

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 30 OF 2013

MARGARET KALONDU MUSAU:.....1ST PLAINTIFF/RESPONDENT

JOHN MUOKI MUSAU:.....2ND PLAINTIFF/RESPONDENT

VERSUS

JOHNSON MUSAU MUINDI:.....DEFENDANT/APPLICANT

AND

**KAVANDI KILONZO:.....1ST INTERESTED
PARTY**

JOHN MUKHUA NYOTA:.....2ND INTERESTED PARTY

RULING

The application is dated 12th March 2025 and is brought under Section 80 of the Civil Procedure Act Cap 21 Laws of Kenya, Order 45 of the Civil Procedure Rules, 2010 seeking the following orders;

1. THAT this application be certified urgent and heard ex parte and service thereof be dispensed with in the first instance for purposes of prayer No. 2 below;
2. THAT pending the hearing and determination of this application, this Honourable Court be pleased to grant an order staying execution of the Judgment dated 19th September, 2022 and the resultant decree issued on 18th December, 2024.

3. THAT this Honourable Court be pleased to grant leave for the Defendant/Applicant to present the newly discovered evidence in support of his case.
4. THAT this Honourable Court be pleased to review and set aside the Judgment dated 19th September, 2022 and the resultant decree issued on 18th December, 2024.
5. THAT this Honourable Court grants any other or further relief that it deems fit in the interest of justice.
6. THAT costs of this Application be borne by the Respondents.

It is supported by the annexed affidavit of JOHNSON MUSAU MUINDI and on the following grounds that on 19th September, 2022, Honourable Justice Christine Ochieng delivered a Judgment in this matter *inter alia* declaring that the agreement between the Applicant and the Respondents herein dated 27th November, 2002 was null and void and that the Defendant ought to transfer the suit properties back to the Plaintiff. Being aggrieved by the aforesaid decision, the Defendant/Applicant seeks to review the same on account of an error apparent on the face of the decree and new circumstances that have since arisen. It is manifest that order No. (b) in the decree issued on 18th December, 2024 erroneously includes Plot Number 38C among the properties to be re-transferred to the Plaintiffs. This property was not part of the original sale transaction, and the Applicant has no legal or equitable interest in it. The inclusion of Plot Number 38C constitutes a clear and self-evident error on the face of the record,

warranting review under Section 80 of the Civil Procedure Act and Order 45 Rule 1(a) of the Civil Procedure Rules, 2010. The Judgment, if executed, will deprive the Applicant of his property without due process, contrary to Article 40(1) of the Constitution of Kenya, 2010, which guarantees the right to own and acquire property. The Judgment was issued without the benefit of the newly discovered evidence, effectively denying the Applicant his right to a fair hearing under Article 50(1) of the Constitution. The Court did not fully consider key statutory provisions before declaring the Sale Agreement dated 27th November, 2002 null and void. Section 3(3) of the Law of Contract Act, Cap 23, upholds written agreements for the sale of land, while Section 26(1) of the Land Registration Act, 2012, provides that a title deed is *prima facie* evidence of ownership unless proven otherwise through fraud or misrepresentation. Had the Court been presented with the newly discovered transfer documents, it would have reached a different conclusion regarding the validity of the sale. The Applicant stands to suffer irreparable loss if the Judgment is executed. If execution proceeds, the properties will be transferred to third parties, making recovery nearly impossible even if the review application succeeds. The loss of land is irreversible, and monetary compensation would not be an adequate remedy. Any further legal proceedings would be rendered meaningless as the properties would have already changed hands. The Court has inherent jurisdiction under Section 3A of the Civil Procedure Act to prevent an injustice and ensure that justice is based on full and accurate facts.

Given the glaring error in the decree and the newly discovered evidence now available, it is only fair that the Court re-examines its decision to prevent a miscarriage of justice. The Applicant stands to suffer substantial loss unless the order of stay of execution of the Judgment and the resultant decree is granted as the properties sought to be preserved will be lost and become irrecoverable at the expense of the Plaintiff, making any success in the court merely academic. It is therefore in the interest of justice that the orders sought herein are granted.

This court has carefully considered the application and submissions therein. The Respondent submitted that the remedy of review is not available for the Applicant. In the case of *Mwihoko Housing Company Limited vs Equity Building Society* (2007) 2 KLR 171 is relevant. It was held, that;

“A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the

judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of Rose Kaiza Vs Angelo Mpanju Kaiza 2009, the Court was categorical that;

“An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made...”

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.”

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.”

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.”

From the above provisions of the law, authorities cited and facts of this case the Applicant stated that he has discovered crucial new evidence that was not available at the time of the Judgment. This includes the Transfer Document confirming lawful transfer and the Application for Consent of the Land Control Board, demonstrating compliance with Section 6(1) of the Land Control Act, Cap 302. The newly discovered documents were not within the Applicant's reach during the hearing despite repeated efforts to obtain them from the Mavoko Land Registry. Given that these documents could not have been produced earlier with reasonable diligence, the Applicant satisfies the legal threshold for review under Order 45 Rule 1(b) of the Civil Procedure Rules, 2010.

I have perused the court file and find that the matter proceeded to full trial and various documents were produced. One of the issues that were determined by the court was whether the Defendant fulfilled the terms of the Agreement dated 27th November 2002 and legally acquired the plots from the Plaintiffs. In the judgement the judge found that the transfer form dated 27th November 2002 the transaction named therein was in respect of plots 37C, 37D, 38C and 38D with Arthi River Block 1/2002 which was different from land mentioned in the sale agreement. She also found that the Defendant did not fulfil the terms of the agreement hence did not legally acquire the plots. The Judge noted that the

Defendant produced another sale agreement dated 27th November which was not signed by the Plaintiffs and it contained hand written corrections. The court found there was an element of fraud and collusion between the Defendant, DW2 and third parties to enable the Defendant to acquire the plots before finalizing the payment of the full purchase price. The Judge found that the Plaintiff is entitled to the orders sought save for the transfer of plot 38C to them as the same had been transferred to a third party. If the same plot 38C is included in the decree then this is a matter of correction by the Deputy Registrar. I find that judgement was delivered on the 19th September 2022 by Lady Justice Christine Ochieng. I concur with the Respondent's submissions that this matter and the instant application cannot fulfill the elements for granting a review.

I find that there is no omission or error on the face of the record in the instant case. I find that there is no sufficient in this case to review the judgement and/or the execution. I note that this application for review was filed on 13th March 2025 and the judgement was entered on 19th September 2022, the Applicant is guilty of laches.

I find that this court is now functus officio. In the case of Telkom Kenya Ltd vs John Ochanda (suing on his behalf and on behalf of 996 former Employees of Telkom Kenya Ltd (supra), the Court of Appeal held as follows on the *functus officio* doctrine;

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon-

The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in re-St Nazaire Co, (1879), 12 Ch. D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions. ---”

The Supreme Court of Kenya in the case of Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others (2013) eKLR, cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, *“The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law”* (2005) 122 SALJ 832 which reads;

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

Section 99 of the Civil Procedure Act provides exceptions to the doctrine of *functus officio* in the following terms-

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”

It is clear that the doctrine of *functus officio* does not bar a court from entertaining a case it has already decided but prevents it from revisiting the matter on a merit-based re-engagement once final judgment has been entered as is the case herein. Having discharged its duty on this suit this court is therefore *functus officio*, defined in Black's Law Dictionary, Ninth Edition as *“having performed his or her office (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”* In the circumstances, the court is wary of the Applicants' invitation to re-engage with this dispute. Having found that this court is *functus officio* and rejecting the application for review I find that the application is not merited and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 26TH DAY
OF NOVEMBER 2025.**

N.A. MATHEKA

JUDGE

ORIGINAL