

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL NO. E065 OF 2021.

MOSES OTIENO ONDIEK (Suing as the Administrator/

Legal Representative of the estate of

JOEL ONDIEK ALWALA) APPELLANT/RESPONDENT

VERSUS

BENTA AKINYI ONYANGO.....1ST RESPONDENT

BENTA AKINYI ONYANGO

(Sued as the administrator/legal

representative of the estate of

CHARLES ONYANGO ALWALA)2ND RESPONDENT

JOSHUA AKEYO OGENDO3RD RESPONDENT

LAND REGISTRAR, AWASI4TH RESPONDENT

R U L I N G

The application before court for determination is the Notice of Motion dated 5th August, 2025 expressed to have been brought pursuant to the provisions of Order 45 Rule 1 of the Civil Procedure Rules 2010 and section 19(2) of the Environment and Land Court Act.

The first relief sought is that the firm of Agnes & Matthews Law LLP Advocates be granted leave to come on record in place of the firm of Ngala Awino & Company Advocates. This relief was not opposed. The Applicant is entitled to legal representation.

The substantive relief sought is that the court do review and set aside the judgement and decree dated 13th July, 2023 and substitute it with an order demising the appeal with costs to the 1st - 3rd Respondent in the appeal who are the Applicants herein.

The application was supported by the averments in the Supporting Affidavit of Joshua Akeyo Ogendo and the annexure thereto.

The application was opposed vide the contents of the Replying Affidavit sworn by the appellant on 22nd September 2025.

The application was heard by way of written submissions. It was submitted on behalf of the Applicants vide the written submissions dated 29th September, 2025 that the discovery of the new and important evidence in the nature of Grant of Letters of Administration Ad Litem dated 28th October, 2025 challenges the very basis of the legality of the Appellant's title over the suit land. That were the new and important evidence available to court on 13th July, 2023 when the court judgement given; the court would

most likely have held that the Appellant was not owner of the suit land.

Counsel relied on the provisions of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules and the case of Mjanaheri Farm Limited -vs- China Road & Bridges Corporation & Another on the grounds upon which a judgement can be reviewed and submitted that the Applicants focus on discovery of new and important evidence as the basis of the application for review.

That the new evidence reveals that the very basis of the Appellant's appeal before this court being that the deceased (Joel Ondiek Alwala) had inherited the suit land from his mother PRISKA OCHIENG ALWALA, also deceased, was misleading and fraudulent.

That the Appellant acquired title through intermeddling in the estate of Prisca Ochieng Alwala. That the evidence now placed before court by the Applicant is not only new and relevant but is of such decisive character that had it been placed before this honourable court during the hearing of the appeal it would have altered the outcome of the appeal. That it demonstrates that the judgement was predicated on an incomplete factual matrix.

Counsel, relying on the case of Unigroup Transporters Limited -vs- Mwasame [2024]KECA 567 (KLR), submitted that even after due

diligence the new and important evidence in the nature of the Grant of Letters of Administration ad Litem dated 28th October, 2024 over the estate of Priska Ochieng Alwala could not be within the knowledge of the Applicant.

That it took the 1st and 2nd Applicants in January, 2024 to inquire from the area chief whether there had been any succession to the estate of Prisca Ochieng Alwala and that, that was when they learned that the Appellant's purported title over the suit land was so obtained by intermeddling in the estate of Priska Ochieng Alwala.

That the Appellant consented to the court in Kisumu MC SUCC MISC/E014/2024 issuing a joint grant of Letters of Administration ad Litem over the estate of Prisca Ochieng Alwala with the Appellant being one of the co-administrators of the estate.

Counsel urged the court to allow the application.

On behalf of the Respondent in the application (Appellant in the appeal), written submissions dated 8th October, 2025 were filed.

Counsel submitted that the judgement was delivered on 13th July, 2023. That the Applicant settled both the costs of the appeal as well as the cost of the lower court. That on 31st July, 2025 by consent signed by Counsel for both parties the matter was marked as settled. That a consent is a binding agreement and can only be set

aside by the court on grounds like mistake, fraud or misrepresentation. Counsel submitted that review cannot issue when there is a consent order.

Counsel submitted further that the application has not met the threshold for grant of an order of review.

That the application is brought two years after the judgement and decree which is inordinate delay without proper explanation.

Counsel relied on the Court of Appeal Case of Civil Appeal No.352 of 2015 Gerphas Alphonse Odhiambo -vs- Felix Adiego where it was held that;

“The period of delay, however short must go in tandem with the explanation for it. Without any explanation there would be no basis for exercise of discretion.”

That although the Applicants in their submissions rely on discovery of new evidence as the ground for seeking review, this is not captured in the application. Counsel submitted that the succession to the estate of Priska Ochieng Alwala was instituted by the Applicants who had all the time to do it. That they all along knew about Priska Ochieng Alwala and her death hence it was not a new discovery. That the Applicant did not annex the order sought to be reviewed, to the application. That the Applicants seem to be

litigating a suit on behalf of the estate of the late Prisca Ochieng Alwala without a plaint to allow the Respondent file defence.

That there is a suit pending namely; KISUMU ELC NO.37 OF 2025 in respect of the estate of Priska Ochieng Alwala and that the litigation cannot be maintained in two parallel suits hence the application is sub-judice.

I have considered the application, the Replying Affidavit and the submissions filed. The grounds for grant of an order of review of judgement or decrees as contained in Order 45 Rule 1 Civil Procedure Rules under which the application is brought are:

- (i) discovery of new and important matter of evidence which after the exercise of due diligence was not within the Applicant's knowledge or could not be produced by him/her at the time when the decree was passed or the order made.
- (ii) on account of some mistake or error apparent on the face of the record.
- (iii) any other sufficient reason
- (iv) that the application must be brought without unreasonable delay.

Although the application is brought under Order 45 of the Civil Procedure Rules, it does not disclose the specific ground(s) upon which the application was brought but refers to succession proceedings initiated after the judgement.

In their submissions, the Applicants contended that the grant of Letters Ad Litem obtained in the said succession cause in respect of the estate of Priska Ochieng Alwala was the new and important matter whose discovery occurred after the judgement and which is the basis for the application for review.

Counsel submitted that the focus of the Applicants was on discovery of a new and important evidence as the ground for the application. This however is not supported by the application. However, be that as it may, the issue that arises is; what constitutes new and important evidence that can be a basis of an application for review of a judgement.

In my view, the new evidence envisaged in order 45(1) is evidence that was in existence as at the time the judgement was made which evidence did not come to the knowledge of the Applicant even after exercise of due diligence but was discovered after the judgement sought to be reviewed.

The new and important matter of evidence referred to in this case is one created after delivery of the judgement. The succession proceedings and the Grant of Letters of Administration Ad Litem cannot be said to have been discovered after the judgement.

The Appellant seems to challenge the propriety of the judgement of the court whether it was right for the court to decide the appeal in favour of the appellant who according to the applicant had obtained the land fraudulently. This can however only be addressed on appeal and not by an application for review. Having delivered the judgement, the court is functus officio as far as the merit of the judgement is concerned.

The application was brought after unreasonable and unexplained delay.

I find that the application does not meet the threshold for an application for review of judgement. None of the grounds under Order 45 Civil Procedure Rules have been demonstrated. The application lacks merit and is hereby dismissed.

Costs to the Respondent in the application (Appellant).

Orders accordingly.

Ruling read and signed at Kisumu and delivered virtually this 4th day of December, 2025.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

Okoth for the Applicant.

Akinyi for the Respondent.