

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELCLC NO. E165 OF 2023**

**WILSON GACANJA.....1<sup>ST</sup>**  
**PLAINTIFF**

**VERSUS**

**DARUL ARQAM ISLAMIC CENTRE.....1<sup>ST</sup>**  
**DEFENDANT/RESPONDENT**  
**DARUL ARQAM INSTITUTE.....2<sup>ND</sup>**  
**DEFENDANT/RESPONDENT**  
**DARUL ARQAM INTEGRATED SCHOOLS LIMITED.....3<sup>RD</sup>**  
**DEFENDANT/RESPONDENT**

**AND**

**FULL MOON VENTURES LIMITED.....INTERESTED PARTY**

**RULING**

**1.** Before this court is the notice of motion dated 29<sup>th</sup> April, 2025 filed by the interested party, and it is expressed to be brought under **Articles 50 and 159 (d) of the Constitution, Sections 1A, 1B, 3A and 63 of the Civil Procedure Act, Order 9 Rule 9, Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules** seeking the following orders: -

- 1. Spent.**
- 2. The honourable court be pleased to vary the orders of 6<sup>th</sup> June, 2024 barring the transfer of property Nairobi Block 23/71 (formerly LR. No. 209/9970) the suit property on condition that**

***upon the successful transfer of the suit property to the 2<sup>nd</sup> plaintiff, undertakes not to charge, transfer or otherwise encumber the title pending the hearing and determination of the suit.***

***3. Any other orders the honourable court may deem fit.***

***4. Costs of this application be provided for.***

2. The application is premised on the grounds on its face. It is further supported by the affidavit of Abdihakim Shaffy Mohamed, the director of the interested party sworn on even date. The interested party deposed that together with the plaintiff, they entered into an agreement for the sale of the suit property known as Nairobi Block 23/71 formerly LR. No. 209/9970 vide an agreement of sale dated 3<sup>rd</sup> April, 2023. He further deposed that the court issued a ruling on 6<sup>th</sup> June 2024 stopping the process of transfer. However, the defendants/respondents having frustrated the process of the hearing of the main suit, it is necessary that the court varies the said orders. The interested party deposed that the import of the ruling and the delay is that they have no faculty over their land nor the money.

3. Further, it was deposed that the plaintiff is of old age and ailing and as a result, a power of attorney was executed to represent him in the matter. Further, that it is necessary to vary the orders

to allow the conclusion of the transfer process provided that the suit property shall not be charged, transferred or interfered in any way to pending the conclusion of the matter.

4. The 1<sup>st</sup> defendant/ respondent opposed the application vide the replying affidavit of Fuad Salim sworn on 17<sup>th</sup> June, 2024 (sic). The 1<sup>st</sup> defendant/respondent deposed that the application has been made in bad faith and ought to be dismissed with costs. Further, that the interested party has failed to adduce any new or important information or establish an error on the face of record to warrant the grant of an order for review. The 1<sup>st</sup> defendant/respondent went on to depone to issues that are not the subject of the instant application including the issues on the notice to produce dated 21<sup>st</sup> February, 2025. In conclusion, the 1<sup>st</sup> defendant/respondent deposed that it has always been keen to expedite the hearing of this matter.
5. The plaintiff filed a response to the application vide the replying affidavit of Kinny Allan Kamanu sworn on 10<sup>th</sup> July, 2025. He supported the application and further deposed that the defendants/respondents' possession of the suit property has caused undue delay and hardship in completion of the transfer process. Further, that it is unjust and unequitable for the

defendants/respondents who have no contractual or proprietary claim to benefit from orders that restrain the transfer of land that was lawfully sold by the plaintiff and paid in full. In conclusion, the plaintiff's son deposed that unless the orders are varied, they will continue to suffer prejudice, while the defendants/respondents who have no claim continue to benefit from the injunctive relief.

6. The application was canvassed by way of written submissions. The defendants/respondents filed their written submissions dated 18<sup>th</sup> July, 2025 where they raised two issues for determination which are ***whether the interested party/applicant has met the threshold for review***, and ***whether the defendants will suffer prejudice if the orders sought are granted***.
7. On the first issue the defendants/respondents submitted that the pursuant to the provisions of **Section 80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules**, the interested party has failed to justify the grant for an order of review. They further submitted that the interested party has failed to provide an explanation to this court for the inordinate delay in seeking a review of the ruling. Further, that the likely contention that they

were not a party to the original proceedings is untenable and devoid of merit.

8. On the second issue, the defendants/respondents submitted that it is crucial that the status quo order not be vacated given that they have a valid and established interest in the suit property, and that such transfer will occasion them prejudice. Further, that lifting the order at this stage would effectively amount to a determination of the suit itself. To buttress on this issue, the defendants/ respondents relied on the cases of **Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited & Another [2020] eKLR** and **Texaco Ltd v Mulberry Ltd [1972] 1 WLR 814**.
9. By the time of writing this ruling, the plaintiff/respondent and the interested party had not filed their written submissions. Be that as it may, I have considered the application, the replies thereof and the written submissions filed by the defendants/respondents.
10. The orders seeking to be varied culminated from the ruling delivered on 10<sup>th</sup> June, 2024 where the court granted the orders of status quo to the extent that the suit property should not be transferred to any party nor any new construction or demolitions

take place on the suit property. At the time this order was issued, the interested party was not a party to these proceedings.

11. In my view, the issue for determination is *whether the court ought to vary the said orders and accept the undertaking not to transfer or charge the suit property pending the determination of the suit.*
  
12. A careful reading of the interested party's arguments is that the defendants/respondents have frustrated the disposal of the suit with delaying tactics which frustrates ownership of the suit property as they are not in possession. The interested party maintained that there is a valid agreement between itself and plaintiff, an argument which was supported by the plaintiff's son. On the other, hand, the defendants/respondents argued that varying the orders would mean determining the suit, and more so they will suffer prejudice. They contended that no reason has been adduced to enable this court vary the decision pursuant to **Order 45** of the **Civil Procedure Rules**. More importantly, and as I would agree with the defendants/respondents, the provisions of the law inviting the court to determine the instant application are misplaced and one would wonder whether indeed the interested party was keen in drafting its pleadings.

**13. Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules provides as follows:-**

***Section 80. Review***

***“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.] Application for review of decree or order.***

***“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 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”***

14. From the above provisions, it is clear that while **Section 80 of the Civil Procedure Act** grants the court the power to make orders for review, **Order 45** sets out the procedure and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.

15. In **Kithoi v Kioko (1982) KLR 177**, page 181, the Court of Appeal stated that:-

***“.....the Civil Procedure Rules Order XLIV demands inter alia, that an application for review must be based in the discovery of new and important evidence which was not within the applicant’s 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 on the face of the record or for any other sufficient reason. The application for review must strictly prove the grounds for review, except for review on the ground of mistake or error apparent on the record, falling which the***

**application will not be granted.” (Emphasis added)**

- 16.** For the interested party to succeed in a claim seeking variation of the orders, it is obvious that there is no error apparent on the face of the record and there is no new discovery of new or important information. The only other reason to vary the said orders is if it is shown that there is sufficient reason necessitating the same. In this case, it is notable that the interested party was not a party to these proceedings when the orders were made and further, citing frustration by the defendants/respondents to have the matter proceed to trial is in my view unfair. Both parties have had different reasons for adjourning the matter on 3<sup>rd</sup> February, 2025, 20<sup>th</sup> March, 2025 and 21<sup>st</sup> July, 2025 which are valid and reasonable.
- 17.** From the above, no sufficient reason has been shown to vary the orders of the court issued on 10<sup>th</sup> June, 2024. The notice of motion dated 29<sup>th</sup> April, 2025 lacks merit and it is hereby dismissed. Costs in the cause.

Orders accordingly.

**DATED, SIGNED & DELIVERED VIRTUALLY  
THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**HON. MBOGO C.G.  
JUDGE  
07/11/2025.**

**In the presence of:**

*Mr. Benson Agungo - Court assistant*

*Mr. Mumo holding brief for Mr. Njoroge for the Defendants*

*Mr. Eredi for the Plaintiff and holding brief for Mr. Madowo for the  
Interested Party*

ORIGINAL