



REPUBLIC OF KENYA



**KENYA LAW**  
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**Maiyo & another v Ng'enyi (Environment and Land Case 58 of 2017)  
[2025] KEELC 8649 (KLR) (11 December 2025) (Ruling)**

Neutral citation: [2025] KEELC 8649 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT AND LAND CASE 58 OF 2017  
LA OMOLLO, J  
DECEMBER 11, 2025**

**BETWEEN**

**CHARLES K MAIYO ..... 1<sup>ST</sup> PLAINTIFF**

**FREDRICK K SAWE ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ELIZABETH NG'ENYI ..... DEFENDANT**

**RULING**

**Introduction**

1. This ruling is in respect of the Plaintiffs/Applicants Notice of Motion application dated 14<sup>th</sup> April, 2025. It is expressed to be brought under Sections A, B (sic) & 3B of the *Civil Procedure Act* and Order 51 Rule 1 & Order 18 Rule 10 of the Civil Procedure Rules.
2. The application seeks the following orders;
  - a. That the honorable court be pleased to set aside, vary or review orders of 18<sup>th</sup> March, 2025.
  - b. That upon setting aside, varying or reviewing the orders of 18<sup>th</sup> March, 2025 re-open the plaintiffs' case for Re-cross examination of DW 1, to be produced by the defendant. (sic)
  - c. That Honorable (sic) court further be pleased to grant the Plaintiffs leave to summon or call the Director of survey of Kenya personally or his duly appointed agent to attend Court to testify and produce the original survey file Ref No.21350/XXIV/85 for L.R Kericho/Municipality Block 6/111.
  - d. That further any other necessary orders that be granted as the circumstances may require. (sic)
  - e. That the costs of this application be in cause.



3. The application is based on the grounds on its face and the supporting affidavit of the 1<sup>st</sup> Plaintiff/Applicant.

### **Factual Background**

4. The Plaintiffs/Applicants commenced the present proceedings vide the Plaint dated 18<sup>th</sup> January, 2011 where they seek the following prayers;
  - a. A declaration the Plaintiffs (sic) are the rightful joint owners of the title no. Kericho Municipality 6/111 (sic) (hereafter referred to as the suit land) and the Defendant's actions of invading the Plaintiffs suit land is illegal.
  - b. A permanent injunction restraining the Defendant, her agents, servants and/or employees from trespassing, entering, occupying or in any manner dealing with title No. Kericho Municipality/ Block 6/111.
  - c. Costs of the suit.
  - d. Any other relief.
5. The Defendant/Respondent filed her Statement of Defence and Counterclaim dated 10<sup>th</sup> February, 2011. It was amended on 30<sup>th</sup> May, 2014.
6. The Defendant/Respondent seeks the following orders in the Counterclaim;
  - a. A declaration that the Defendant is the legal owner of LR Unsurveyed Nursery School Plot – Kericho Municipality now also referred to as Kericho/Municipality Block 6/111.
  - aa. An order of demolition of the entire illegal structures put up on premises LR Unsurveyed Nursery School Plot- Kericho Municipality now also referred to as Kericho Municipality Block 6/111 at the Defendants costs.
  - aaa. Mesne profits
  - b. Costs and interest at Court rates.
  - c. Any other and or further relief as the Honourable Court may deem fit and just to grant.
7. On 7<sup>th</sup> May, 2025 the Court issued directions that the application under consideration be heard by way of written submissions.
8. On 8<sup>th</sup> May, 2025, there was a mention to confirm filing of submissions and on 21<sup>st</sup> July, 2025, the application was reserved for ruling.

### **The Plaintiffs/Applicants Contention**

9. The affidavit in support of the application is sworn on 14<sup>th</sup> April, 2025 by the 1<sup>st</sup> Plaintiff/Applicant.
10. The 1<sup>st</sup> Plaintiff/Applicant contends that the Court issued orders that DW1 be recalled.
11. The 1<sup>st</sup> Plaintiff/Applicant also contends that by mistake, the case was closed before DW1 could attend for re-cross examination.
12. The 1<sup>st</sup> Plaintiff/Applicant further contends that DW3 who is the Principal Surveyor, only produced copies of documents instead of producing the original survey file.



13. It is the 1<sup>st</sup> Plaintiff/Applicant's contention that the documents produced by DW3 are suspect (sic) and therefore they are seeking that the Director of Survey Kenya personally attends Court and produces the original survey file No. 213550/XXIV/85 (sic) together with all other documents.
14. It is also the 1<sup>st</sup> Plaintiff/Applicant's contention that he was in Court when DW3 testified and goes on to state that he observed that DW3's behavior was suspicious and that is why he is seeking that the Director of Survey comes to Court.
15. He ends his deposition by stating that he will be prejudiced if the application is not allowed.

### **The Defendant/Respondent's Response**

16. In response to the application, the Defendant/Respondent filed a Replying Affidavit sworn on 6<sup>th</sup> May, 2025.
17. She deposes that this is an old matter that was filed on 5<sup>th</sup> April, 2011. She goes on to state that the matter has been heard and all the parties have closed their cases.
18. She also deposes that directions were issued for the Plaintiffs/Applicants to file their submissions and upon service upon her, she was to file her submissions.
19. She further deposes that instead of filing their submissions, the Plaintiffs/Applicants opted to file the application under consideration that seeks to re-open their case.
20. It is her deposition that the application is frivolous and an abuse of the Court process and goes on to state that the application has been filed maliciously with the intention of delaying the determination of this suit.
21. It is also her deposition that the Plaintiffs/Applicants did not bother to have the application certified urgent to enable it to be determined before the mention date for submissions.
22. It is further her deposition that the Plaintiffs/Applicants cannot purport to re-open their case and yet her case is already closed. She adds that she is not ready to re-open her case.
23. The Defendant/Respondent deposes that the Plaintiffs/Applicants are seeking that the Director of Survey be personally or through his duly appointed agent attend Court and produce documents.
24. She also deposes that the Director of Survey has already been summoned to Court and has testified through his agent. She goes on to state that the Director of Survey also wrote the letter dated 12<sup>th</sup> June, 2024.
25. She further deposes that DW3 testified that the Plaintiffs/Applicants deed plan No. 85090 is not authentic as it belongs to parcels of land in Mombasa.
26. It is her deposition that the Director of Survey attached to his letter dated 12<sup>th</sup> June, 2024 the genuine deed plan which belongs to her.
27. It is also her deposition that the said letter is personally signed by the Director of Survey One F. Kimani and nothing will change if he either comes personally or appoints an agent.
28. It is further her deposition that it is not compulsory for the Director of Survey to personally attend to a matter as there are several offices under him. She goes on to state that the Director of Survey has several matters to attend to all over the country.



29. She deposes that it is not possible for the Director of Survey to avail the original file and goes on to state that this is because, his agent has already obtained copies of documents from the original file, certified them as true copies and availed them in Court.
30. She also deposes that the Plaintiffs/Applicants had ample opportunity to cross examine DW3 who was the agent of the Director of Survey.
31. She further deposes that the Plaintiffs/Applicants have had more than fifteen years to avail the required witnesses before closing their case.
32. It is her deposition that the Plaintiffs/Applicants have the habit of applying to either re-call or re-open their case. She goes on to state that the Plaintiffs/Applicants filed an application on 11<sup>th</sup> January, 2023 seeking to stop the hearing so that they can be recalled to give further evidence.
33. It is also her deposition that it is not enough for the Plaintiffs/Applicants to allege that DW3 testified in a suspicious manner. She goes on to state that the Plaintiffs/Applicants ought to have availed proof in support of the said assertions.
34. It is further her deposition that the Plaintiffs/Applicants had sufficient time to cross examine DW3 and for the Court to observe his demeanor.
35. She ends her deposition by stating that she is prejudiced by the application under consideration and she prays that it be dismissed with costs.

#### **The Plaintiffs/Applicants Response to the Defendant/Respondent's Replying Affidavit.**

36. The Plaintiffs/Applicants filed a "Further Supporting Affidavit" sworn by the 1<sup>st</sup> Plaintiff/Applicant in response to the Defendant/Respondent's replying affidavit. It is sworn on 27<sup>th</sup> May, 2025.
37. He deposes that he has been advised by his advocates on record that the Defendant/Respondent's Replying Affidavit runs short of an admission of the inadvertence omission of the proceedings and the procedure in the hearing.
38. He also deposes that they are seeking that their case be re-opened because the original survey file was not produced and the documents that were produced could not be authenticated.
39. He further deposes that the Defendant/Respondent's opposition to the interrogation of her documents is suspicious. He goes on to state that they are the ones intending to call the Director of Survey and this will not prejudice the Defendant/Respondent in any way.
40. It is his deposition that it is evident that the Defendant/Respondent is hiding something from the Court.
41. It is also his deposition that a suit can be re-opened before judgement is delivered. He goes on to state that the Court has powers to re-open the suit and summon any persons or call for any documents.
42. He ends his deposition by stating that the Court should allow justice to take its course and all the issues be prosecuted on well founded and legally sound evidence.

#### **Issues for Determination**

43. The Plaintiffs/Applicants filed their submissions on 9<sup>th</sup> June, 2025 while the Defendant/Respondent filed her submissions on 16<sup>th</sup> July, 2025.



44. The Plaintiffs/Applicants reiterate the averments of the 1<sup>st</sup> Plaintiff/Applicant's Replying Affidavit and submit that parties have a right to a fair hearing which includes being given an opportunity to present their case and evidence.
45. The Plaintiffs/Applicants then reiterate the averments in the 1<sup>st</sup> Plaintiff/Applicant's "Further Supporting Affidavit" and submit that the documents produced by DW3 were certified without their originality being traced. (sic)
46. The Plaintiffs/Applicants submit that to some extent DW3 disowned the documents he produced and it is therefore imperative that the Director of Surveys be called to provide the correct position.
47. The Plaintiffs/Applicants also submit that the Defendant/Respondent will be vindicated if the documents produced are genuine.
48. The Plaintiffs/Applicants conclude their submissions by urging the Court to allow their application with costs.
49. In her submissions, the Defendant/Respondent submits on the following issue;

**a. Whether the Court should set aside, vary and/or review and re-open the Applicant's case. (sic)**

50. The Defendant/Respondent relies on the judicial decision of Susan Wavinya Mutavi vs Isaac Njoroge & another [2020] eKLR and while reiterating the averments in her Replying Affidavit, submits that the Plaintiffs/Applicants application is an abuse of the Court process.
51. The Defendant/Respondent relies on the judicial decision of Samuel Kiti Lewa vs Housing Finance Co. of Kenya Ltd & another [2015] eKLR as was cited in Maina v J.K Horeria t/a Horeria & Company & another [2023]eKLR and submits that the Director of Survey has already been summoned to Court.
52. It is the Defendant/Respondent's submissions that the agent of the Director of Survey already testified and she will therefore be prejudiced if the Plaintiffs/Applicants are allowed to re-open their case and recall him.
53. The Defendant/Respondent relies on Article 50 (1) of *the Constitution*, Order 18 Rule 10 of the Civil Procedure Rules, the judicial decisions of Sameoi v National Housing Corporation & another (Civil Suit E008 of 2020) [2023] eKLR, Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others [2007]eKLR and submits that the Plaintiffs/Applicants application has been filed too late in the day.
54. The Defendant/Respondent reiterates the averments in her replying affidavit and submits that the Plaintiffs/Applicants have not met the required threshold to re-open their case.
55. The Defendant/Respondent concludes her submissions by relying on Section 27 of the Civil Procedure Rules and urges the Court to dismiss the Plaintiffs/Applicants application with costs.

**Analysis and Determination**

56. I have considered the Plaintiffs/Applicants application, the response thereto and the rival submissions. It is my view that the following issues arise for determination;
  - a. Whether the orders issues on 18<sup>th</sup> March, 2025 should be reviewed and the Plaintiffs/Applicants allowed to re-cross examine DW1.
  - b. Whether the Plaintiffs/Applicants should be granted leave to summon the Director of Survey to attend Court and produce the original survey file for land parcel No. Kericho/Municipality Block 6/111.



c. Who should bear costs of the application.

**A. Whether the orders issued on 18th March, 2025 should be reviewed and the Plaintiffs/Applicants allowed to re-cross examine DW1.**

57. The Plaintiffs/Applicants are seeking that the Court reviews its orders issued on 18<sup>th</sup> March, 2025 and they be allowed to re-cross examine DW1.

58. The Plaintiffs/Applicants contend that the Court had issued orders that DW1 be recalled but due to an oversight, he was not recalled.

59. Counsel for the Defendant/Respondent informed the Court on 7<sup>th</sup> May, 2025 that they did not object to DW1 being recalled.

60. A perusal of the Court record shows that on 18<sup>th</sup> March, 2025 the Court stated as follows;

“The Defence case is hereby marked as closed. The Plaintiff shall have 21 days to file and serve submissions. The Defendant shall have 21 days upon service. Mention on 7<sup>th</sup> May, 2025 for submissions”

61. This is the order of the Court that the Plaintiffs/Applicants are seeking to have reviewed.

62. 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.”

63. Order 45 Rules 1 and 2 of the Civil Procedure Rules 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.”

64. In the judicial decision of Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR the Court held as follows:

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.” (Emphasis mine)

65. As was held in the above cited judicial decision, the circumstances under which the Court may review its orders are as follows:

- a. Discovery of new evidence which was not within the knowledge of the Applicant or could not have been produced at the time an order was made or a decree issued.
- b. On account of mistake or error apparent on the face of the record.
- c. For any sufficient reason.

66. In the present matter, it is apparent that the Plaintiffs/Applicants did not rely on any of the above three grounds in seeking that the Court reviews its orders issued on 18<sup>th</sup> March, 2025.

67. Nevertheless, a further perusal of the Court record shows that on 30<sup>th</sup> October, 2024 the Court stated as follows;

“This matter shall proceed from where it had reached. DW1 is hereby recalled for purposes of producing his National Identity Card and Letter of Discharge from Kenya Defence Forces. Summons to issue to him...”

68. From the proceedings of 30<sup>th</sup> October, 2024, it is apparent that leave was granted for DW1 to be recalled. The reason and extent of recall was also set out.

69. Section 146 (4) of the [Evidence Act](#) provides as follows;

“(4) The Court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.”

70. Since the Defendant/Respondent did not object to DW1 being recalled, my view is that no prejudice will be caused. Further the reason of his recall and extent of evidence to be tendered during his recall has been set out in the order.

71. I appreciate that this will cause delay but my view is that it is better that all parties are given opportunity to present their case rather than go home thinking that the outcome would have been different had it not been for them being denied opportunity to state their claim or defend it.



**B. Whether the Plaintiffs/Applicants should be granted leave to summon the Director of Survey to attend Court and produce the original survey file for land parcel No. Kericho/Municipality Block 6/111.**

72. The Plaintiffs/Applicants are seeking leave to summon the Director of Survey, Kenya or his duly appointed agent, to attend Court and produce the original survey file Ref No. 21350/XXIV/85 for land parcel No. Kericho/Municipality Block 6/111.
73. The Plaintiffs/Applicants contend that a Principal Surveyor testified as DW3 and produced copies of various documents instead of producing the original Survey File.
74. The Plaintiffs/Applicants also contend that it is important for the Director of Survey to come to Court and testify because DW3 acted suspiciously as he was giving his evidence.
75. The Defendant/Respondent on the other hand contends that the Director of Survey was summoned and his agent gave evidence on his behalf.
76. The Defendant/Respondent also contends that the Director of Survey wrote a letter dated 12<sup>th</sup> June, 2024.
77. The Defendant/Respondent further contends that it is not necessary for the Director of Survey to personally attend Court and produce the original file because his agent produced copies of documents that are in the said file.
78. It is the Defendant/Respondent's contention that the Plaintiffs/Applicants have not availed any evidence to demonstrate that DW3 testified suspiciously and she therefore urges the Court to dismiss the application.
79. Order 16 Rule 1 of the Civil Procedure Rules provides as follows;
- “ 1. At any time before the trial conference under Order 11 the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.”
80. In the judicial decision of Dahir Sadik Ausaad v Modogashe Construction Ltd & 3 others [2016] eKLR the Court held as follows;
- “ This Court has powers to issue summons to witnesses to attend a trial. That is done on the application of any party. It is also done after the case has been certified as ready for hearing.”
81. A perusal of the Court record shows that on 30<sup>th</sup> October, 2024, the Court issued summons to among other persons, the Director of Survey Ruaraka, Nairobi to attend Court and give evidence.
82. A further perusal of the Court record shows that on 18<sup>th</sup> March, 2024, one Elvin Ongesa testified as DW3. It was his evidence that he is a Principal Land Surveyor based at the Survey of Kenya Headquarters and he was in Court to represent the Director of Survey.
83. It was also his evidence that he has been at the said office for a period of five years and that he had the authority to represent the Director of Survey and testify.



84. He testified and was cross examined by Counsel for the Plaintiffs/Applicants. Upon cross examination, DW3 confirmed that summons were issued to the Director of Survey who is known as Weldon Maritim. He also admitted that he did not have a letter authorizing him to testify.
85. It is evident that summons were issued to the Director of Survey to come to Court and give evidence.
86. It is also evident that DW3 gave his evidence as a representative of the Director of Survey.
87. It is further evident that Counsel for the Plaintiffs/Applicants had the opportunity to cross examine DW3 on the veracity of his evidence.
88. Given the said circumstances, it is my view that the Plaintiffs/Applicants have not laid any basis for this Court to grant them leave to summon the Director of Survey.
89. On the supposed suspicious behavior of DW3 while giving evidence, I wish to state that it is the court that is clothed with authority to observe demeanor of witnesses and make notes as may be relevant. The Plaintiffs/Applicants, unfortunately, cannot direct the Court on what deductions to draw for what they observed. This is a preserve of the Court.

**c. Who should bear costs of the application.**

90. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

**Disposition**

91. Taking the foregoing into consideration, the Plaintiffs/Applicants application partially succeeds and I order as follows;
  - a. The Plaintiffs/Applicants are hereby granted leave to recall DW1 for further cross examination; for reasons and to the extent set out in the order issued by this court on 30<sup>th</sup> October, 2024.
  - b. The costs of this application shall abide the outcome of the suit.
92. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 11<sup>TH</sup> DAY OF DECEMBER, 2025.**

**L. A. OMOLLO**

**JUDGE.**

In the presence of: -

Mr. Miruka for the Plaintiffs/Applicants.

Mr. Gai for the Defendant/Respondent.

Court Assistant; Mr. Joseph Makori

