

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND COURT AT KAKAMEGA
ELCC CASE NO. E001 OF 2023

FRED BURUDI MURUNGA.....1ST PLAINTIFF

ALICE SHIHUNDU.....2ND PLAINTIFF

VERSUS

MAURICE JOMO SHIKHUTULI..... DEFENDANT

RULING

1. Before court is a notice of motion dated 20th March 2025 filed by the defendant seeking the following orders;

a) Spent

b) That this Honourable court be pleased to review, vary and or set side the orders issued on 20th February 2025 and allow the defendant/applicant to tend to the crops currently on the suit land and also plant maize on the section he has always utilized for maize farming.

c) That costs of this application be provided for.

2. The application is anchored on the grounds on its face.

The applicant's case is that when the court made the order of 20/02/2025 to the effect that status quo be maintained and the defendant to be restricted to the space he is currently occupying, the defendant was occupying the whole of the suit property and had even grown crops like sugarcane and maize which need urgent weeding, tending and maintenance to avoid destruction. That the defendant is a farmer who relies on farming and the order herein puts him at a disadvantage taking away his sole source of sustenance causing him financial hardship.

3. The application is opposed. Alice Shiundu Murunga filed a replying affidavit dated 2nd April 2025, opposing the application. She stated that the application was misconceived and was an afterthought, full of falsehoods and mischief. That the suit property belonged to the respondent's late father Murunga Kisosi a fact confirmed by the Succession Court in Kakamega HC Succession Cause No. E026 of 2022. That despite the said judgment the respondent has graciously allowed the applicant to

use a portion of the suit property pending the determination of this suit.

4. That as orders sought to be reviewed were made pursuant to a consent, the instant application does not meet the threshold for review under Order 45 of the Civil Procedure Rules.
5. The court has duly considered the application and the response thereto. The only issue that arise for determination is whether the applicant has met the threshold for grant of orders of review.
6. The power to grant review is provided for in section 80 of the Civil Procedure Act and the conditions upon which review can be granted are in Order 45 Rule 1. The said provisions state as follows;

Section 80 of the Civil Procedure Act provides as follows;

“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.”

Order 45 rule 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.

(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.”

7. Therefore, while section 80 of the Civil Procedure Act grants the court the jurisdiction to grant review while Order 45 of the Civil Procedure Rules sets out the rules that restrict the grounds for review to;

- 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 of the application, there is a requirement that the same has to be made without unreasonable delay.**

8. In the instant case, the basis for the prayer for review as indicated by the applicant, is that the applicant is a farmer and relies on farming as his sole sustenance and that he has maize and sugarcane on the suit property which need to be weeded, tended and maintained. The applicant never provided evidence of the allegation that there was maize and sugarcane on the suit property as no supporting affidavit was filed to support the application.

9. The applicant has not told court that at the time of the order, he was not aware that he is a farmer using the suit property for maize farming and that there was a crop on the suit property that needed weeding and tending. He has also not shown any error apparent on the face of the record that needs rectification. Further, no sufficient cause has been shown, requiring the court's intervention by review. Therefore, none of the elements for review has been demonstrated by the applicant. Besides, the order of 20/02/2025 was made by consent of both counsel. It is trite that a consent order is a contract and unless fraud, misrepresentation, duress or undue influence is demonstrated, the same cannot be set aside. In the

instant case, none of the elements for setting aside a consent order has been established by the applicant.

10. The upshot is that I find no merit in the application dated 20th March 2025, which I dismiss with costs to the plaintiffs/respondents.

11. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA
IN OPEN COURT/VIRTUALLY THROUGH
MICROSOFT TEAMS VIDEO CONFERENCING
PLATFORM THIS 15TH DAY OF OCTOBER, 2025**

**A. NYUKURI
JUDGE**

In the presence of;

Mr. Khayumbi for the plaintiff/respondent

Mr. Shiloya for the defendant/ applicant

Court Assistant: Delphine.