



REPUBLIC OF KENYA



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Malinda v Muutu; King’oo (Interested Party) (Environment and Land Case E041 of 2021) [2025] KEELC 8430 (KLR) (4 December 2025) (Ruling)

Neutral citation: [2025] KEELC 8430 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND CASE E041 OF 2021
EO OBAGA, J
DECEMBER 4, 2025**

BETWEEN

JOSEPH MUTUA MALINDA PLAINTIFF

AND

JAMES MAINGI MUUTU DEFENDANT

AND

MIKE JULIUS KING’OO INTERESTED PARTY

RULING

Introduction

1. This is a ruling in respect of a notice of motion dated 15th May, 2025 in which the Defendant/Applicant seeks the following orders:
 1. That this honourable court be pleased to review and vacate in its entirety the ruling and orders of the honourable court given on the 18th day of December, 2024 by Lady Justice Hon. T. Murigi and accordingly, by way of review do issue a fresh ruling on the rightful application due for consideration before the court.
 2. That the costs of this application be provided for.

Background

2. The Plaintiff/Respondent had filed a suit against the Applicant in which he sought the following reliefs:
 1. A declaration that the Plaintiff’s developments otherwise known as Mami/Forte Hotel as well as Lokoo Club/Lounge and the adjoining facilities and erected on land parcel numbers



Makueni/Unoa/1456, Makueni/Unoa/1474 and Makueni/Unoa/2657 do not in any way encroach on a road reserve.

2. A declaration that the intended demolition, by the Defendant, of the Plaintiff's developments otherwise known as Mami/Forte Hotel as well as Lokoo Club/Lounge and the adjoining facilities and erected on land parcel numbers Makueni/Unoa/1456, Makueni/Unoa/1474 and Makueni/Unoa/2657 is unlawful and without basis.
3. An order of permanent injunction restraining the Defendant, by itself, its officers, agents, servants, contractors or any other persons whomsoever from in any way demolishing or interfering with any part of the Plaintiff's developments otherwise known as Mami/Forte Hotel as well as Lokoo Club/lounge and adjoining facilities and erected on land parcel numbers Makueni/Unoa/1474 Makueni/Unoa/1474 and Makueni/Unoa/2657
3. The Respondent contemporaneously filed a notice of motion dated 2nd December, 2021 in which he sought an injunction against the Applicant restraining it from moving into the suit properties with a view to demolishing them on allegations that they had encroached on to the road reserve.
4. Before the notice of motion could be heard, the Applicant filed a notice of preliminary objection dated 30th March 2022 in which the issue of the court's jurisdiction to hear both the application and the suit was raised. The preliminary objection was based on the provisions of Section 72 of the Physical Planning and Land Use Act, 2019 which confers jurisdiction on the county government to hear appeals relating to enforcement notices.
5. On 9th June, 2022 the court gave directions on filing of written submissions in respect of preliminary objection. The matter was slated for mention on 11th July, 2022 to confirm filing of written submissions. The matter could not be mentioned on 11th July, 20-22 as the day had been gazetted as Eid-al- Adha.
6. By a letter dated 29th July, 2022, the Respondent's lawyer obtained a mention date at the registry on the same date. The case was fixed for mention on 6th October, 2022 to confirm filing of submissions. The Respondent's lawyers were directed to serve mention notice.
7. On 6th October, 2022, the Respondent's lawyers applied to withdraw the suit with no orders as to costs. The court allowed the application as prayed. Consequently allowing the withdrawal with no order as to costs.
8. On 11th October, 2023, the Applicant filed a notice of motion dated 7th September, 2023 in which it sought the following orders:
 1. That this matter be certified urgent and be heard *ex parte* in the first instance.
 2. That this honourable court be pleased to award costs of this suit to the Defendant.
 3. That costs of this application be borne by the Plaintiff.
9. On 16th May, 2024, the Applicant's advocate applied for leave to file an amended notice of motion. The leave was granted to amend the notice of motion dated 7th September, 2023. Directions as to the disposal of the amended notice of motion by way of written submissions were granted on the same day.
10. The Applicant filed an amended notice of motion dated 12th July, 2024 in which it sought the following orders:
 1. That this matter be certified urgent and be heard *ex parte* in the first instance.



2. That this honourable court be pleased to set aside the exparte proceedings of 6th October, 2022 and all the other orders consequential thereto.
 3. That consequently, this honourable court be please to make a determination on the issue of costs of the suit and do, in the circumstances, award the same to the Defendant.
 4. That costs of this application be borne by the Plaintiff.
11. The parties filed written submissions to the application dated 12th July, 2024 as directed by the court. In a ruling delivered on 18th December, 2024 the court dismissed the Applicant’s application with costs. This is what prompted the Applicant to file the present application.

Applicant’s Contention

12. The Applicant contends that there is an error apparent on the face of the record in that the judge based her ruling on the application dated 7th September, 2023 which had long ceased to exist upon amendment. The Applicant further contends that both parties filed submissions in respect of the application dated 12th July, 2024 and that there were no submissions in support of the application of 7th September, 2023.
13. The Applicant states that it had no notice of the mention of 6th October, 2022 and that the court ought not to have entertained the application for withdrawal in the absence of the Applicant.
14. The Applicant questions the court’s ruling and casts doubt as to whether the judge read the submissions which clearly referred to the application of 12th July, 2024.

Respondent’s contention

15. The Applicant’s application is opposed through a replying affidavit sworn on 14th July, 2025. The Respondent contends that the Applicant’s application is an abuse of the process of the court, is frivolous and vexatious. The Respondent further contends that this is a second attempt by the Applicant to get a favourable order on costs.
16. The Respondent states that the mere fact the judge referred to application dated 7th September, 2024 in her ruling does not justify a review.

Parties Submissions

17. The parties were directed to file written submissions. The Applicant filed submissions dated 18th August, 2025. The Respondent filed submissions dated 8th September, 2024 (sic).

Applicant’s submissions

18. The Applicant submitted that there is an error apparent on the face of the record in that the judge made a ruling based on a wrong application. The Applicant relied on the case of National Bank of Kenya Limited -vs-Ndungu Njau (1997) KECA 71 (KLR) where it was held as follows:

“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.....”.



Respondent's submissions

19. The Respondent submitted that the Applicant had not met the threshold for review. He relied on the case of *Kibiru Mwaniki & 2 Others (Civil Appeal 37 of 2023) (2024) KEHC 10417 (KLR) (23 August, 2024) (Ruling)* where it was held as follows:

“The 3rd applicant has premised its application for review on an error on the face of the record, the error being that there was a failure to make an award of costs. An award of costs is in the discretion of the judge as brought out in Section 27 of the *Civil Procedure Act* and therefore it cannot be termed as an error apparent on the face of the record when the court fails to award a party the costs of the suit. If the 3rd Applicant is aggrieved by the court failing to make an award of costs in its favour, the avenue to pursue is to file an appeal and not seek review. If the court reverses the order on costs sought herein, this would amount to the court sitting on its own finding appeal”.

20. The Respondent also relied on the case of *Omote –vs- Ogutu (Civil Appeal) E005 OF 2021) (2022) KEHC 16441 (KLR)* where it was held as follows:

“From the submissions made by the Applicant, he believes he was the successful party and ought to have been awarded costs of the appeal. This is akin to asking the court to sit on appeal of its decision and reverse it. The fact that a party believes that the court should have reached a different conclusion or that the decision was erroneous are matters fit for appeal rather than review which is limited to scope. Notably also, courts have held that: “the process of reasoning cannot be treated as an error apparent on the face of the record justifying the exercise of the power of review.” An: “an erroneous order/decision cannot be corrected in the guise of exercise of the power of review. (*Republic –vs Advocates Disciplinary Tribunal Ex parte Apollo Mboya (2019)*)”.

Analysis and Determination

21. I have considered the Applicant's application, the opposition thereto by the Respondent, the submissions filed as well as the authorities relied on. The only issue is whether the Applicant has met the threshold for review on account of error apparent on the face of the record.
22. In the instant case, the Applicant contends that the judge (Lady Justice Murigi) considered a wrong application. The Applicant contends that instead of the court making a ruling on the application of 12th July, 2024, the court based the ruling on the application of 7th September, 2024. This does not amount to an error apparent on the face of the record. Though the ruling referred to a wrong application, the findings were on what is the main contention in this matter. If the Applicant considers the ruling as erroneous, then that is not a ground for review. It may be a good ground for appeal.
23. The Appeal is even casting doubts whether the judge read the submissions as both parties filed submissions which were based on the application of 12th July, 2024. This cannot form the basis of a review. If the Applicant feels that the court did not consider its submissions that is not a ground for review. It may be a ground for appeal.
24. The Applicant complains that a withdrawal of a suit ought not to have been made in the absence of the opposite party. This is a ground for appeal. The court gave reasons why the application for withdrawal was allowed with no order as to costs and went ahead to observe that the Applicant should have preferred an appeal. The Applicant cannot therefore bring this as a ground to attack the ruling.



This should have been directed to the proper court on appeal as this court cannot sit on appeal arising from a decision of a fellow judge.

25. It is clear that the Applicant is attacking the ruling of 18th December, 2024. This is not the forum for such an attack. I therefore find that the Applicant's application is devoid of merit. The same is dismissed with costs to the Respondent.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 4TH DAY OF DECEMBER, 2025.

.....

HON. E. O. OBAGA

JUDGE

In The Presence Of:

Mr. Masila for Applicant.

Mr. Munyao for Mr. Muumbi for Respondent.

Court assistant – Steve Musyoki

