

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ELC LC NO 14 OF 2013

SIMON MUTAI (*Suing as the administrator of the estate of*

JOHN KIMUTAI SOI)
PLAINTIFF

VERSUS

DAVID MACHARIA MWANGI (*Sued as the administrator of the*
estate of the late LILY WARUGURU MWANGI) **1ST**
DEFENDANT

PEATER ITOTIA RUGU (*Sued as the administrator of the*
estate of the late PAUL RUGU ITOTIA) **2ND**
DEFENDANT

Consolidated with ELC NO. 60B of 2022 (formerly Nakuru HCCC No. 324 of
2009)

DAVID MACHARIA MWANGI (*Suing as he administrator*
of the estate of LILY WARUGURU MWANGI)
PLAINTIFF

VERSUS

SIMON MUTAI (*Sued as the administrator of the*
estate of the late JOHN KIMUTAI SOI) **DEFENDANT**

THE DIRECTORS KALENJIN ENTERPRISES LTD **DEFENDANT**

THE DISTRICT LAND REGISTRAR, NAKURU **DEFENDANT**

RULING

1. This ruling is in respect of the 1st Defendant's Notice of Motion dated 20th November, 2025, seeking the following orders:
 - a) ***Spent.***
 - b) ***Spent.***
 - c) ***Spent.***
 - d) ***That the judgment delivered on the 3rd November 2025, together with all other consequential orders be reviewed, varied and/or set aside.***
 - e) ***That the costs of this application be provided for***

2. The application was supported by the annexed affidavit of David Macharia Mwangi, sworn on 20th November 2025, and deponed that he has now traced crucial documents relating to the suit parcel of land which took him time to trace. He urged the court to allow the application as prayed.

3. The 1st Defendant/Applicant also filed a replying affidavit sworn on 9th January 2026, in response to the Plaintiff's grounds of opposition and stated that the documents are relevant as they are in respect to the ownership of the disputed parcel of land. That he managed to trace the documents after the judgment and filed the application for review immediately.

4. The 2nd Defendant/ Respondent filed a replying affidavit sworn on 8th January 2026, by Benard Koskei, who opposed the application and urged the court to dismiss it with costs.

2ND DEFENDANT'S SUBMISSIONS

5. Counsel for the 2nd Defendant filed submissions dated 9th December 2025, and identified the issue for determination as whether the judgment delivered on 3rd November 2025, together with all consequential orders should be reviewed, varied and/or set aside.
6. Counsel relied on Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, and submitted that the reasons given by the Applicant that he has just traced some crucial documents after the delivery of the judgment is not tenable.
7. It was counsel's submission that the court having delivered a judgment on merit, is now *functus officio*, and cannot receive and consider additional evidence post-judgment. Counsel relied on the case of **Minister for Health & another v Uasin Gishu Memorial Hospital Limited & another; Attorney General & another (Interested Parties) [2019] KESC 14 (KLR)**, and submitted that whereas the principles enunciated in this case are in respect of taking additional evidence by Appellate courts, they also apply to the instant application calling for additional evidence post judgment.

8. Mr. Ratemo further submitted that the suit property Nakuru Municipality Block 29/914(Ronda) does not appear anywhere on the documents alleged to have been traced. Further that the Applicant has not demonstrated that the alleged additional evidence is directly relevant to the matter before the court.
9. Similarly, this suit was instituted on 12th November 2009, and the Applicant has not demonstrated that the deceased was unable to trace the alleged documents during her lifetime. Further that the Applicant has not demonstrated what efforts he made to trace the alleged documents prior to the hearing.
10. Mr. Ratemo, urged the court to dismiss the application with costs as the Applicant seeks to patch up the gaps in his case.

PLAINTIFF'S SUBMISSIONS

11. Counsel for the Plaintiff filed grounds of opposition and submissions dated 6th January 2026, respectively, and identified the issues for determination as whether the 1st Defendant/Applicant has met the legal threshold for review of the judgment of this Honourable court, and who should bear costs.
12. Counsel relied on Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules and submitted that the conditions for review are stringent and must be strictly satisfied. Counsel relied on the case of National **Bank of Kenya Ltd V Ndungu Njau [1997] eKLR** where the

Court of Appeal held that a review cannot be granted merely because a party is dissatisfied with the decision or seeks to re-argue the case as that would amount to an appeal.

13. According to counsel, the 1st Defendant/Applicant has not alleged/demonstrated any error apparent on the face of the record as the judgment sought to be reviewed was heard on merit after a full hearing where all issues were addressed.
14. Mr. Mutai submitted that the Applicant's alleged new evidence comprising of share certificates and an agreement entered into between Philip Mwangi Kibiribiri and Andrew Agui Rotich does not qualify as new and important evidence within the meaning of Order 45 of the Civil Procedure Rules, for the following reasons: *that the said individuals are not parties to this suit, the 1st Defendant was not a party to the alleged agreement and has no locus standi to rely on them, the agreement does not mention , describe or relate to the suit land, and that the share certificate has no probative value hence could not have influenced the court's findings even if they were produced.*
15. Counsel relied on the case of Francis **Origo & Another V Jacob Kumali Mungala [2005] eKLR**, where the Court of Appeal emphasized that review is not meant to introduce evidence that does not go to the root of the decision and evidence that is irrelevant to matters in controversy cannot form a basis for review.

16. Mr. Mutai further submitted that this suit has been in court since 2013, and no explanation has been offered as to where the alleged evidence was for over a decade and relied on the case of **Pancras T. Swai V Kenya Breweries Ltd [2014] eKLR**, where the Court of Appeal held that a party must clearly demonstrate that the new matter could have been discovered with reasonable diligence before judgment. Counsel therefore urged the court to dismiss the application with costs to the Plaintiff/respondent.

ANALYSIS AND DETERMINATION

17. The issue for determination is whether the 1st Defendant has met the threshold for review of the judgment of this court dated 3rd November 2025.
18. The principles for the grant of a review order are governed by Order 45 rule (1) of the Civil Procedure Rules and Section 80 of the Civil Procedure Act. Order 45 rule (1) sets the rules.
19. Order 45, Rule 1 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.”

20. Further, Section 80 of the Civil Procedure Act, Cap. 21 Laws of Kenya gives the court power for review 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

21. For an Applicant to succeed in an application for review, such applicant must have discovered a new and important matter which after the exercise of due diligence, was not within his/her knowledge at the time the decree was passed or the order was made; or that there was a mistake or error apparent on the face of the record; or that there are sufficient reasons and the application must be made without due delay.

22. The Applicant in this case just stated that he discovered new documents after the delivery of the judgment. He has not demonstrated whether he exercised due diligence and that these documents were not within his knowledge at the time the judgment was delivered. This matter was filed in 2012, and has been in court for many years. The 1st Defendant /Applicant was substituted to take over the case from the late mother Lily Waruguru, It is on record that the 1st Defendant produced a list of documents dated 16th April 2025, and a further list of documents filed by the late Waruguru dated 20th September 2012. If there were other documents to be relied on, the late Waruguru could have applied to be granted time to file further documents if she had them.

23. It is further on record that DW1 the Applicant herein told the court that the documents issued to his father by Kalenjin Enterprises were presented at the Tribunal therefore, he did not have them. This means that at all material times, he knew of documents which he ought to have done due diligence to seek their production either from the makers or issuing a Notice to produce. Courts cannot allow parties to do their cases

piecemeal or by instalments. Any alleged new evidence without adherence to the principles laid down in Order 45 of the Civil Procedure Rules cannot warrant a review of an order/decreed or a judgment. This would mean that any aggrieved/unsuccessful party would try another bite of the cherry instead of filing an appeal.

24. In the case of **Republic -vs-Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR** the court set out the principles to consider in the review of its own decisions as follows:

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.*
- ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.*
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.*
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.*
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.*
- vi. While considering an Application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some*

subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.*
- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.*
- ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.*
- x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.*

25. The Applicant should note that the mere discovery of new or important matter or evidence is not sufficient ground for review. He must also show that such matter or evidence was not within his knowledge and even after the exercise of due diligence, the same could not be produced before the court during the hearing. The court will not grant a review simply because a party has found better evidence later; it must be convinced the evidence was genuinely unavailable.

26. I have considered the application, the submissions by counsel and find that the 1st Defendant/Applicant has not met the threshold for the review of the judgment dated 3rd November 2025, and is therefore dismissed with costs to the Plaintiff/Respondent.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 9TH DAY
OF FEBRUARY 2026.**

**M. A. ODENY
JUDGE**