



**Kenya Power & Lighting Co Ltd v Rosewa Agencies Limited (Environment and Land Case 1048 of 2014) [2025] KEELC 8366 (KLR) (24 November 2025) (Ruling)**

Neutral citation: [2025] KEELC 8366 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE 1048 OF 2014  
TW MURIGI, J  
NOVEMBER 24, 2025**

**BETWEEN**

**KENYA POWER & LIGHTING CO LTD ..... APPLICANT**

**AND**

**ROSEWA AGENCIES LIMITED ..... RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated 1<sup>st</sup> November 2023, brought under Order 45 Rule 1, 2 & 3, Order 22 Rule 22 of the Civil Procedure Rules, and Section 3A of the [Civil Procedure Act](#), in which the Applicant seeks the following orders: -
  - i. Spent.
  - ii. Spent.
  - iii. That this Honourable Court be pleased to review/set aside the judgment dated 22/02/2023 entered against the Defendant/Applicant herein.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Justus Ododa, sworn on even date.

**The Applicant's Case**

3. The deponent averred that the judgment in this case was delivered on 22<sup>nd</sup> February 2023 in favour of the Plaintiff based on the evidence on record. He further averred that at the time the judgment was delivered, the Defendant/Applicant had neither traced nor obtained the existing Wayleave Agreement authorizing the Defendant to enter the suit property to install electricity lines.
4. He explained that the Defendant/Applicant discovered, traced, and obtained the wayleave agreement for the suit property on 04/09/2023 after a thorough search of its records held by the Government



Survey, which is the custodian of the wayleave agreements. He stated that the Defendant had made numerous attempts to locate the wayleave agreement before the hearing and determination of this case, but was unsuccessful due to the age and volume of the documents that had to be retrieved from the Defendant's records. He emphasized that the wayleave agreement is new and important evidence because it authorized the Defendant to access the suit property, which was transferred to the Plaintiff.

5. According to the deponent, the wayleave agreement shows that it was executed on 11/02/1975 by the Directors of Kigwe Ltd, the previous registered owners of the suit property, and the current managing director of the Plaintiff herein.
6. He further stated that the suit property was transferred, sold, and/or assigned to the Plaintiff in 2005 after the Wayleave Agreement had been executed. He argued that the discovery of the wayleave nullifies the Plaintiff's claim, which was based on the Defendant's alleged trespass into the suit property. He contended that, in light of the discovery of the wayleave agreement, this suit does not disclose a reasonable cause of action against the Defendant.
7. The deponent is apprehensive that if the Plaintiff executes the judgment, the application will be rendered nugatory and occasion the Defendant irreparable loss.

### **The Plaintiff/respondent's Case**

8. The Respondent filed a replying sworn by Charles Kigwe Wathua, on 17<sup>th</sup> November 2023, in opposition to the application. He averred that the Plaintiff is the registered proprietor and beneficial owner of the suit property. He further averred that there is no wayleave or service line registered against the suit property.
9. He stated that sometime in June 2014, the Defendant trespassed onto the suit property and illegally deposited electricity poles without the Plaintiff's permission. Following the trespass, the Plaintiff instituted this suit against the Defendant, who proceeded to install the electricity poles during the pendency of the application for an injunction.
10. He maintained that the parties were given an opportunity to present their cases, and the court repeatedly went out of its way to accommodate the Applicant. He explained that during the hearing, he testified that the suit property had no power line until June 2014, when the Defendant trespassed and unlawfully installed it. He further stated that the Defendant's witness confirmed that the Defendant did not have wayleave on the suit property.
11. He stated that the 1975 wayleave agreement involves different parties and pertains to a separate parcel of land. He denied any link between Kigwe Ltd and the Plaintiff, as well as the claim that the Plaintiff bought the suit property from Kigwe Ltd. He clarified that Kigwe Ltd was one of the first indigenous companies owned by the broader Kigwe family, which included his grandfather and siblings, holding large land parcels in Juja registered under Kiambu District, and others in Thika District, which were distinct during the 1960s and 1970s.
12. He asserted that land parcel No. L.R. No. 11407, related to the Wayleave agreement, is entirely different from the suit property (L.R. No. 18697/4) because the former is a freehold while the latter is a leasehold. He also stated that the suit property had no wayleave or power lines until 2014, when the Defendant installed the disputed power lines.
13. He asserted that there has been an inordinate delay of 8 months in filing the present application and added that the orders sought are prejudicial to the Respondent.
14. The application was canvassed by way of written submissions.



## The Defendant/applicant's Submissions

15. The Applicant filed its submissions dated 21<sup>st</sup> April 2025.
16. On behalf of the Applicant, Counsel outlined the following issues for the court's determination:-
  - a) Whether the Defendant/Applicant has certified the grounds for review of the judgment?
  - b) Whether the Defendant/Applicant has certified the grounds for stay of execution?
17. On the first issue, Counsel relied on Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules to submit on the legal framework governing the review of judgments. Further reliance was placed on the case of London Distillers (K) Ltd v. Cabinet Secretary, Ministry of Education & Four Others (2022) eKLR, which reaffirmed the established grounds for review.
18. On the first condition, Counsel submitted that the Applicant has discovered a Wayleave agreement dated 11/02/1975 related to the suit property. It was submitted that the agreement is structured in accordance with Section 3 of the Law of Contract Act, as it contains the names of the contracting parties, the subject property, the consideration, and the obligations of each party. To buttress this argument, reliance was placed on the case of Peter Mwangi Kabue vs Rural Electrification Authority (2018) eKLR.
19. Counsel further submitted that the suit property arose from a subdivision of L.R. No. 11407 owned by Kigwe Limited. Counsel contended that the subdivision of the original parcel caused the differences in the L.R. and I.R. of the mother title.
20. It was submitted that the Plaintiffs' claim that they did not acquire the suit property from Kigwe Ltd is irrelevant, as Kigwe Ltd was the original owner of the entire land before any transfer or sale.
21. It was further argued that the Plaintiff's land forms part of the original L.R. No. 11407 and is governed by the wayleave agreement signed in 1975, as the wayleave applies to successive parcels of land derived from the original title. To support this argument, reliance was placed on Section 143(3), which states that:-
  - a. A public right of way shall attach to and run with the servient land in respect of which it has been created and shall be binding on all owners from time to time of the servient land, any manner they are occupying the land, whether under a land or a derivative right thereof, or under customary law or as a successor in title to any such owner or as a trespasser.
22. It was submitted that the wayleave negates the evidence of trespass because the Applicant had permission to enter the Plaintiffs' land to install, operate, repair, or remove any electric poles. To support this point, reliance was placed on the case of Vumacam (Pty) Ltd vs Johannesburg Roads Agency & 3 others (14867/20) (2020) ZAGPJHC 18.
23. It was submitted that the Defendant was justified in entering the Plaintiff's land to replace the old wooden power lines with concrete power lines to enhance safety and supply electricity to the public in Juja and its environs. To support this point, reliance was placed on the case of Kenya Power & Lighting Co. Ltd v Kipevu Inland Container EPZ Ltd (2018) eklr.
24. Counsel relied on Sections 25 and 28 of the Land Registration Act to submit that the rights of a registered proprietor are not absolute as they are subject to encumbrances and other rights on the land. It was submitted that the Defendant has an easement right over the Plaintiff's Land, which allows it to enter the Plaintiff's land. Further reliance was placed on the case of Kenya Power & Lighting Co.



Ltd v Mosiara Trading Co Ltd (2016) eKLR, Section 176 of the Energy Act, and Section 86 of the Government Land Act.

25. It was further submitted that the wayleave agreement could not be produced before the judgment because the Defendant was unable to locate it. Reliance was placed on the case of Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others. It was submitted that the wayleave agreement had existed for over 48 years prior to the judgment, and that the suit property was transferred to the Plaintiff in 2005 after the execution of the wayleave agreement.
26. It was submitted that the wayleave was sent to the archives for safekeeping, and that the Defendant made several efforts to locate it before the case was heard and determined. However, it could not be found due to its age and the large volume of documents that had to be physically retrieved from the Defendant's archival records.
27. It was submitted that the Defendant discovered new and important evidence which, after due diligence, could not be produced by it at the time the court passed the decree.
28. Counsel submitted that the new evidence gives effect to the intention of the judgment as to the existence of the wayleave.
29. Counsel argued that there was no delay because the new evidence was discovered on 04/09/2023, while the application was filed on 02/11/2023.
30. It was further argued that the Defendant has demonstrated sufficient grounds, as they will suffer prejudice, and the public interest outweighs the private interest. It was submitted that the Plaintiff will not be prejudiced, since they will have the opportunity to contest the new evidence presented by the Defendant.
31. Regarding the second issue, Counsel submitted that the Applicant has met the condition for the grant of stay of execution pending appeal outlined in Order 42 Rule 6 of the Civil Procedure Rules. It was submitted that the Applicant will suffer irreparable harm, as the damages awarded are substantial and the Plaintiff would be unable to refund that amount.
32. He maintained that the application was filed without delay and that the Applicant was willing to abide by any conditions imposed by the court.

### **The Plaintiff/respondent's Submission**

33. The Plaintiff/Respondent filed his submissions dated 19<sup>th</sup> May, 2025.
34. On behalf of the Respondent, Counsel cited Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules to discuss the law governing the review of judgments. Counsel relied on the case of Republic v Public Procurement Administrative Review Board & 2 Others (2018) eKLR to outline the requirements for an application for review. Further reliance was placed on the case of Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others (2021) eKLR.
35. Counsel argued that the Defendant, in its pleadings and evidence, clearly stated that it neither installed nor owned the disputed electric power line.
36. It was submitted that the existence of the wayleave was neither pleaded nor the subject of the dispute between the parties since the Defendant denied knowledge of the erection of the power line. It was submitted that the court considered the pleadings, the evidence, submissions, and law in determining that the Defendant had constructed high-voltage power cables that have remained on the suit land



since 2014 to date. Counsel argued that the purported new evidence regarding the existence of some wayleave was never pleaded and was not a matter for determination.

37. It was submitted that the Defendant has no wayleave concerning the suit property, as confirmed by its witness during cross-examination. It was further submitted that the purported wayleave agreement does not relate to the suit property, as it pertains to another property. Counsel argued that reopening the dispute based on the alleged new evidence would be irregular and unjust, since neither party raised the issue in their pleadings. It was argued that introducing the document would require amending the pleadings after the judgment, which is improper and unlawful under the circumstances.
38. It was submitted that the Defendant's failure to comply with the procedure for acquiring and producing documents in accordance with Section 80 of the *Evidence Act* rendered those documents illegal and inadmissible. To buttress this argument, reliance was placed on the case of *Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* (2017) eKLR.
39. It was submitted that the Applicant has not discovered any new evidence to warrant the grant of the orders sought. Counsel further submitted that the letters attached to the application, showing exchanges between the Defendant and various state agencies, clearly show that the Defendant requested the documents for the purpose of filing the present application. It was further submitted that a losing party must not be allowed to reopen its case through craft. To buttress this argument, reliance was placed on the Supreme Court case of *Outa v Okello & 3 others* (Petition 6 OF 2014) (2014) (2017) KESC 25 (KLR) ( 24 February 2017) (Ruling); *Frdrick Otieno Outa v Jared Odoyo Okello & 3 others* (2017) eKLR.
40. Counsel argued that the grounds raised by the Applicant are an appeal disguised as an application for review, which constitutes an abuse of the court process. Counsel further contended that the orders sought are highly contentious and can only be determined by an appellate court. To support this point, reliance was placed on the case of *Northern Indian Cettors (India) v Ltd Governor of Delhi* 1980 AIR 674.

### **Analysis And Determination**

41. Having considered the application in light of the pleadings, the respective affidavits, and the rival submissions, the only issue that arises for determination is whether the judgment delivered on 22<sup>nd</sup> February 2023 should be reviewed and/or set aside.
42. The law governing applications for review is outlined in Section 80 of the *Civil Procedure Act* and in Order 45 Rule 1 of the Civil Procedure Rules.
43. Section 80 of the *Civil Procedure Act* provides 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.
44. Order 45 Rule 1 of the Civil Procedure Rules provides that: -  
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 the judgment to the court which passed the decree or made the order without unreasonable delay.
45. The provisions of Order 45 were restated by the Court of Appeal in the case of *Benjoh Amalgamated Limited & Another Vs Kenya Commercial Bank Limited (2014) eKLR*, as follows:-
- “In the High Court both the *Civil Procedure Act* in Section 80 and the Civil Procedure Rules in Order 45 Rule 1 confer on the court power to review. Rule 1 of order 45 shows the circumstances in which such review would be considered ranging from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High court greater amplitude for review.”
46. Similarly, in *Republic vs Public Procurement Administrative Review Board & 2 Others (2018) eKLR* the court held that: -
- “Section 80 gives the power of review and Order 45 sets out the rules. These rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review.”
47. As regards the first requirement, the Applicant must show that there is discovery of a new or important matter of evidence which, after due diligence, was not within his knowledge or could not be produced at that time.
48. The Applicant stated they were unable to locate the wayleave agreement for the suit property due to the age and volume of the documents that had to be retrieved from the Defendant’s archival records. It was contended that the wayleave agreement nullifies the Plaintiff’s claim, which was based on the alleged trespass onto the suit property. The Plaintiff contends that the wayleave agreement does not relate to the suit property. He further contended that there has been no discovery since the Defendant denied installing and owning the electric power line.
49. I have carefully perused the court record. It is well-established that parties are bound by their own pleadings. At paragraph 4 of the Defendant’s statement of defence, the Defendant denied trespassing into the suit property or on any property belonging to the Plaintiff. At paragraph 5 of the defence, the Defendant denied erecting or laying any electric poles on the suit property. The Defendant did not raise the issue of the wayleave agreement in its defence. Therefore, the Applicant cannot rely on evidence it initially denied. Granting the application would require parties to amend their pleadings and could potentially reopen the case.
50. Based on the foregoing, this court finds that the Applicant has not demonstrated the discovery of a new or important matter of evidence that he could not have presented before the judgment was issued.



51. Regarding the second requirement, the Applicant must establish that there is an error apparent on the face of the record. In the case of *Nyamogo & Nyamogo Vs Kogo* (2001) EA 170, the court held that;
- “An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of definitiveness inherent in its very nature, and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning, where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong is certainly no ground for review, though it may be one for appeal.”
52. Similarly, in the case of *Timber Manufacturers and Dealers Vs Nairobi Golf Hotels (K)* HCCC No. 5220 of 1992, Emukule J held that:-
- “For it to be said that there is an error apparent on the face of the record, it must be obvious and self-evident and does not require an elaborate argument to be established.”
53. The Applicant has not pinpointed the errors that are apparent on the face of the record.
54. The Court is also mandated to consider if there are sufficient reasons to review the Court’s judgment.
55. Discussing what constitutes sufficient cause for purposes of review, the Court of Appeal in the case of *The Official Receiver and Liquidator Vs Freight Forwarders Kenya Ltd* (2000) eKLR stated that:-
- “These words only mean that the reason must be one that is sufficient to the court to which the application for review is made, and they cannot, without at times running counter to the interest of justice, limited to the discovery of new and important matter or evidence or occurring of an error apparent on the face of the record.”
56. The Applicant has not demonstrated any sufficient reason to warrant a review of the Court’s JUDGMENT.
57. Finally, the Applicant must demonstrate that the application was filed without undue delay.
58. The judgment sought to be reviewed was delivered on 22/02/2023. The instant application was filed on 1<sup>st</sup> November 2023. That duration is far from reasonable.
59. In so finding, I am persuaded by the findings in the case of *John Agina Vs Abdulswamad Sharif Alwi C. A Civil Appeal No. 83 of 1992*, where the court stated as follows;
- “An unexplained delay of two years in making an application for review under Order 44 Rule 1 (now Order 45 Rule 1) is not the type of sufficient reason that will earn sympathy of the court.”
60. From the foregoing, I find that the Applicant has not satisfied the conditions for the grant of review of the judgment delivered on 22/02/2023.



The upshot of the foregoing is that the application is devoid of merit, and the same is hereby dismissed with costs to the Respondent

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2025.**

.....

**HON. T. MURIGI**

**JUDGE**

In The Presence Of

Nyakiti holding brief for Nyagwara for the Plaintiff

Abdi – Court Assistant

