

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA**  
**ELCLPET No. E002 OF 2023**

**JENIFER NYABOKE MOCHACHE .....  
PETITIONER**

**VERSUS**

**LAND REGISTRAR, NYAMIRA COUNTY ..... 1<sup>ST</sup>  
RESPONDENT**

**LAND SURVEYOR, NYAMIRA COUNTY ..... 2<sup>ND</sup>  
RESPONDENT**

**AND**

**COMMISSION ON ADMINISTRATIVE JUSTICE ..... 1<sup>ST</sup>  
INTERESTED PARTY**

**GRACE KWAMBOKA MBUGA ..... 2<sup>ND</sup>  
INTERESTED PARTY**

**WESLEY OTIERI ..... 3<sup>RD</sup>  
INTERESTED PARTY**

**RULING**

1. On 13<sup>th</sup> November 2024, the court (Mugo Kamau, J.) delivered a ruling in this matter as follows:

***This suit was commenced by a Constitutional Petition dated 9/10/2023 where the Petitioner sought the following orders. She also by an Application dated 16/10/2023 sought for conservatory orders for;***

***a. Restraining the Respondents and the 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties from entering upon undertaking, registering or permitting any***

***dealings, carrying out any survey work or making of any entries in respect of the land parcel numbers and the register relating to the land described in the 1st Respondent's letter to the Applicant dated 8/3/2023 as Lietego Settlement Scheme/404 or 1405.***

***b. That the Respondents to forthwith avail to the Applicant and for this Court's inspection a copy of the Report of the boundary confirmation exercise conducted on 6/4/2023 relating to an alleged boundary dispute involving Title Numbers Lietego Settlement Scheme/404 and 405.***

***I am privy to another matter touching on the same subject matters i.e. Lietego Settlement Scheme/404 and 405. A Ruling in the said matter has just been delivered by this Court this morning and it is important for the parties to study the same in order to be informed and ascertain whether the same would serve the purpose of this Application.***

2. Shortly thereafter, the Petitioner filed Notice of Motion dated 13<sup>th</sup> November 2024, which is the subject of this ruling. The following orders are sought in the application:

1. *The application herein be certified as urgent and heard ex parte in the first instance.*

*2. The Honourable court be pleased to review and/or vacate the ruling delivered on 13<sup>th</sup> November 2024.*

*3. In place of the orders and ruling of 13<sup>th</sup> November 2024 the 1<sup>st</sup> Respondent be ordered to provide the following documents and/information to the Petitioner prior to any boundary demarcation exercise:*

*(a) Particulars of GRACE KWAMBOKA MBUGA and WESLEY OTIERI in respect to the boundary dispute. Who are they and what is the basis of their claim?*

*(b) The description of the boundary dispute as presented by GRACE KWAMBOKA MBUGA and WESLEY OTIERI*

*(c) The original or certified copy of the entire file of Lietego/82*

*(d) All procedural documents entailed in the application for and approval of subdivision of Lietego/82*

*(e) All documents entailed in the application for and approval of generation of titles for Lietego/404 and 405*

*(f) All documents entailed in the purchase and transfer of titles Lietego/82, Lietego/404 and 405 including but not limited to proof of valuation and stamp duty assessment and payments*

*(g) A certified copy of the “field diagram” referred to in paragraph 3 of the Registrar's letter dated 5<sup>th</sup> June 2023 and a certified copy of the mutation also referred to in the same paragraph of the letter*

*(h) The reason for the Registrar’s conclusion at paragraph 3 of the letter dated 5<sup>th</sup> June 2023 that “the measurements used to create the parcels in question is inaccurate”. What is the discrepancy or irregularity that rendered them inaccurate?*

*(i) The steps required for Lietego 82 to be subdivided afresh as proposed in the Registrar's letter dated 5<sup>th</sup> June 2023 since the registered owner thereof (James Otieri) is now deceased.*

*4. There be a stay of any survey and/or boundary demarcation exercise in respect of Lietego/82, Lietego/404 and 405 pending the 1<sup>st</sup> Respondent’s compliance with the orders above.*

*5. That costs of this application be provided for.*

3. The application is supported by an affidavit sworn by the Petitioner's counsel on record, Valentine Ataka, and is based on the following grounds:

- 1. This Honourable Court delivered a ruling in part on the Applicant's application dated 9<sup>th</sup> October 2023 on 13<sup>th</sup> November 2024 intimating that the decision needs to await the decision in NYAMIRA ELC E011 OF 2024.*
- 2. The Counsel on record for the Applicant explained to court that the documents requested in the application herein are a necessary need to the Applicant in order to participate in the orders given in NYAMIRA E011 OF 2024.*
- 3. The said order issued on 13<sup>th</sup> November 2024 will be a hinderance to the course of justice and breach the constitutional right of the Applicant as the documents requested in this application are prudent for the applicant to rely on the demarcation process ordered in NYAMIRA ELC E011 OF 2024, unless the orders given herein by the court is reviewed, vacated and/or set aside.*
- 4. The Respondents and Interested Parties will not suffer any prejudice as this matter will now be set down for determination based on the application filed dated 9<sup>th</sup> October 2023.*

5. *The Respondents and Interested Parties will not suffer any prejudice as this matter will now be set down for hearing and determination once and for all.*
  6. *The application has been made without delay and it is in the interest of justice that the orders sought in the application filed herein be granted for expeditious determination of this matter to its logical conclusion.*
  7. *The Applicant has sufficient reason for seeking the orders of review sought.*
  8. *The Court itself directed the filing of this application.*
4. Mr Ataka deposed in the affidavit that the court intimated in its ruling that its decision needed to await a decision in Nyamira ELC No. E011 of 2024. He added that the documents sought in the application are necessary to for the Petitioner/Applicant to participate in the orders given in Nyamira ELC No. E011 of 2024 and that the orders sought to be reviewed will be a hinderance to justice and a breach of her constitutional rights. That her rights to a fair hearing and fair administrative action would be breached if she participated in a demarcation process without full knowledge of the nature of the dispute she is being subjected to and that she is left confused since there exists a decision of the registrar dated 5<sup>th</sup> June 2023 in which the registrar indicated legality of subdivision of Lietego/82.

5. The Petitioner/Applicant also filed a further affidavit sworn by Anyango Ivy, an advocate practicing in the firm of AKO Advocates LLP which is on record for her.
6. The First Respondent opposed the application through a replying affidavit sworn by George Kariuki Maina, a Land Registrar Nyamira County who deposed that the information and documents sought in the application were supplied to the Applicant through the First Respondent's letter dated 19<sup>th</sup> July 2024, receipt whereof was acknowledged by one Ivy Anyango, an associate in the firm of AKO Advocates LLP. That the Applicant had never reverted to the First Respondent nor complained that what was supplied was insufficient.
7. On his part, the Second Respondent opposed the application through a replying affidavit sworn by Orogoo Oganda Francis, a Land Surveyor Nyamira County who deposed that his office had never received any request for information as alleged by the Applicant. He added that the information and documents sought had been supplied by the First Respondent through the letter dated 19<sup>th</sup> July 2024.
8. The Respondents also filed Grounds of Opposition dated 16<sup>th</sup> June 2025.
9. The First Interested Party filed a replying affidavit sworn by Mercy K. Wambua, its Commission Secretary. She deposed that pursuant to the First Interested Party's mandate on access to information, the First Interested Party received an

application by the Petitioner through email dated 17<sup>th</sup> April 2023 seeking review of failure by the First Respondent to facilitate access to information and that the First Interested Party discharged its mandate by requesting the First Respondent through a letter dated 21<sup>st</sup> August 2023 to avail the information sought. She added that the First Respondent complied by providing the information to the Petitioner through letter dated 15<sup>th</sup> December 2023 and that the information that the Petitioner is now seeking through prayer 3 of Notice of Motion dated 13<sup>th</sup> November 2024 is different from the information that she sought earlier.

10. The application was canvassed through written submissions. The Petitioner/Applicant filed submissions dated 15<sup>th</sup> April 2025 and supplementary submissions dated 8<sup>th</sup> July 2025. The Respondents filed submissions dated 24<sup>th</sup> June 2025, The First Interested Party filed submissions dated 14<sup>th</sup> July 2025 while the Second Interested Party filed submissions dated 24<sup>th</sup> June 2025.

11. I have carefully considered the application, the affidavits, grounds of opposition and the submissions. The issues that arise for determination are whether the court has jurisdiction to hear and determine the application and whether the orders sought should issue.

12. The Respondents have argued that the application seeks merit review of a ruling delivered by Mugo Kamau, J. on 13<sup>th</sup>

November 2024 in Nyamira ELC No. E011 of 2024 and that consequently, this court lacks jurisdiction. Jurisdiction is an issue that pervades all litigation. It is the entry point in any matter that a Court of law is called upon to determine. It is the very life and soul of any judicial proceedings. Without jurisdiction, the proceedings come to a certain end and the Court cannot take any further step. See **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR.**

13. The Supreme Court underscored the centrality of jurisdiction in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** thus:

***A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents . . . that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.....Where the Constitution exhaustively provides for the jurisdiction of a***

***Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution.***

14. The Court of Appeal emphasised the futility of proceedings conducted without jurisdiction as follows in **National Social Security Fund Board of Trustees vs. Kenya Tea Growers Association & 14 Others** [2023] KECA 80 (KLR):

***Jurisdiction, a mantra in adjudication connotes the authority or power of a court to determine a dispute submitted to it by contending parties in any proceeding. A Court of law is invested with jurisdiction to hear a matter when: (a) it is properly constituted as regards numbers and qualifications of members of the bench, and no member is disqualified for one reason or another; (b) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the Court from exercising its jurisdiction; and, (c) the case comes before the Court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction. The three ingredients must co-exist in order to infuse jurisdiction in a***

***Court. Where a Court is drained of the jurisdiction to entertain a matter, the proceedings flowing from it, no matter the quantum of diligence, dexterity, artistry, sophistry, transparency and objectivity injected into it, will be marooned in the intractable web of nullity.***

15. There is no doubt that I do not have jurisdiction to conduct merit review of a decision by a Judge of concurrent jurisdiction. Pursuant to **Section 16** of the **Environment and Land Court Act**, such proceedings must be by way of an appeal to the Court of Appeal. The question that however arises is whether what the Applicant has placed before the court through Notice of Motion dated 13<sup>th</sup> November 2024 is an application for merit review.

16. A reading of the heading of the application shows that it is brought inter alia under **Order 45 Rule 1 (b)** of the **Civil Procedure Rules**. **Order 45 Rule 1** of the **Civil Procure Rules** provides:

***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.***

17. Further, a reading of prayer 2 of the application leaves no doubt that the Applicant is principally seeking review of the ruling that I reproduced at the opening paragraph of this ruling. The said ruling was delivered in this case and not Nyamira ELC No. E011 of 2024. As drafted, prayers 3 and 4 of the present application can only be granted as a consequence of prayer 2 being allowed. I am satisfied that what is before the court is an application for review under **Order 45** of the **Civil Procedure Rules** and that this court has jurisdiction to hear and determine it. Whether the application meets the threshold for granting review is altogether a different matter.

18. Pursuant to **Order 45 Rule 2 (1)** of the **Civil Procedure Rules**, an application for review on grounds other than the discovery of new and important matter or evidence is to be made only to the judge who passed the decree, or made the order sought to be reviewed. The Applicant has not relied on discovery of new and important matter or evidence. The order sought to be reviewed herein was made by Mugo Kamau, J. Considering that the Judge has since proceeded on transfer to another station, it falls on me, pursuant to **Order 45 Rule 2 (2)** of the **Civil Procedure Rules**, to hear and determine the application.

19. The Court of Appeal summed up the law relating to review in **Mutisya (Suing as the personal representative of the Estate of Simon Wambua Makau (Dcd)) v Macharia t/a Three Bins Services & another** [2023] KECA 234 (KLR) thus:

***Section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules are instructive on the principles applicable in a review application. A reading of the above provisions clearly shows that while Section 80 (f) of the Civil Procedure Act grants the court power to make orders for review, Order 45 sets out the jurisdiction 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.***

20. A reading of the grounds of the application, the supporting affidavit and even the Applicant's submissions leaves no doubt that the Applicant is of the view that the Learned Judge ought not to have made the order sought to be reviewed. Among other arguments, the Applicant has contended that "*the order issued on 13<sup>th</sup> November 2024 will be a hinderance to the course of justice and breach the constitutional right of the Applicant.*"

21. At paragraphs 20 and 21 of her submissions dated 15<sup>th</sup> April 2025, the Applicant argued thus:

*20. The Honourable Court in its Ruling of 13<sup>th</sup> November 2024 failed to consider that the documents sought by the Applicant are critical for her meaningful participation in the demarcation process ordered in NYAMIRA ELC E011 OF 2024.*

*21. The decision to defer the Applicant's application simply violates her right to access information and fair administrative action as provided in Article 35 and 47 of the Constitution of Kenya.*

22. Put differently, the Applicant is manifestly of the view that the Learned Judge erred and that the ruling of 13<sup>th</sup> November 2024 is a hinderance to the course of justice. While litigants are free

to form own opinions on decisions of the court, a litigant seeking review under **Order 45** of the **Civil Procedure Rules** cannot do so to correct a perceived mistake of law or fact or an erroneous finding. The Court of Appeal made that abundantly clear in **National Bank of Kenya Ltd v. Ndungu Njau [1997] eKLR** where it held thus:

***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 provision of law cannot be a ground for review. In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favor of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree***

***that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.***

23. Given the grounds that she has adopted for seeking setting aside, through review of the order, the Applicant should instead have appealed against the decision. The Applicant has not established a case for review. Since the rest of the prayers in the application were contingent upon review being granted, it follows that those other prayers equally fail.

24. In view of the foregoing discourse, I find no merit in Notice of Motion dated 13<sup>th</sup> November 2024, and I therefore dismiss it with costs to the Respondents and Interested Parties.

**Dated, signed, and delivered at Nyamira, this 5<sup>th</sup> day of November 2025.**

**D. O. OHUNGO  
JUDGE**

Delivered in the presence of:

Ms Anyango for the Petitioner

Mr Ndiritu for the Respondents

Ms Musembi for the First Interested Party

Mr Wainaina for the Second Interested Party

No appearance for the Third Interested Party

Court Assistant: B Kerubo