Musyoka v Mutua (Environment and Land Case 79 of 2025)
[2025] KEELC 8174 (KLR) (25 November 2025) (Ruling)

Neutral citation: [2025] KEELC 8174 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND CASE 79 OF 2025

NA MATHEKA, J

NOVEMBER 25, 2025

BETWEEN

VERONICAH MUTWA MUSYOKA ..... PLAINTIFF

AND

JOSEPH MUSEMBI MUTUA ..... DEFENDANT

RULING

1. The application is dated 8th August 2025 and seeks the following orders;

    1. The Honourable Court be pleased to review the Orders delivered by Hon. Justice Nelly A. Matheka on 25th June 2025 and the subsequent Orders made thereto. To wit:

        Orders No. I being "That the Matter is not certified urgent" and

    2. The Honourable Court be pleased to review the Orders made by Hon. Justice Nelly A. Matheka on 24th July 2025 and the subsequent Orders made thereto. To Wit;

        Order being "That the Hearing of Application dated 20th June 2025 be on 8th December 2025. No Interim Orders."

    3. The Honourable Court be pleased to issue an earlier hearing date for the Application dated 20th June 2025 and to make further orders it deems fit to expedite the hearing of the Application dated 20th June 2025.

    4. This Honourable Court hear and determine the Application dated 20th June 2025 before the Third Term Schools reopening.

    5. Costs of this application be provided for.

2. It is based on the following on the grounds that the Court Orders subject for review were delivered on 25th June 2025 and the 24th July2025. On the 25th June 2025, the Court made the following orders:

The Matter is not certified urgent and Inter parties hearing on the 24th July 2025. On the 24th July 2025, the Court made the following orders: Hearing on 8th December 2025 and no interim orders.

3. The Defendant/ Respondent who is the father of the three children/minors has since abdicated his parental responsibilities and is no longer providing for the minors. The Applicant did not expect that as a result of their separation and the dispute before this Honourable Court, the Defendant/ Respondent would stop providing for the minors who are Seventeen (17), Fourteen (14) and Nine (9) years respectively. The three minors have since closed schools and are living with the Applicant, who is their mother. That the Orders made by this Honourable Court failed to take into account the fact that the Applicant uses the proceeds of the rental income from the two rental buildings on Plot No. 2075 III and Plot No. 2802 to cater for the needs of the minors including but not limited to their food, school fees, health needs, shelter (rent) and clothing. It is on this backdrop that the Applicant who is the minors' mother seeks to cure the apparent mistake/error by way of a Review Application. The Applicant seeks to have the Orders reviewed/rectified/corrected so that the Application dated 20th June 2025 can be heard and determined expeditiously to avoid occasioning prejudice on the part of the minors and a miscarriage of justice on the Applicant.

4. This Honourable Court has slated the 8th December 2025 for the hearing of the Application dated 20th June 2025 which Application had sought for the rental income to be remitted back to the jointly held account of the parties being Cooperative Bank Account No. 01109388662500. Based on the terms of the Court Order, should the said hearing proceed on 8th December 2025, the Applicant and the minors will suffer irreparable harm as they will fail to pay school fees which will infringe on their right to education and additionally their essential needs will not be sufficiently catered for before that date. The Honourable Court did not issue any interim orders and hence the Applicant and the minors will not have access to the rental income from the two rental buildings up until the hearing on 8th December 2025 and a ruling sometime after the 8th December 2025. Having it that the Applicant will not have access to the rental income from the two rental buildings, the Applicant is and will continue to be financially strained as she is unilaterally catering for all the needs of the minors who are in her physical custody. The Applicant is straining financially to provide for all the three minors as she does not have access to the rental income as she used to before the Defendant's actions of redirecting the depositing of the rental income from their jointly owned account to his personal account.

5. The Court has the inherent powers to amend, rectify and/or correct its judgement to ensure that the ends of justice are served. Justice will be served if Court reviews the Court Orders to issue an earlier hearing date. No prejudice will be suffered by the Respondent if the Court orders dated 25th June 2025 and 24th July 2025 is reviewed as prayed. That in Board of Governors, Moi High School, Kabarak & another v Malcolm Bell (2013) eKLR, this court held that as a matter of public policy, this Court held that it has the inherent power, for the purposes of delivering on its constitutional mandate in any matter properly before it and to uphold both parties' right to a fair trial under Article 50(1), which power is geared towards meeting the ends of justice. Based on the principles set out in the case of Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited [20141 eKLR, this Court has the residual jurisdiction to review its ruling in cases of miscarriage of justice with a view to correct the same. The residual jurisdiction of this Court to review its decisions goes beyond the grounds for review as set out in section 21A of the *Supreme Court Act* and the case of Fredrick Otieno Outa vs Jared Odoyo Okello & 3 others (2017) eKLR, since a gross miscarriage of justice and breach of the right to fair trial invokes the inherent and residual jurisdiction of this Court. Suffice, in allowing the application in terms of the Orders sought, the court will not only be exercising its powers under Sections 80 and 99 of the *Civil Procedure Act* and Order 45 Rule 1 (1) of Civil Procedure Rules but will also be exercising

its inherent powers to make such essential and/or ancillary orders as may be necessary for the ends of justice

6. 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;
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> "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..."

7. 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."

8. 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."

9. 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."

10. From the above provisions of the law, authorities cited and facts of this case the Applicant stated that it has recently come to the realization of the Applicant that the Defendant has resolved to stop providing for the minors' essential needs including but not limited to their school fees, food, shelter (rent), clothing and health expenses. The Defendant has since removed the three minors and the Applicant from his police medical cover without proper justification or arrangement for alternative care in flagrant violation of the children's rights. The above new facts were not within the Applicant's knowledge and could not have been possibly discovered upon exercise of due diligence nor could the facts have been produced before delivery of the Orders of 25th June 2025 and 24th July 2025. Consequently, the Defendant's actions of ceasing to provide for the minors and taking them out of his police medical cover qualifies to be a ground for review of the Court Orders dated 25th June 2022 and 24th July 2025 and the same is outrightly within the ambits of the grounds specified in Order 45 Rule 1 of the Civil Procedure Rules.

11. I have perused the court file and find that on this matter first came up on the 25th June 2025, this court peruse the pleadings and found it was not urgent and decline to give any interim orders giving and inter parties hearing on the 24th July 2025. On the material date it was adjourned to the 8th December to allow the Respondent to respond. I concur with the Respondent's submissions that this matter. Matters of separation and maintenance belong to the High Court and this court has no jurisdiction. 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 my earlier orders of placing the inter parties hearing date of 8th December 2025. I also note that that date is only two weeks away from today. 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 25TH DAY OF NOVEMBER 2025.

N.A. MATHEKA

JUDGE