

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KAKAMEGA
ELC APPEAL NO. E020 OF 2024

ANNE WESONGA NAMBIRO.....1ST

APPELLANT

PATRICK MUBATSI NAMBIRO.....2ND

APPELLANT

VERSUS

ABDALLAH WAMERE.....1ST

RESPONDENT

HUSSEIN MUNYENDO.....2ND

RESPONDENT

IBRAHIM WAKHANYANGA.....3RD

RESPONDENT

THE LAND REGISTRAR, KAKAMEGA.....4TH

RESPONDENT

**(Being an appeal against the ruling of Hon. T. A. Obutu,
(SPM) delivered on 25th April 2024 in Mumias SPM MCL
& E Case No. 68 of 2022)**

JUDGMENT

Introduction

1. This appeal was filed by Anne Wesonga Nambiro and Patrick Mubatsi Nambiro challenging the decision and ruling of Hon. T.A. Obutu (SPM), delivered on 25th April 2024 vide Mumias SPMC L & E Case No. 68 of 2022, wherein the learned Magistrate dismissed the appellants' application dated 25th September 2023 in which they sought joinder to the suit as interested parties as well as the setting aside of the consent dated 18th August 2023 which was adopted as judgment of the court on 5th September 2023.

Background

2. By a plaint dated 25th November 2024, the respondents herein sued the Land Registrar Kakamega alleging to be joint registered owners of parcel No. N.

WANGA/KOYONZO/N. Wanga/Koyonzo/1065 measuring 26.5 acres which they alleged was transmitted to them upon the death of their father one Javary Wamere. That upon registration, they have been in occupation of the suit property. That delay in registration was due to case No. 626 of 1990.

3. They further stated that the defendant had failed to grant them an official search. That they obtained a copy of the register only to realize that there was entry No. 7 made on 8th October 2007, which had been made without their consent and knowledge. That the defendant had purported to dispose their land without their authority. That there was no justification for an entry that reinstated a subdivision which had been cancelled on 16th September 2005 by entry No. 3, without an attendant court order. That entry No. 7 was contrary to the restriction which had been registered on the title on 16th March 2007, in entry No. 6. They insisted that entry No. 7 was entered maliciously, illegally, irregularly and unlawfully.

4. They accused the defendant of fraud alleging that he allowed parcel No. N. Wanga/Koyonzo/1065 to be subdivided into parcel Nos. N. Wanga/Koyonzo/1225 and N. Wanga/Koyonzo/1226 yet the registered owner of the land died in 1974. They further stated that the defendant issued title deeds for parcel Nos. N. Wanga/Koyonzo/1225 and N. Wanga/Koyonzo/1226 when the plaintiffs were still the registered owners and without doing a physical visit to the land or summoning the parties. That the Government in Gazette Notice No. 3915 of 29th May 2025 indicated that the plaintiffs were the registered owners of the suit property. They sought the following orders;

a) An order declaring the entry No. 7 in the copy of the register of land parcel number N Wanga/Koyonzo/1065 illegal, unlawful and irregular and the defendant be ordered to expunge and / or delete the same from the record forthwith.

b) An order declaring the plaintiffs herein legally registered owners of land parcel number N. Wanga/Koyonzo/1065 vide entry No. 6

c) An order to Kakamega County Criminal Investigating Officer to investigate and recommend for prosecution all persons, their agents and servants claiming ownership to the parcel contrary to the declared position herein.

d) An order compelling the defendant to implement the boundary dispute summons issued by his office on the 14th May 2019.

e) An order restricting the respondent from altering or amending entries in the register of N.Wanga/Koyonzo/1065 without authority, knowledge of the plaintiffs nor legal or justifiable cause.

f) Costs of this suit.

5. In a defence dated 17th July 2023, the defendant denied the plaintiffs' claim and stated that he had since removed entry No. 7 on the register of parcel No. N. Wanga/Koyonzo/1065.

6. Before the matter was heard, on 18th August 2023, parties entered into a consent of even date which stated as follows;

“By consent of parties the application dated 24/7/2023 be allowed as prayed and the following orders issued by court.

- 1. THAT the defendant is hereby ordered to expunge/remove entry No. 7 from the register of land parcel No. North/Wanga/Koyonzo/1065 and issue the Plaintiffs/Applicants with certificate of official search in respect to the land parcel with immediate effect.**
- 2. That the defendant is hereby ordered to lift/remove the restriction placed on land parcel NO. North/Wanga/Koyonzo/1065 on 16th March 2007 vide entry No. 6.**
- 3. That the defendant/respondent herein be ordered to implement/execute the boundary dispute summons between land parcel NO. North/Wanga/Koyonzo/1065 and other neighbouring parcels issued by his office on 14th May, 2019.**
- 4. That the OCS Koyonzo Police Station to provide security for the defendant when complying with order 3 above.**

Dated at Mumias this 18th day of August 2023.”

7. The above consent was adopted as an order of court on 5th September 2023, resultantly settling the matter.

8. Subsequently, the interested parties who are the appellants herein filed application dated 25th September 2023 seeking the following orders;

a) Spent.

b) Spent.

c) This honorable court be pleased to enjoin the interested parties as parties hereto.

d) That this honorable court be pleased to stay, set aside, vary, vacate and review all the proceedings and orders herein including the orders issued on 5th September, 2023 pursuant to a purported consent filed on 18th August, 2023.

e) This suit be struck out with costs for being *Res Judicata* and incompetent in view of KAKAMEGA CMCC NO. 626 OF 1990; KAKAMEGA HCCA NO. 12 OF 1996 & 59 OF 2007; KAKAMEGA HCCC NO. 136 OF 1997; C.A.C.A NO. 84 OF 1998 and KAKAMEGA ELC PETITION NO. E004 OF 2021 and or in the alternative the suit be heard a fresh and

***denovo* with the participation of the interested parties.**

f) That entry NO. 7 on the register of land parcel NO. N. Wanga/Koyonzo/1065 be reinstated and the said title be marked as closed and the Kakamega County Land Registrar be ordered to reinstate and maintain Land title Nos. Wanga/Koyonzo/1226 and 1225 which was the position prior to the orders irregularly and unlawfully issued on 5th September, 2023.

g) The costs of this application be borne by the plaintiffs/respondents.

9. The application was supported by an affidavit sworn by the 1st interested party. It was the applicants case that the plaintiffs secretly filed suit disguised as a claim against the Land Registrar when the effect of the orders they sought was to revoke the titles held by the interested parties, in circumstances where the Chief Magistrates court, the High Court and Court of Appeal have already held in previous suits between the plaintiffs and interested parties that parcel No. N. Wanga/Koyonzo/1065 was lawfully and procedurally closed and title No. N. Wanga/Koyonzo/1226 validly and

lawfully created and is the valid property of the interested parties.

10. Further, that the plaintiffs deliberately lied to court and concealed material facts including the fact that their suit was *res judicata* having been adjudicated upon in Kakamega CMCC 626 OF 1990; KAKAMEGA HCCA NO. 12 OF 1996 & HCCA NO. 59 OF 2007; KAKAMEGA HCC NO. 136 OF 1997 (OS); KAKAMEGA ELC PETITION NO. E004 OF 2021 and CA NO. 84 OF 1998.

11. They contended that the plaintiffs have caused the Magistrates court to sit on appeal of matters determined by the Court of Appeal and issued orders of 5th September 2023 overturning the same. That the Land Registrar Kakamega, failed to carry out due diligence as he has all the records and history in regard to parcels Nos. N. Wanga/Koyonzo/1065, N. Wanga/Koyonzo/1225 and N. Wanga/Koyonzo/1226 and it was erroneous for him to enter into the impugned consent.

12. That the interested parties ought to be joined to the case to argue their case. That this suit was unnecessary,

mischievous, dishonest, an abuse of the court process, frivolous, vexatious and a mockery of justice.

13. The application was opposed. The respondents filed a preliminary objection dated 7th November 2023 and a replying affidavit dated 22nd November 2023. They argued that the court was *functus officio* and lacked jurisdiction to determine the application. That the application sought for the court to sit on appeal of its decision. That the application sought substantive orders in a determined suit and that it was an abuse of the court process.

14. In their replying affidavit, the respondents stated that there is no justification for joinder and joinder will not serve any useful purpose as the matter has been concluded and decree executed and the application is overtaken by events. That parcel No. N. Wanga/Koyonzo/1065 comprises their home and there is no threat of sale hence conservatory orders are unnecessary.

15. Further that a judgment cannot be reviewed or vacated by the court that made it. That nothing useful was raised by the applicants. That orders made in the cases cited by the applicants are not similar to the orders herein, hence the matter is not *res judicata*. That the applicants are not parties in this matter and lack capacity to seek orders herein. That orders in Kakamega CMCC No. 626 of 1990 were never executed for over 12 years hence statute barred.

16. They added that the decision of the Court of Appeal in CA 84 of 1998 did not prohibit right to adverse possession, and that the decision was made *per incuriam*. That the applicants did not present before court sale agreements in regard to parcel No. N. Wanga/Koyonzo/1226.

17. Upon consideration of the application, response and submissions, the learned trial Magistrate held that since the mater was settled by consent, the judgment can only be varied by another consent or in circumstances where the court is satisfied that the consent was unlawfully obtained. Further that as the judgment has been

executed, the application is overtaken by events and it will be an academic exercise to join the applicants to the suit. Therefore, the trial court dismissed the application with costs.

18. Aggrieved with the ruling, the appellants herein filed Memorandum of appeal dated 7th May 2024 citing the following nine grounds of appeal;

a) The learned trial Magistrate erred in law and or fact in dismissing the appellants' application dated 25th September, 2023 yet the said application was merited and proper and it ought to have been allowed with costs.

b) The learned trial Magistrate failed to appreciate that the claim by the 1st, 2nd and 3rd respondents as filed before him and the reliefs sought and all the issues raised had already been heard and determined in KAKAMEGA CMCC NO. 626 OF 1990; KAKAMEGA HCCA NO. 12 OF 1996; KAKAMEGA HCCC NO. 136 OF 1997 (O.S); KAKAMEGA HCCA NO. 59 OF 2007, C.A.C.A NO. 84 OF 1998 and KAKAMEGA ELC PETITION NO. E004 OF 2021 and the suit was not only *Res Judicata* but also that by his orders he overturned all the

verdicts and judgments in the above case: which he had no power to do.

c) The learned trial Magistrate erred in law and or fact by failing to appreciate that the effect of the consent entered into between the 1st, 2nd and 3rd respondents on one part and the 4th respondent on the other part and the consent orders dated 6th September, 2023 issued pursuant thereto was to not only reinstate land title No. N. Wanga/Koyonzo/1065 which had been closed by valid orders of the Kakamega Chief Magistrate's court, Kakamega High Court and the Court of Appeal but also revoke the appellants' land title No. N. Wanga/Koyonzo/1226 without them being notified or accorded an opportunity to be heard.

d) That the learned trial magistrate erred in law and fact in failing to appreciate that the entry No. 7 on the register of land title No. N. Wanga/Koyonzo/1065 which he was being asked to lift or expunge was a valid court order issued on 22nd May, 2007 in KAKAMEGA CMCC NO. 626 OF 1990 which order directed the closure of land title No. N. Wanga/Koyonzo/1065 and reinstatement of title Nos. N. Wanga/Koyonzo/1225 and 1226

and by his orders issued on 6th September, 2023 he quashed and overturned the said order of a court of concurrent jurisdiction which he had no power to do.

e) The learned trial magistrate erred in law and or fact by failing to appreciate that the respondents had misled or duped him and their consent was a product of both fraud and collusion as the 1st, 2nd and 3rd respondents on one part and the 4th respondent on the other part could not lawfully and procedurally enter into a consent between themselves whose effect was to cancel or take away the appellants' land title No. NORTH WANGA/KOYONZO/N. Wanga/Koyonzo/1226 and the court ought not have permitted or sanctioned such fraud as he did and by his ruling the trial magistrate sanctioned the conspiracy by the respondents to defraud the appellants.

f) The learned trial magistrate erred in law and or fact by failing to hold that grounds justifying the setting aside of the purported consent recorded before him had been established, namely fraud, collusion and deliberate concealment of material particulars and he ought to have set aside the

proceedings and orders before him and accorded the appellants an opportunity to present their case as they had been condemned unheard and title to their land revoked in a case they were not party to which is extremely unjust yet the primary purpose of the court is to hear parties and to justice.

g) The learned trial magistrate shifted the burden of proof and or he failed to identify and critically analyze the issues for determination and or make a proper finding on them.

h) The learned trial magistrate erred in law and or fact by holding that since the order complained of had been executed the appellants could not be entertained or given a chance to be heard when the contrary was the position.

i) The learned trial magistrate's decision was arrived at in a cursory and perfunctory manner and his decision was predetermined, unjust, biased, flawed and indefensible and has occasioned a serious miscarriage of justice.

19. Consequently, the appellants sought the following orders;

a) That this appeal be allowed with costs.

b) That the ruling of the subordinate court be set aside and the same be substituted with orders allowing the appellants application dated 25th September 2023 with costs to be borne by the 1st, 2nd and 3rd respondents.

c) Any other or further relief deemed just and expedient.

20. The appeal was disposed by way of written submissions. On record are submissions filed by the appellants dated 5th November 2024 and those filed by the respondents dated 17th June 2025.

Appellants submissions

21. Counsel for the appellants submitted that in Kakamega CMCC CASE NO. 626 OF 1990, the 1st, 2nd and 3rd respondents sued one Peter Nambiro, now deceased and whose estate is represented by the 1st appellant, seeking for a declaration that they were the lawful heirs to parcel No. N.Wanga/Koyonzo/1065 and that the subdivision thereof was fraudulent, illegal null

and void. That the respondents proceeded ex parte and their suit was allowed which resulted in entry No. 3 in the register whereof the subdivision of parcel No. N.Wanga/Koyonzo/1065 was cancelled. That this led to the filing of an application by the appellants to set aside the said orders which application was allowed vide orders of 10th September 2007. That in that case, title for parcel No. N.Wanga/Koyonzo/1065 was ordered closed and title Nos. N.Wanga/Koyonzo/1225 and 1226 reinstated and the court further ordered the respondents' eviction from parcel No. N.Wanga/Koyonzo/1226. That the said order was implemented vide entry No. 7 on the register of parcel No. N.Wanga/Koyonzo/1065 effectively closing that title. Counsel argued that with that history therefore the trial Magistrate in Mumias SPMC NO. 68 of 2022 had no jurisdiction to set aside the order of 22nd May 2007 issued in Kakamega CMCC NO. 626 OF 1990. Counsel argued that the respondents' challenge of the orders issued in Kakamega CMCC NO. 626 OF 1990 to the High Court and Court of Appeal was unsuccessful.

22. It was further submitted for the appellant that therefore the suit before the trial court was *res judicata*. Counsel further argued that in Kakamega HCC NO. 136 OF 1997 (OS), the respondents had claimed the suit property on the basis of the doctrine of adverse possession in respect to parcel No. N.Wanga/Koyonzo/1226, but that the said suit was dismissed.

23. Further that the Court of Appeal held that the respondents had no claim over parcel No. N.Wanga/Koyonzo/1226 by adverse possession or otherwise. Counsel argued that by filing a claim for adverse possession, the respondents were in effect acknowledging the legality of the registration of the appellants' title. It was contended for the appellant that being aware of the above position, it was the height of mischief and dishonest for the 1st to 3rd respondents to file Mumias SPMC ELC Case No. 68 of 2022 disguised as a claim against the Land Registrar. That the respondents in collusion with the Land Registrar entered into the impugned consent without mentioning

or notifying the appellants, which means that the appellants were condemned unheard.

24. Reliance was placed on provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules and the case of **Republic v Kwale County Land Registrar & Others Mombasa ELC J.R NO. 11 OF 2021** for the proposition that a party who is likely to be affected by the decision of a court ought to be joined to the proceedings before court.

25. Counsel insisted that the trial court was not *functus officio* and had jurisdiction to determine the appellants' application. Concerning review, counsel referred to the case of **Sylvester Nthenge v Johnstone Kiamba Kiswili Makueni ELC Appeal No. 2 of 2021**. It was contended for the appellants that as the consent order affected the appellants' rights, those orders ought to be reviewed. Counsel argued that the argument that the court was *functus officio* was mischievous as it sought to protect an illegality. The findings of the trial court were faulted on the basis that the holding that a consent can only be set aside by another consent only applies to the

parties to the consent and was not applicable in the circumstances of this case. They urged the court to allow the appeal.

Respondents submissions.

26. Counsel for the respondent submitted that at the time the appellants filed their application, they were not parties to the suit, but sought substantive orders. Counsel argued that the appellants were not parties to the consent hence lacked the capacity to seek its review. It was further contended for the respondents that the appellants did not attach any defence or pleading to their application to show that they had an arguable case. Counsel also argued that the trial court by dint of provisions of section 59 and 60 of the Evidence Act took judicial notice of the law and declined to descend into the arena of the dispute.

27. On the role of this court as a first appellate court, reliance was placed on section 78 of the Civil Procedure

Act and the case of **Abok James Odera T/A A.J. Odera & Associates v John Patrick Machira T/A Machira & Company Advocates (20130 e KLR.** Regarding orders of eviction that were issued in the former suit against the respondents, counsel contended that those orders were irregular and contrary to section 4 of the Limitation of Actions Act which prescribed 12 years as the period to execute court orders. Further that extension of those orders was dubiously done on 16th March 2021 vide Kakamega CMCC NO. 626 of 1990. Counsel argued that on that basis, the Land Registrar was justified in executing the impugned consent.

28. Reliance was placed on the case of **Mwadungudu v Rashid; Land Registrar, Mombasa.** On *locus standi* Counsel referred to the case of **Isaya Masira Momanyi v Daniel Omwoyo & Another [2017] KEHC KLR** and argued that the appellants were not the registered proprietors of the suit property. Counsel argued that the appellants did not have grant of representation in regard to the estate of Peter Nambiro Mubatsi hence they lacked the requisite capacity to file the application.

On the question as to whether the appeal was merited, counsel submitted that there was no fault, error, illegality or irregularity to warrant this court's interference with the trial court's decision.

29. It was the respondents' counsel's position that the trial court was *functus officio* as the court had already rendered its final decision. To buttress this position, counsel referred to the case of **Murgani v Kenya Revenue Authority [2014] KLR**, among others. Counsel further referred to the provisions of Order 45 Rule 1 of the Civil Procedure Rules in regard to the threshold for review. It was further argued for the respondent that as the matter had been determined, the appellants could not be joined to the suit. Contention was also made that the orders sought by the appellants could not be granted at that stage. Counsel argued that an order for review cannot be sought post judgment.

30. On the question of *res judicata*, it was submitted for the respondents that the respondents never made any application to set aside the orders made in the former

cases cited by the appellants. Counsel argued that the said orders were irregularly issued.

31. Counsel further held the view that the appellants had not met the threshold for setting aside a consent order and cited the cases of **Board of Trustees National Social Security Fund v Michael Mwalo [2015] KECA 782 (KLR)** and **Wasike v Wamboko** for the argument that a consent can only be set aside where there is fraud, collusion or the agreement is contrary to the policy of the court. In that regard, counsel submitted that no fraud, mistake, misrepresentation, error, irregularity or illegality were demonstrated by the appellants.

Analysis and determination

32. The court has carefully considered the appeal, the entire trial court record and the parties' rival submissions. The role of this court as a first appellate court is to evaluate the findings and conclusions made by the trial court in view of the facts of the case and the

applicable law, and decide whether those findings should stand or not and give reasons either way.

33. Having considered the appeal herein the issues that arise for the court's determination are;

a) Whether the appellants had met the threshold for joinder

b) Whether the appellants had met the threshold for setting aside consent order.

c) Whether the appellants met the threshold for grant of review orders and

d) Whether the suit in Mumias SPMC L & E CASE NO. 68 of 2022 was res judicata.

e) Whether the learned trial magistrate was wrong in dismissing the appellant's application dated 25th September 2023.

34. Order 1 Rule 10 (2) of the Civil procedure Rules grants this court power, either *suo motto* or upon application by either party, to join a new party to the proceedings before court, either as defendant, plaintiff or interested party where the presence of such party would enable the court effectively determine all matters in dispute.

35. To be joined to a suit as an interested party, an applicant must demonstrate that they have a direct, identifiable and proximate stake in the proceedings and that they will be affected by the outcome of the court's decision.

36. In **Francis Kariuki Muruatetu & Another v Republic & 5 Others Petition No. 15 as consolidated with No. 16 of 2013 [2016] e KLR**, the Supreme Court of Kenya set out the following principles for joinder;

a) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

b) The prejudice to be suffered by the Intended Interested Party in case of non-joinder, must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.

c) Lastly, a party must, in its application, set out the case and or submissions it intends to

make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court.

37. The appellants herein sought to be joined to the suit on the basis that the respondents secretly filed suit against the Land Registrar, entered consent which had the effect of cancelling their title for parcel No. N. Wanga/Koyonzo/1226. The fact that the appellants are registered owners of the said title is confirmed by the register thereof. It is also clear that the consent order cancelled entry No. 7 on the register of parcel No. N. Wanga/Koyonzo/1065 which entry referred to the subdivision that created parcel No. N. Wanga/Koyonzo/1226.

38. Further, the fact that the appellants were not aware of the suit and the consent filed before the trial court is also not contested. The fact that the appellants are registered proprietors of parcel N. Wanga/Koyonzo/1226 vests in them proprietary rights protected order article 40 of the Constitution of Kenya and that right cannot be

taken away without due process. I therefore find and hold that the appellants had the necessary and identifiable stake in the proceedings before court to warrant their joinder. The position taken by the trial court that since the order had been executed, the application was overtaken by events, in my view, was wrong as the appellants were not given opportunity to be heard before the consent judgment was entered, yet the same deprived them of their property. Therefore, the trial court was wrong in failing to join them to the suit before it.

39. The principles for setting aside a consent are well settled. There must be a demonstration of fraud or collusion or misrepresentation or mistake or that the consent is contrary to the policy of the court or for any sufficient cause.

40. In the case of **Flora Wasike v Destimore Wamboko [1988] e KLR**, it was held as follows;

“It is now settled law that a consent judgment or order has a contractual effect and can only be set aside on grounds which would justify

setting a contract aside or if certain conditions remain to be fulfilled, which are not carried out.”

41. Similarly, in **S.M. N. V Z. M. S & 3 Others [2017] e KLR**, the court held that to set aside a consent, any one of the following circumstances must be shown;

- i. Where the consent was obtained fraudulently,**
- ii. In collusion between affected parties**
- iii. Where the agreement is contrary to the policy of the court;**
- iv. Where the consent is based on insufficient material facts;**
- v. Where the consent is based on misapprehension or ignorance of material facts;**
- vi. Any other sufficient reason.**

42. In the instant case, the respondents conceded that there were cases between them and the appellants regarding parcel No. N. Wanga/Koyonzo/1226. Besides, entry No. 7 closed title for parcel No. N. Wanga/Koyonzo/1065 and created title Nos. N.

Wanga/Koyonzo/1225 and N. Wanga/Koyonzo/1226, yet the respondents chose to only sue the Land Registrar, who had no proprietary interest in parcel N. Wanga/Koyonzo/1226 and excluded the appellants.

43. In view of the fact that there had been previous cases between the parties, and the obvious prejudice to be suffered by the appellants by their exclusion from the suit, it is my view that the exclusion of the appellants in Mumias SPM CM L & E No. 68 of 2022, was not by default but by design so as to defraud the appellants of their land. In agreeing to deprive the appellants of their land through a consent that excluded them, it is clear that there was collusion between the parties in that case and the consent lacked legality as it violated the appellants' rights under article 40 of the Constitution of Kenya using fraud and deceit.

44. The Land Registrar is obligated under section 87 of the Land Registration Act to avail opportunity to be heard to all persons affected by his decision, yet his decision to execute the consent herein affected the

appellants but he did not attempt to grant them a hearing.

45. Therefore, the learned trial Magistrate was wrong when he failed to find that there was collusion between the parties in Mumias SPM L& E No. 68 of 2022 in the execution of the consent. In addition, the consent having effectively set aside decisions made other courts, vide inter alia case No. Kakamega CMC 626 OF 1990 and Civil Appeal 84 of 1998, amounted to an illegality as a Magistrates court cannot set aside the decision of another magistrate, or the decision of the Court of Appeal.

46. The jurisdiction to grant review of court decisions is provided for in Section 80 of the Civil Procedure Act while the threshold for review is set out in Order 45(1) of the Civil Procedure Rules.

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.**

Order 45 Rule 1 for 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.**

47. Therefore, for a party to succeed in seeking orders of review, it must demonstrate that;

(a) That there is discovery of new and important matter or evidence, which was not in his knowledge or could not be produced by him after exercise of due diligence; or

(b) That there is a mistake or error apparent on the face of the record; or

(c) That there is a sufficient reason; and

(d) An application for review must be made without unreasonable delay.

48. In **Civil Appeal No. 2111 of 1996, National Bank of Kenya Vs Ndungu Njau**, the Court of Appeal held that;

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evidence and should not require an elaborate argument to be established.”

49. Similarly, in the case of **Benjoh Amalgamated Limited vs Kenya Commercial Bank Limited [2014] e KLR**, the court stated that the residual jurisdiction of the court to review its own decisions should be invoked with circumspection.
50. Jurisprudence on review orders therefore, point to the position that once a court has made a decision on merit, it ought not revisit the matter if the challenge is on merit. However, the court's power to review is limited and ought to be exercised cautiously, scrupulously and judiciously, only to the extent allowed by law.
51. In the case of **Evan Bwire vs. Andrew Aginda Civil Appeal No. 147 of 2006** the Court of Appeal stated as follows;
- “An application for review will only be allowed on strong grounds particularly if its effect will amount to reopening the application or case afresh.”**
52. In the case of **Nyamogo & Nyamogo vs. Kogo [2001] EA 170**; the court discussed the issue of an error apparent on the face of the record, as follows;

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law spares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a new adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”

53. In determining a review application, the court should also consider if there is sufficient reason to review its earlier decision. In the case of **Sarder Mohamed vs. Charan Singh & Another 1959 EA 793**, it was stated as follows;

“Any other sufficient reason for the purposes of review refers to the grounds analogous to the other two (for example error apparent on the face of the record and discovery of new and important matter).”

54. In the instant case, the fact that the appellants were deprived of their property without due process or being

made aware of the consent, which is an injustice, is sufficient reason for review, hence the appellant deserved orders of review, and the trial court was wrong in declining to grant a review when the decision sought to be reviewed was anchored on collusion, fraud and illegality.

55. On the question of *res judicata*, section 7 of the Civil Procedure Act provides as follows;

“Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

***Explanation.* — (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.**

***Explanation.* — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.**

***Explanation.* — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.**

***Explanation.* — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.**

***Explanation.* — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.**

***Explanation.* — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”**

56. Essentially, a court is by law barred from adjudicating over an issue between the same parties which has already been determined on merit with finality by a competent court. To prove *res judicata*, the applicant must demonstrate that the issue in the current suit was directly and substantially in issue in the similar suit; that the former suit was between the same parties or their privies; that those parties were litigating under the same title; that the issue was heard and finally determined in the former suit; and that the court that heard and determined the former suit/ issue was competent to try the subsequent suit or the issue in which the issue was raised.

57. In the case of **Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd [2017] e KLR**, the court enumerated the elements of *res judicata* in the following terms;

“The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;

- a) **The suit or issue was directly and substantially in issue in the former suit.**
- b) **That former suit was between the same parties or parties under whom they or any of them claim.**
- c) **Those parties were litigating under the same title.**
- d) **The issue was heard and finally determined in the former suit.**
- e) **The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the suit is raised.**

11. Similarly, in the case of **The Independent Electoral and Boundaries Commission -vs- Maina Kiai & 5 Others (2017) e KLR**, the Court of Appeal held as follows;

“For the law of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied as they were rendered not in disjunctive but conjunctive terms;

- a) **The suit or issue was directly and substantially in issue in the similar suit.**
- b) **That the former suit was between the same parties or parties under whom they or any of them claim.**
- c) **Those parties were litigating under the same title.**
- d) **The issue was heard and finally determined in the former suit.**
- e) **The court that formerly heard and determined the issue was competent to try the subsequent suit or the issue in which the issue was raised.”**

12. In the above case, the Court of Appeal stated the purpose of the doctrine of *res judicata* as follows;

“The role of the doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and Commonsensical Protection against Wastage of time and resources in an endless round of litigation at the behest

of intrepid pleaders hoping, by multiplicity of suits and fora to obtain at last outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered noisome nuisance and brought to disrepute or calumny. The foundations of res judicata this rest in the public interest for swift, sure and certain justice.”

58. In the instant case, the appellants argued that Mumias SPMC ELC CASE NO. 68 OF 2022 was res judicata as there were earlier suits in respect of the same subject matter, parties and issues which had been determined with finality by other court.

59. I have perused the orders made in Kakamega CMC Case No. 626 of 1990 on 8th December 2020. In that matter, the trial court authorized the OCS Matungu Police station to evict the three respondents herein from parcel No. N. Wanga/Koyonzo/1226 and issued a permanent injunction restraining the respondents herein from trespassing, alienating laying claim using or in any manner interfering with parcel No. N. Wanga/Koyonzo/1226. The court also ordered their

arrest and to be detained in prison for contempt of court for disobeying orders issued on 22nd May 2007. It is clear that the question of the legality of subdivision of parcel No. N. Wanga/Koyonzo/1065 to create 1226 among others was the issue for determination in Kakamega CMCC Case No. 626 of 1990 and that suit was determined on its merit in favour of the appellants herein.

60. No orders were produced by the respondents showing that orders of 8th December 2020 were reviewed, stayed, set aside or appealed against. I am therefore satisfied that the parties, issues and subject matter in Kakamega CMCC Case No. 626 of 1990 (former suit) and in Mumias SPM 68 of 2022 were the same, hence the dispute between the parties herein over parcel No. N. Wanga/Koyonzo/1226 was determined on merit with finality by a competent court, which fact renders Mumias SPMC L & E CASE No. 68 of 2022 *res judicata*.

61. When the respondents herein were unhappy with the decision in the former suit, they did not appeal. They

instead filed Kakamega ELC Petition E004 OF 2021, where they sued the Chief Magistrate and the appellants herein, complaining that the latter wrongly issued an eviction order against them. That suit was struck out for want of jurisdiction on 1st March 2022 by this court. For the above reasons, I find and hold that Mumias SPM L&E 68 of 2022 is *res judicata*.

62. Ultimately, I am satisfied that the trial court was wrong in its decision dated 25th April 2024, for; declining to join the appellants to proceedings in Mumias SPM L&E 68 of 2022 when they had demonstrated an identifiable stake in the proceedings; failing to set aside and review the consent judgment when it was clear that the same was obtained by collusion illegality and fraud; dismissing the appellants application on the basis that the application was overtaken by events, when there was a clear case of injustice and collusion and when the respondents' suit was *res judicata*.

63. The upshot is that I find and hold that the appeal herein is merited, and the same is hereby allowed. The

ruling of the trial court dated 25th April 2024 in regard to the appellants' application dated 25th September 2023 is hereby set aside and substituted with the following orders;

- a) The application dated 25th September 2025 is hereby allowed.**
- b) The applicants are hereby joined to Mumias SPMC L&E CASE NO. 68 OF 2022 as interested parties.**
- c) The consent order dated 18th August 2023 and orders of 5th September 2023 together with subsequent orders thereto are hereby reviewed, vacated and or set aside. Consequently, entry No. 7 of the register on title for parcel No. N. Wanga/Koyonzo/1065 is hereby reinstated and that title is marked as closed. The Land Registrar, Kakamega is hereby ordered to reinstate and maintain land title Nos. N. Wanga/Koyonzo/1226 and N. Wanga/Koyonzo/1225 which was the position prior to the orders irregularly and unlawfully issued on 5th September 2023.**
- d) The suit in the lower court being Mumias SPMC L&E CASE NO. E68 OF 2022 is hereby dismissed for being *res judicata*.**

e) The costs of this appeal and the costs in the court below in respect to the application dated 25th September 2023 are awarded to the appellants herein and shall be borne by the 1st, 2nd and 3rd respondents.

64. It is so ordered

DATED, SIGNED AND DELIVERED AT KAKAMEGA VIRTUALLY/OPEN COURT THIS 4TH DAY OF FEBRUARY 2026 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI
JUDGE

In the presence of;

Mr. Akwala for the appellants

Mr. Shifwoka for the 1st to 3rd respondents

No appearance for the 4th respondent

Court Assistant- Delphine