Omino & 3 others (Suing as Personal Representatives of Henry Micah Omino - Deceased) v Tich Housing Co-operative Society Ltd (Environment and Land Case Civil Suit 43 of 2020) [2025] KEELC 18492 (KLR) (17 December 2025) (Ruling)

Neutral citation: [2025] KEELC 18492 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT AND LAND CASE CIVIL SUIT 43 OF 2020

SO OKONG'O, J

DECEMBER 17, 2025

BETWEEN

JOSEPHAT KOLA OMINO ..... 1ST PLAINTIFF

LINDA ATIENO OMINO ..... 2ND PLAINTIFF

PHILISTAS OLILO OMINO ..... 3RD PLAINTIFF

ELIZABETH ANYANGO OMINO ..... 4TH PLAINTIFF

SUING AS PERSONAL REPRESENTATIVES OF HENRY MICAH OMINO - DECEASED

AND

TICH HOUSING CO-OPERATIVE SOCIETY LTD ..... DEFENDANT

RULING

1. The full facts of this case are set out in the ruling of this court delivered herein on 10th July 2025. In summary, the Plaintiffs brought this suit against the Defendant through a plaint dated 10th July 2020 seeking the following reliefs;

    a. A declaration that the transfer of all that property known as L.R No. 6096 (I.R 3411) comprising 162 acres (hereinafter referred to as "the suit property") registered on 20th January 2009 was illegal, irregular and fraudulent and as such null and void.

    b. An order directing the cancellation of entry No. 34 by which the title to the suit property was transferred to the Defendant and restoration of the property to the deceased.

    c. An order directing the Defendant to vacate the suit property and in default be evicted therefrom at its costs.

d. A permanent injunction restraining the Defendant whether by itself, its agents or anyone claiming through it from interfering with the Plaintiffs' use and possession of the suit property.

e. General damages for trespass

f. Costs of the suit

2. The Plaintiffs averred that at the time of his demise, the deceased, Henry Micah Omino, was the registered owner of the suit property. The Plaintiffs averred that the deceased and the Defendant entered into an agreement dated 4th September 2007 under which the deceased agreed to sell and the Defendant agreed to purchase a portion of the suit property measuring 70 acres or thereabouts at a consideration of Kshs. 150,000/- per acre, making an aggregate total price of Kshs. 10,500,000/-. The Plaintiffs averred that under the terms of the said agreement, the deceased deposited the title for the suit property with the advocates who were representing both parties in the transaction. The Plaintiffs averred that in breach of the terms of the agreement, the Defendant failed to facilitate the subdivision of the suit property and instead irregularly, illegally and fraudulently caused the entire parcel of land to be transferred to its name before proceeding to take possession thereof. The Plaintiffs averred that the transfer of the suit property to the Defendant was null and void and its entry into the suit property amounted to trespass. The Plaintiffs averred that due to the Defendant's failure to comply with the terms of the agreement of sale, the Defendant forfeited the deposit it had paid to the deceased.

3. The Defendant filed a statement of defence on 29th July 2020. The Defendant admitted that it entered into an agreement dated 4th September 2007 with the deceased for the purchase of a portion of the suit property. The Defendant also admitted the terms of the said agreement. The Defendant denied, however, that it irregularly, illegally and fraudulently transferred the whole of the suit property to its name and thereafter took possession thereof. The Defendant averred that Rachier & Amolo Advocates, who were acting for both parties in the transaction, erroneously transferred the entire parcel of land in the name of the Defendant instead of the portion thereof measuring 70 acres, which was purchased by the Defendant and which was to be transferred to the Defendant after the subdivision of the suit property.

4. The Defendant averred that upon realising the error, the said common advocates sought to correct the same but were unable to do so since the Original Grant (title) for the suit property and the consents that had been obtained were misplaced and later declared lost. The Defendant averred that it paid to the deceased Kshs. 8,208,033/- leaving a balance of Kshs. 2,291,967/- only, which it had always been ready, able and willing to pay to the Plaintiffs once they agreed to receive the same. The Defendant averred that it had commenced the process of obtaining a provisional title in place of the lost original title so that the erroneous transfer could be corrected. The Defendant averred that contrary to the allegation that it had occupied the whole of the suit property, the Plaintiffs were in occupation of a portion of the suit property measuring 92 acres. The Defendant averred that it would be inequitable to cancel the transaction between the Defendant and the deceased and that it was ready and willing to complete the agreement of sale between it and the deceased. The Defendant urged the court to dismiss the suit with costs.

5. The suit was fixed for hearing on 9th April 2024. When the matter came up on 9th April 2024, at the request of the advocates for the parties who were all present in court, the parties were given a few minutes to discuss if they could settle the matter. When the matter was called out again, the advocates for the parties informed the court that they had reached a partial consent in the matter, which they wished the court to record. The consent was read to the court by the advocate for the Defendant, and the terms thereof were confirmed by the advocates for the 1st to 3rd Plaintiffs and the advocate for the

4th Plaintiff. The consent was adopted as an order of the court in the presence of the advocates for all the parties, and the 1st and 4th Plaintiffs. The order made by the court was on the following terms:

> " By consent;
>
> This suit is settled on the following terms;
>
> 1. The deceased Henry Micah Omino sold to the defendant, Tich Housing Co-operative Society Limited a portion of L.R. No. 6096 (I.R 3411) measuring seventy (70) acres.
> 2. The transfer of the entire parcel of land, L.R. No. 6096 (I.R 3411) to the defendant was erroneous and the same is revoked.
> 3. The ownership of L.R. No. 6096 (I.R 3411) shall revert to the deceased, Henry Micah Omino upon the said revocation of the defendant's title.
> 4. The caveats and/or cautions registered against the title of L.R. No. 6096 (I.R 3411) are hereby lifted.
> 5. The parties shall take accounts to determine the balance of the purchase price due to estate of the deceased in respect of the portion of L.R. No. 6096 (I.R 3411) measuring 70 acres that was sold by the deceased to the defendant.
> 6. Once the balance of the purchase price due is ascertained, the parties shall agree on the mode of payment thereof.
> 7. Once the balance of the purchase price has been paid to the estate of the deceased, L.R. No. 6096 (I.R 3411) shall be subdivided into two (2) portions and the portion thereof measuring 70 acres that was sold by the deceased to the defendant shall be transferred to the defendant.
> 8. The balance of the purchase price ascertained and found to be due to the estate of the deceased shall attract interest at court rates from the date of filing this suit until payment in full.
> 9. The costs for the transfer of L.R. No. 6096 (I.R 3411) from the name of the defendant to that of the deceased and the costs for the subdivision of L.R. No. 6096 (I.R 3411) into two (2) portions as aforesaid shall be met by the defendant.
> 10. The parties shall agree on the costs of the suit failure to which the same shall be determined by the court.
> 11. Either party shall be at liberty to apply."

6. The 1st Plaintiff, who was represented by an advocate when the consent judgment was entered on 9th April 2024, filed a notice to act in person dated 11th November 2024 and thereafter brought an application by way of a Notice of Motion dated 30th January 2025 seeking the following orders;

    1. That the court be pleased to set aside and/or vary the consent judgment entered on 9th April 2024.
    2. That upon the judgment being set aside, the court be pleased to allow the parties to sit down and agree on the possible consent if they so wish.

3. That the costs of the application be provided for.

7. The 1st Plaintiff averred that the advocate who acted for him when the consent judgment was entered by the court did not brief him on the consent. The 1st Plaintiff averred that it would serve the interest of justice if the application were allowed. The 2nd and 3rd Plaintiffs supported the application, while the 4th Plaintiff and the Defendant opposed the application.

8. In a ruling delivered on 10th July 2025, this court dismissed the 1st Plaintiff's application with costs. In the ruling, the court stated as follows in part:

> "The burden was on the applicant to establish the grounds for setting aside the consent judgment. Apart from claiming that he was not consulted before the consent was recorded, the applicant has not claimed that the consent was illegal, fraudulent or was entered into through misrepresentation or collusion between any of the parties or their advocates. The applicant has not even told the court how he is affected or prejudiced by the impugned consent judgment. Since the applicant was present in court when the consent by the parties was read to the court and adopted as a judgment, I am not persuaded that the applicant's previous advocates entered into the consent without consulting the applicant. There is no evidence that the applicant has lodged a complaint against his previous advocates with the relevant authorities for professional misconduct or malpractice. I have also noted that the applicant's application was brought 9 months after the consent judgment was entered by the court. If indeed the applicant was not consulted on the consent that was read to the court in the presence of the parties and their advocates, it could not have taken the applicant 9 months to move the court to set aside the said consent judgment."

The application before the court

9. What is now before the court is the 1st Plaintiff's Notice of Motion application dated 17th July 2025, brought on his behalf by the firm of Amondi & Company Advocates. In the application, the 1st Plaintiff (hereinafter referred to as "the Applicant") has sought an order for the review of the ruling dated 10th July 2025, and the setting aside of the consent judgment entered on 9th April 2024. The Applicant has also sought the costs of the suit. The Applicant contended that the court dismissed his application to set aside the consent judgment on 10th July 2025 on the main ground that the Applicant had failed to adduce evidence of fraud, illegality, collusion, or misrepresentation by the Applicant's previous advocate to warrant the variation or setting aside of the consent. The Applicant averred that he had discovered new evidence which establishes mischief, fraud, and collusion on the part of his previous advocates in the recording of the impugned consent judgment. The Applicant averred that the new evidence was compelling and pointed to the Applicant's previous advocate having acted without instructions and fraudulently.

10. In his affidavit in support of the application, the Applicant stated that after the consent judgment was recorded on 9th April 2024, he visited his previous advocate's office in July 2024 and asked him why he had entered into the said consent without involving him. The Applicant averred that he instructed the said advocate through a letter dated 17th July 2024 to apply for the variation of the said consent. The Applicant averred that his said advocate asked him to give proposals on how he wanted the consent to be varied. The Applicant averred that he wrote to the said advocate on 19th July 2024 with a proposal on how he wanted the consent varied. The Applicant averred that his said former advocate promised him that he would act on his instructions, which he never did. The Applicant averred that he forwarded copies of his said letters to his previous advocate, to the Defendant's advocates for the record. The Applicant annexed his letters to the said advocate as exhibits. The Applicant averred that when his

previous advocate failed to act on his instructions, he filed a notice to act in person and thereafter an application to set aside the consent judgment on 31st January 2025. The Applicant averred that by promising that he would apply for the variation of the said consent and failing to do so was a clear indication that the advocate acted without instructions. The Applicant averred that since he was acting in person, he did not think that the correspondence that he exchanged with his previous advocates after the consent judgment was entered would be relevant to his application for review. The Applicant averred that it was not until he engaged his advocates on record that he was advised that the said correspondence was relevant and should have been produced in his setting aside application. The Applicant averred that he had now placed the evidence before the court, based on which he urged the court to review its ruling of 10th July 2024 and set aside the consent judgment of 9th April 2024.

11. The Applicant filed a further affidavit sworn on 8th August 2025 in which he stated that he had made a complaint against his previous advocate with the Advocates Disciplinary Tribunal. The Applicant averred that the complaint dated 29th July 2025 was lodged on 7th August 2025.

12. The application was opposed by the 4th Plaintiff and the Defendant. The 4th Plaintiff opposed the application through the grounds of opposition dated 12th September 2025. The 4th Plaintiff averred that the impugned consent judgment was entered in the presence of and with the participation of all the parties. The 4th Plaintiff averred that the purported new evidence was an afterthought and could not be a basis for setting aside a consent. The 4th Plaintiff averred that the application was an abuse of the process of the court.

13. The Defendant opposed the application through a replying affidavit sworn by its advocate, Richard Onsongo, on 18th July 2025. The Defendant termed the application misconceived and fatally defective. The Defendant averred that the application had not satisfied the conditions set out in Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules. The Defendant averred that what was claimed by the Applicant to be new evidence was correspondence that was in the possession of the Applicant when he brought his application dated 30th January 2025, and as such, was not new. The Defendant averred that the application was another attempt by the Applicant to scuttle the progress of the suit for his personal benefit.

14. The application was argued on 23rd September 2025 when Ms. Nyambeki appeared for the 1st Plaintiff/Applicant, Ms. Ouma for the 4th Plaintiff and Mr. Onsongo for the Defendant. The Applicant's advocate submitted that the Applicant's application was brought on the ground of the discovery of new evidence. The Applicant's advocate submitted that the new evidence consisted of the letters that the Applicant wrote to his previous advocates after the impugned consent judgment was entered by the court. The Applicant's advocate submitted that since the Applicant was acting in person, he did not appreciate the importance of the said letters. The Applicant's advocate submitted that the Applicant had no problem with the consent. She submitted that the Applicant's complaint was that the consent was not on his terms. The Applicant's advocate urged the court to allow the application in the interest of justice.

15. The Defendant's advocate submitted that the fact that the Applicant acted in person in his application dated 30th January 2025 was not a ground for review. He submitted that the issues raised in the present application were the same issues that had been raised in the application dated 30th January 2025. The Defendant's advocate submitted that the letters claimed to be new evidence were in the possession of the Applicant when he filed the application dated 30th January 2025 and should have been produced then. For the 4th Plaintiff, Ms. Ouma relied entirely on the 4th Plaintiff's grounds of opposition dated 12th September 2025.

Analysis and Determination

17. I have considered the Applicant's application together with the affidavits filed in support thereof. I have also considered the grounds of opposition filed by the 4th Plaintiff and the replying affidavit filed by the Defendant in opposition to the application. Finally, I have considered the submissions by the advocates for the parties. The only issue arising for determination in the application before me is whether a valid basis has been laid by the Applicant to justify a review of the court ruling and order made herein on 10th July 2025 in the Applicant's application dated 30th January 2025. The application was brought under Section 80 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, and Order 45 Rule (1) of the Civil Procedure Rules.

18. Section 80 of the *Civil Procedure Act* provides as follows:

Any person who considers himself aggrieved –

> " a. 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."

19. Order 45 Rule 1 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."

20. In Francis Origo & another v. Jacob Kumali Mungala, Eldoret CA No. 149 of 2001[2005]eKLR, the Court of Appeal stated as follows on review:

> " ...it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the application for review without unreasonable delay."

21. Similarly, in Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints, Nairobi C.A Civil Appeal No. 132 & 133 of 2014, [2016] KECA 73 (KLR), the same court stated as follows:

> " To qualify for a review there are stringent requirements to be met. For instance the applicant must demonstrate that as a matter of right he can appeal but has not exercised that option; that no appeal lies from the decree with which he is dissatisfied; or that he has discovered

a new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced when the order was made; or that there is a mistake or error apparent on the face of the record; or that there are sufficient reasons to warrant the review. It is also a requirement that the application for review must be brought without unreasonable delay."

22. In John Kamau Ruhangi v. Kenya Reinsurance Corporation, Civil Appeal No. 208 of 2006, [2012]eKLR,__ the court stated as follows:

> " It is important to bear in mind that Order 44 Rule 1 of the Civil Procedure Rules sets out the purview of the review jurisdiction. A point outside that purview is not a ground for review. A point which may be a good ground of appeal like an erroneous view of law or evidence is also not a ground for review. That a court reached an erroneous conclusion because it proceeded on an incorrect exposition of the law or misconstrued a statute or other provision of law is no ground of review. All these are grounds of appeal."

23. The Applicant's application was brought on the ground of the discovery of a new and important matter or evidence. I agree with the Defendant that the letters dated 17th July 2024 and 19th July 2024 cannot be described as new matter or evidence within the meaning of the word under Order 45 Rule 1 (b) of the Civil Procedure Rules. The new matter or evidence which can form a basis for review under Order 45 Rule 1 of the Civil Procedure Rules must be a matter or evidence which, first, is new, and secondly, could not be produced by the Applicant applying for review when the order or decree sought to be reviewed was made. It is common ground that the two letters which the Applicant wrote to his previous advocates were within the possession of the Applicant when he made the application dated 30th January 2025. With due diligence, the Applicant could have produced the letters when he made the application dated 30th January 2025. The Applicant has therefore not satisfied the condition for review on the ground of discovery of an important matter or evidence.

24. I wish to add that even if I were to accept the two letters as new and important matter or evidence which the Applicant could not produce during the hearing of the application dated 30th January 2025, after exercise of due diligence, I would still not have reviewed the ruling and order made on 10th July 2025. This is because the Applicant's application dated 30th January 2025 was not dismissed solely on the ground that the Applicant had not proved that his previous advocates recorded the impugned consent without his instructions. That was just one of the grounds on which the application was dismissed. The application was dismissed also on the ground that it was brought after an unreasonable delay of 9 months from the date of the entry of the impugned consent judgment.

Conclusion

25. In the final analysis and for the foregoing reasons, I find no merit in the Notice of Motion application dated 17th July 2025. The application is dismissed with costs to the Defendant and the 4th Plaintiff.

DELIVERED AND SIGNED AT KISUMU ON THIS 17TH DAY OF DECEMBER 2025

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Nyambeki for the 1st to 3rd Plaintiffs

Ms.Ouma h/b for Ms. Chuchu for the 4th Plaintiff

Mr. Onsongo for the Defendant

Ms. J. Omondi-Court Assistant