

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 99 OF 2020

**NEHEMIAH
OCHIENG MOGUSU JUDGEMENT
CREDITOR/APPLICANT**

VERSUS

**MWIHAKI MBOGO 1ST JUDGEMENT
DEBTOR/RESPONDENT**

**SEVENTH DAY ADVENTIST
CHURCH (EA) LTD ... 2ND JUDGEMENT
DEBTOR/RESPONDENT**

RULING

1. What is before Court for determination is the Judgement Creditor's Notice of Motion application dated the 21st July, 2025 where it seeks the following Orders:

a. Spent

b. That this Honourable Court be pleased review and set aside the orders of 3rd March, 2025, striking out the Decree Holder's Application dated 7th October, 2024.

c. That this Honourable Court be pleased to reinstate and fix for immediate hearing, the Application dated 7th October, 2024 even by written submissions; and

d. That the costs of this be granted to the Decree holder.

2. The application is premised on the grounds on its face and the supporting affidavit of NEHEMIAH OCHIENG MOGUSU who deposes that the application dated 7th October, 2024 to enforce the Court's Order and Decree of 6th July, 2023 was fixed for mention on the 3rd March, 2025 without notice to him or his advocate. Further, that on the 3rd March, 2025, the said application was struck out without notice to any party. He only learnt of the striking out through the Case

Tracking System. He contends that he already complied with

the Court's directions of 14th October, 2024 save for the Respondent who had neither filed nor served responses to the Enforcement Application. He argues that the Enforcement Notice was dismissed during a mention and not a hearing occasioning miscarriage of justice. He explains that the 4th Clause of Order and Decree of 6th July, 2024 was directed to the 1st Defendant to vacate the suit premises within ninety (90) days from the said date, failure of which eviction orders were to issue. He avers that despite the express orders, the Judgement Debtors' were yet to yield vacant possession of LR No. DAGORETTI/ RIRUTA/ S.954. Further, that he has been denied enjoyment of the said land and cannot even claim mesne profits. He reiterates that there still remains a Decree and Order of this Court pending execution.

3. The 1st Respondent opposed the application by filing a replying affidavit where she avers that the Applicant's enforcement application was dismissed for want of

prosecution as neither the Applicant nor the Advocate were present in Court when the matter was mentioned. She insists that mention dates are accessible through the Case Tracking System. She contends that the prayers seeking review of the orders given on the 30th March, 2025 is founded on bad law. She claims she filed an Appeal. She contends that the instant application has been filed five months late. She reiterates that the Applicant has not demonstrated whether there was an error apparent on the face of record nor presented new material evidence to warrant the review. Further, that the Applicant slept on his rights.

4. The instant application was canvassed by way of written submissions.

Analysis and Determination

5. Upon consideration of the instant Notice of Motion application

including the respective affidavits and submissions, the only issue for determination is whether the Court should review

or set aside the Orders of 3rd March, 2025, striking out the Decree Holder's Application dated 7th October, 2024 and reinstate the said application for hearing.

6. The Applicant has sought for review of this Court's orders dated the 3rd March, 2025 which dismissed his application dated the 7th October, 2024 for want of prosecution. The 1st Defendant has opposed the instant application insisting that the Applicant was indolent, had filed the application late and that there was no error apparent on the face of record or presentation of new evidence to warrant review.
7. On perusal of the Court record, I note on the 3rd March, 2025, the 2nd Defendant's Counsel informed Court that he was not aware why the matter had been fixed for mention as there was a pending Appeal No. E 839 of 2023. The Court then proceeded to mark the file as closed without dealing with the Applicant's application seeking to enforce the Decree. There is no record in the proceedings where the

Court dismissed the Applicant's application for want of prosecution. From the Court record, I note there is a favourable judgement in favour of the Applicant. The 1st Defendant has opposed the application insisting that there is a pending Appeal but there is no indication if the Court of Appeal granted a stay of execution pending Appeal.

8. The grounds upon which a judgement or order of the Court can be reviewed and or set aside are stipulated under Section 80 of the Civil Procedure Act as well as Order 45 of the Civil Procedure Rules.
9. Section 80 of the Civil Procedure Act stipulates that:

***—“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.”

10. While Order 45, rule 1 (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 judgment to the court which passed the decree or made the order without unreasonable delay.’

11. On review the Court of Appeal stated as follows in **Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2019] eKLR;**

“an order for review is restricted to parameters set out by the law. The Appellant may have had a genuine grievance but this did not fall within the ambit of a review application.”

12. In this instance, the Applicant has sought for review of this Court’s order issued on the 3rd March, 2025, which has been vehemently opposed by the Respondent. In the case of **Muyodi v Industrial and Commercial Development Corporation and Another EALR (2006) EA 243**, the Court of Appeal while dealing with issues of review held that:

“For an application for review under Order 45 Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to

show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay.”

13. Based on the facts before Court while associating myself with the decisions cited, noting that there is a favourable judgement in favour of the Applicant, which is yet to be enforced. Further, noting that this Court proceeded to mark the file as closed during the mention, yet the Applicant's application for enforcement of Decree was pending; I find that there was indeed an error apparent on the face of record and will proceed to review the Order closing this Court file, reopen the Court file and direct that the application dated the 7th October, 2024 seeking enforcement of the said Judgement to be heard on merit.

14. It is against the foregoing that I find the Plaintiff's Notice of Motion dated the 21st July, 2025 merited and will allow it. I direct that the Plaintiff Application dated 7th October, 2024

be fixed for hearing within thirty (30) days from the date hereof, failure of which it will stand dismissed.

15. Costs in the cause

**DATED SIGNED AND DELIVERED AT NAIROBI THIS
15TH DAY OF JANUARY, 2026**

CHRISTINE OCHIENG

JUDGE

In the presence of:

Ondiwa for Rachuonyo for 2nd Respondent

Court Assistant: Joan