



Wambua v Munyao (Being sued as an Administrator of the Estate of John Musau Mupya) & 2 others (Environment and Land Appeal E008 of 2023) [2025] KEELC 7364 (KLR) (28 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7364 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E008 OF 2023
NA MATHEKA, J
OCTOBER 28, 2025**

BETWEEN

JOHNSON WAMBUA APPELLANT

AND

BONIFACE MUNYAO (BEING SUED AS AN ADMINISTRATOR OF THE ESTATE OF JOHN MUSAU MUPYA) 1ST RESPONDENT

SUSAN NDINDA MUTETI (BEING SUED AS THE ADMINISTRATOR OF THE ESTATE OF MICHAEL MUTETI) 2ND RESPONDENT

NATIONAL HOUSING CORPORATION 3RD RESPONDENT

RULING

1. The application is dated 3rd June 2025 and is brought under Order 45 Rule 3 of the Civil Procedure Rules 2010 seeking the following orders;
 1. That this Application be certified urgent and service be dispensed with in the first instance and it be heard ex-parte.
 2. That there be a stay of the hearing and determination of the Bill of Costs dated 22nd of April, 2025 by Nzuki Nzioki & Co. Advocates and on 6th of March, 2025 by Anthony Melekyo Advocates pending hearing and determination of this Application.
 3. That the court be pleased to review the Judgment dated the 26th of February, 2025.
 4. That costs be in the cause.
2. It is based on the following grounds, annexed Affidavit of JOHNSON WAMBUA and such other grounds that the Appellant being aggrieved by the Judgment and Decree delivered by Hon. Ondieki



on the 3rd of August, 2023 appealed to this court the whole of the Judgment setting out 4 Grounds of Appeal as per the Memorandum of Appeal dated the 10th of August, 2023 which set the Grounds of Appeal as that the learned Magistrate erred in law by considering the basing its entire Judgment on issued that had already been considered and substantive Ruling made on them and thereby falling into error. That the learned Magistrate erred in law in that having made the Ruling on the above issues the court had become functus officio on those issues and therefore lacked jurisdiction to entertain them at Judgment and in so doing entirely misdirected itself. That the learned Magistrate erred in law by purporting to depart from its own earlier decision over the same issues in the same matter and proceeds to determine the suit using them without any basis in law. That the learned Magistrate erred in law and fact by failing to determine the suit on its merit and instead striking it out entirely on a technicality whose Ruling he had already been made thereby failing in error. That the Memorandum of Appeal dated 10th August, 2023 sought that the Judgment and Decree of dated 3rd of August, 2023 set aside and the Appeal be allowed.

3. That the Court upon hearing the Appeal rendered a Judgment on the 26th of February, 2025 dismissing the Appeal on the ground that the Sale Agreement for the purchase of the property was on the 31st of October, 2001 and on that ground that there was no evidence on record to show that the 1st Defendant is the administrator of the Estate of the deceased JOHN MUSAU MUPYA. That there is an error apparent on the face of the record on the ground that the court did not consider the ruling in the trial court.
4. That the court in its Ruling under paragraph 75 concluded by stating that the suit was not filed out of time set by Section 4(a) and 7 of the Limitations of Actions Act. That there has never been an Appeal on the above decision that effectively settled the issue on limitation of time and the Court in its Judgment of the 26th of February, 2025 failed to consider the following facts which was an error apparent on the face of the record. That the Applicant error or mission by the trial court was by failing to consider the Ruling of the court dated 5th of August, 2021 and the Judgment dated 3rd of August, 2023 were a departure of each other a position not tenable in law making it a ground ripe for review. That the Respondents have now filed their respective Bill of Costs pursuant to the Judgment of the Court dated the 26th February, 2025 coming up on the 5th of June to confirm filing of submissions and there is apprehension that the same will be heard and determined before the court can consider the Application for review. That the Appellant/Applicant prays that the Bill of Costs filed by the Respondents be stayed pending the hearing of this Application for review. That it is in the interest of justice that the Court do consider review of the Judgment dated the 26th of February, 2025 to avoid a miscarriage of justice. The Applicant had filed a notice of appeal dated 3rd March 2025 but the same was withdrawn on the 10th June 2025.
5. Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section 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.”

6. The aforesaid rule is based on section 80 of the *Civil Procedure Act*, Cap. 21 Laws of Kenya which states 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.”

7. Under Section 80 of the *Civil Procedure Act*, the court has unfettered discretion to make such orders as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously. In *Court of Appeal, Civil Appeal No. 211 of 1996, National Bank of Kenya vs Ndungu Njau*, the Court of Appeal held that;

“ A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evidence and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceed on an incorrect expansion of the law.”

8. It then follows that Order 45 provides for three circumstances under which an order for review can be made. The applicant must demonstrate to the court that there has been 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. Secondly, the applicant must demonstrate to the court that there has some mistake or error apparent on the face of the record. The third ground for review is worded broadly; an application for review can be made for any other sufficient reason.

9. In the instant application, the Applicant prays for the setting aside of the orders made on 25/1/2024 on the grounds that there is an error apparent on the face of the record. According to the Applicant, the error apparent on the face of the record is that there is an error apparent on the face of the record on the ground that the court did not consider that the Ruling of Hon. C.N. Ondieki dated 5th of August, 2021 had already made a determination on the issue of whether the matter is time barred or not. In the Ruling of Hon. C.N. Ondieki dated 5th of August, 2021 he had already made a determination on the issue on paragraph 74 of the Ruling which stated as follows;

“74. That said and done, I proceed to consider the facts and circumstances unique to this matter in order to trace and identity the appropriate reference date



from which time started to run. Gathering from the said Plaintiff of the Respondent read together with the documents sought to be relied upon by parties including the Defendants, including a copy of the letter dated 14th March, 2012 sent NHC to David Mutunga & Company Advocates; a copy of the letter 16th of March, 2012 sent to NHC by the Plaintiff herein; a copy of the letter dated 27th June, 2012 sent to NHC by the Plaintiff herein; a copy of the letter dated 25th July, 2012 addressed by NHC to the Plaintiff herein and also forwarded to one Susan Ndinda Muteti; a copy of the undated letter received by NHC on the 30th August, 2012 addressed by the 1st Defendant herein together with his brothers forwarding a Sale Agreement dated 1st August, 1999; a copy of the letter dated 6th June, 2013 sent to NHC by the Plaintiff herein; a copy of the letter dated 13th November, 2013 sent to NHC by the Plaintiff herein forwarding a banker's cheque No 196569; a copy of the letter dated the 20th February, 2014 sent to NHC by the Plaintiff herein and also forwarded to one Susan Ndinda Muteti, I find that the dispute leading to this action did not begin on 31st October, 2001 as painted by the Applicant. From the flurry of correspondences exchanged by all parties herein, it is evident that the cause of action herein arose on or about the 14th of March, 2012. It follows that by the 29th of June 2017 when this claim was filed, the 6 years' limitation period prescribed by Section 49 (a) of the *Limitation of Actions Act* had not lapsed and further the 12 years' limitation period prescribed by Section 7 thereof for recovery of land had not lapsed. 75. Wherefore this court concludes that this suit was not filed out of time set by Section 4(a) and 7 of the Limitations of Actions Act."

10. The errors the Applicant alludes must be self-evident and would not require an elaborate argument to be established. This principle was enunciated by the Court of Appeal in *National Bank of Kenya Ltd vs Ndungu Njau Civil Appeal No. 211 of 1996 (UR)* where it held:-

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established."

11. Similarly in *Paul Mwaniki vs National Hospital Insurance Fund Board of Management (2020) eKLR* the court stated:

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for review."

12. The court went on to say;

"The term 'mistake or error apparent' by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation of the facts or the legal position. If an error is not self-evident and detection



thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for purposes of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it.”

13. I have taken the liberty to peruse the said ruling in great detail together with the documents produced in the trial court. The Plaintiff produced a sale agreement dated 31st October 2001 between the Plaintiff and John Musau Mupya. He produced a cheque endorsed to National Housing Corporation (3rd Defendant) dated 26th November 2001. A letter dated 15th December 2009 from the 3rd Defendant’s Managing Director to John Musau Mupya regarding the transfer of the suit property to the Plaintiff. Thereafter there were various correspondence between the Plaintiff and the 3rd Defendant concerning the assignment and processing of the title of the suit property culminating with the letter dated 16th October 2014 from the 3rd Defendant’s Managing Director advising the Plaintiff to pursue the matter in court for the determination of the rightful owner as there was a claim by a third party of the same the suit property. Given the circumstances I find that even though the sale agreement was entered in 2001, there has been an ongoing ownership dispute with the Plaintiff alleging fraud in his letter dated 20th February 2014 to the 3rd Defendant.
14. The law on limitation of actions in respect of fraud stipulates under Section 26 of the Limitation of Actions Act as follows:

“ Where, in the case of an action for which a period of limitation is prescribed, either-

 - (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
 - (b) the right of action is concealed by the fraud of any such person as aforesaid; or
 - (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”
15. Be that as it may, from the facts of this case it is clear that the cause of action started on the 16th October 2014 when the 3rd Defendant clearly stated that they would not assign the suit property to the Plaintiff as a dispute over ownership had occurred and advised the parties to pursue court action for determination of the same. I find that the suit in the trial court was filed in 2017 and the cause of action arose in 2014 hence the limitation period had not lapsed. Throughout the intervening period negotiations had been going on about the sale agreement in question. Indeed, I concur with the trial court in his ruling dated 5th August 2021 when he found that the cause of action in this matter did not arise in 2001 when the sale agreement was entered into and it was wrong for the trial magistrate to find otherwise in his final Judgement.
16. It is my considered view that the Applicant has met the threshold of orders of review. Evidently, from the above, it is clear that an error apparent on the face of the record has occurred and this court will have to review its judgement. Having dismissed this case on a preliminary point of law, I find that there



is need by the trial court to considered this case on its merits having found that the suit was not time barred in the first place. I find that the application is merited and I grant the following orders;

1. That the court reviews the Judgment dated the 26th of February, 2025 and sets aside all the orders forthwith.
2. The Judgment and Decree dated 3rd of August, 2023 is set aside.
3. This matter is remitted back to the trial court for the same to be heard De Novo by a court of competent jurisdiction other than Hon C.N Ondieki.
4. Costs of this Application, the Appeal and the matter in the trial court to be in the cause.

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF OCTOBER 2025.

N.A. MATHEKA

JUDGE

