and should not require any elaborate argument to be established – National Bank of Kenya Ltd -V- Ndungu Njau 1996 KLR 469 [1997 KECA 71 KLR]. It must be prima facie evident per see from the record without the need for any detailed examination or scrutiny. The Applicant has not demonstrated that. The fact that his counsel failed to file the report or that the case proceeded by way of written submissions and therefore he could not have known that the report was omitted, as pleaded in paragraphs 24 and 27 of his supporting affidavit, cannot fall under the ambit of mistake or error because, as I have already stated above, he had the report all along so it is not new "matter or evidence." It matters not that the Petition was canvased by way of submissions and not through oral evidence. Whether a matter is heard by way of viva voce evidence or submissions does not limit a party from adducing any oral evidence in support of the case which the Court has been called upon to determine. He cannot now say that he came to know about the "failure to produce the report when judgment was delivered and the crucial information on when the building was constructed was being questioned". In paragraphs 3, 4 and 5 of his Petition, the Applicant had deposed as to how in January 2023, the Respondent's workers, agents and contractors had descended upon his building and destroyed 3 guests rooms, 4 toilets and two shops valued at Kshs.5,000,000 and forced a road to pass through his land. In response, the Respondent had deposed in paragraph 6(b) of its reply that it was infact the Applicant who had encroached on public land being a road reserve by some 3 metres. Therefore, it must have been known to the Applicant that it was upto him to make available to the Court all the relevant documentary evidence in support of his case.

20. The Applicant has also cited "any other sufficient reason" as a basis for the application. In paragraph 25 of his supporting affidavit, he has deposed thus:

    25: "That this Honourable Court has power to review the judgment upon any other sufficient reason."

    There have been conflicting decisions by the Superior Court on what amounts to "any other sufficient reason". In the case of Shanzu Investments Ltd -V- Commissioner of Lands C.A. Civil Appeal No 100 of 1993, the Court of Appeal took the view that any other sufficient reason need not be analogus with the other grounds set out in Section 80 of the *Civil Procedure Act* or Order 45 of the Civil Procedure Rules as to do so would be a restriction and an un-necessary clog on the Courts unfettered jurisdiction to apply for review. In the case of Sadar Mohamed -V- Charan Singh & Anor 1963 EA 557 the Court took the view that "any other sufficient reason" for the purposes of review refers to grounds analogus to the other two grounds i.e. error on the face of the record and discovery of new matter. That notwithstanding, the Applicant has not suggested what that "any other sufficient reason" is in the circumstances of this case to warrant a review of the judgment. In his supporting affidavit, he refers to the fact of existence of the building as being essential (paragraph 23) and that he only came to know about failure to produce the report after the judgment (paragraphs 24 and 25). It all boils down to the Applicant seeking an opportunity to adduce further evidence which was infact

always within his control. In Odunga's Digest on Civil Cases Law and Procedure page 7023, the author citing Air Commentaries, The Code of Civil Procedure (1951) writes:

> " Although the Court has unfettered discretion to review it's judgments, there are now established some principles upon which that discretion may be exercised. For example, a party who not only had an opportunity of raising a question but who did not raise it and or argue if abandoned it, cannot under ordinary circumstances be allowed to agitate the question in review. Nor is it a sufficient reason for granting a review that if another opportunity was given to the Applicant, he would satisfy the Court that it's previous order was wrong. This would be equivalent to a Court sitting on it's own appeal."
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> I am also guided by the Australian case of Autodesk Inc -V- Dyason (No 2) 1993 HCA 6 (1993) 176 CLR 300 cited in the case of Zakaria Muigai Kiber -V- John Mwenia Nguma C.A. Civil Appeal (application) No E300 of 2021 where it was stated that the power to re-hear a case is not to be exercised for the purpose of re-agitating arguments already considered by the Court; nor is it to be exercised simply because the party seeking a rehearing has failed to present arguments in all it's aspects or as well as it might have been put. The purpose of the jurisdiction is not to provide a back door method by which unsuccessful litigants can seek to re-argue their cases. Similarly in the Indian case of Sow Chandra Kanta & Another -V- Sheikh Habib 1975 AIR 1500, 1975 SCC (4) 457, the Supreme Court delineated the boundaries for review as follows:
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> > " A review of judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in early by judicial fallibility. A mere rePetition, through different counsel, of old and over-ruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential impact are obviously insufficient."

21. In the circumstances of this case, and as I have already stated in the preceding paragraphs of this ruling, the thrust of the Applicant's case is that there was an error on the part of his counsel to file some report. That would amount to re-agitating his claim and which is not the purview of the review jurisdiction.

22. The up-shot of all the above is that having considered the Notice of Motion dated 17th December 2024, this Court issues the following disposal orders:

    1. The Motion is dismissed.

    2. In the circumstances of this case, I make no orders as to costs.

BOAZ N. OLAO

JUDGE

31ST JULY 2025

RULING DATED, SIGNED AND DELIVERED ON THIS 31ST DAY OF JULY 2025 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO

JUDGE

31ST JULY 2025