REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC NO 161 OF 2014

Consolidated with

BUSIA ELC CASE NO 91 OF 2014

AND

BUSIA ELC CASE NO 99 OF 2019

AND

BUSIA ELC CASE NO 86 OF 2017

KEVIN MORRIS WASIKE ..... PLAINTIFF

= VERSUS =

GABRIEL MUINDI SIMIYU ..... DEFENDANT

R U L I N G

1. This ruling was due on 2nd December 2025. However, following my transfer from Busia with effect from 15th January 2026, this Court has had to prioritize finalizing the part heard cases. That explains the delay which is regretted.
2. The dispute between **KEVIN MORRIS WASIKE** (the Plaintiff) and **GABRIEL MUINDI SIMIYU** (the Defendant) over the land parcels **NO BUKHAYO/LUPIDA/1979** and **2491** was heard through consolidated suits. The Plaintiff was partly successful in a judgment delivered by **A. OMOLLO J** on 7th May 2024.
3. The Plaintiff filed a Notice of Appeal dated 13th May 2024 which was however withdrawn on 3rd June 2024.

4. The Defendant has now moved this Court vide his Notice of Motion dated 5th January 2025 premised under the provisions of **Articles 19(2), 21(3), 22(1), 28, 40, 43, 47, 50(1), 57, 60(f)** and **159** of the **Constitution, Sections 13(2)(e), 13(3), 13(7), 18(a)(11), 18(d)** and **19** of the **Environment and Land Court Act, Section 1A, 1B, 3A** and **80** of the **Civil Procedure Act** as well as **Order 45 Rule (19), 2(1)** and **5** and **Order 51 Rule 1** of the **Civil Procedure Rules**. He seeks the following orders:

   1) **That the firm of MASIGA, OTIENO & ASSOCIATES ADVOCATES be deemed to be properly on record and be allowed to prosecute this application and the main suit upon re-opening.**
   2) **That this Honourable Court be pleased to review the judgment dated 7th May 2024 and order re-hearing and re-opening of the case for just determination.**
   3) **That the costs be provided for.**

The Motion is based on the grounds set out therein and is supported by the Defendant's affidavit of even date.

5. The gist of the Motion is that the Defendant has discovered that the judgment delivered on 7th May 2024 was obtained through a misrepresentation of facts and deliberate concealment of information which is new and important matter or evidence that was not within his knowledge and only came to light on 30th January 2025. That while trying to implement this Court's judgment and orders arising therefrom, the County Surveyor found that it was impractical to do so thus leaving the Court in an embarrassing position. That he therefore recommended that a correction was required. It is therefore only fair that the judgment be reviewed since there are three contradictory reports two from the same surveyor and one from the County Surveyor hence there is a great reason for the Court to have a re-look into the matter. Otherwise, leaving the judgment as it is will paint this Court as a toothless dog delivering un-informed decisions. There is sufficient cause and a mistake and error apparent on the face of the record since this Court was misled in delivering a judgment under a mistaken belief that the report filed was a true reflection of what is on the suit land.

6. The Defendant has an arguable case as the execution will be untenable and the Plaintiff will suffer no prejudice. This Court has the jurisdiction to grant the orders sought in any event, the judgment has not resolved the dispute as the Plaintiff has been left without any land since the purported land only exists on paper. That the application has been made within a reasonable time and in good faith. Land matters are sensitive and emotive and should be determined on merit. The Defendant also invokes the words of **LUKE 23:46** in persuading me to judge him fairly.

7. In opposing the Motion, the Plaintiff filed a replying affidavit dated 13th March 2025 in which he has averred, inter alia, that the Motion was never served on him and that he only became aware about it when he perused this file on 12th March 2025 in the Registry. That the Motion does not raise any issues and if the Defendant was aggrieved by the judgment, he should have appealed. That infact the Defendant compromised the surveyors because he visited the site with them yet they did not implement the Court order. That on 22nd November 2024, the Plaintiff visited the County Surveyor's office and met one Geoffrey Kamadi who informed him that the Defendant had no

land. There are no contradictory reports as alleged and the County Surveyor did not implement the orders of this Court saying they were erroneous yet his duty was not to create a new judgment. The Defendant slept on his rights and he cannot now seek a remedy for what he claims to be an erroneous judgment. The Motion is without merit and should be dismissed with costs.

8. The Court directed that the Motion be canvassed by way of written submissions. The same were filed by **MR OTIENO** instructed by the firm of **MASIGA, OTIENO ASSOCIATES ADVOCATES** for the Defendant and by **MS WAKOLI** instructed by the firm of **WAKOLI & WAKOLI ADVOCATES** for the Plaintiff.

9. I have considered the Motion, the rival affidavits and the submissions by counsel.

10. The law on review of judgments and orders is found in **Section 80** of the **Civil Procedure Act** which states 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."

The procedure for seeking an order of review of a judgment or order is provided for in **Order 45 Rule 1(1)** of the **Civil Procedure Rules** which reads:

1(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 <u>new and important matter or evidence</u> 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, <u>or on account of some mistake or error apparent on the face of the record</u>, or <u>for any other sufficient reason</u>, 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 <u>without unreasonable delay</u>."** Emphasis mine

It is clear from the above that a party seeking the remedy for review of a decree or order must satisfy the following conditions:

1) Show that there is discovery of new and important matter or evidence; or
2) Demonstrate that there is some mistake or error apparent on the face of the record; or
3) Provide any other sufficient reasons; and
4) File the application without any unreasonable delay.

In the case of **FRANCIS ORIGO & ANOTHER -V- JACOB KIMALI MUNG'ALA C.A. CIVIL APPEAL NO 149** of **2001 [2005 KECA 356 KLR]**, the Court of Appeal after citing the

provisions of the then **Order XLIV rule 1** of the **Civil Procedure Rules** stated thus:

> **"From the foregoing, 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."**

The Supreme Court in the case **PARLIAMENTARY SERVICE COMMISSION -V- MARTIN NYAGA WAMBORA & OTHERS** application **NO 8** of **2017 [2018 KESC 74 KLR]** reiterated **"<u>that the review window so envisaged is not meant to grant an Applicant a second bite of the cherry. It is not an opportunity for an Applicant to re-litigate his/her case</u>."** The Court then went on to state the following at paragraph 32, of it's ruling as the principles to guide a Court considering an application for review:

1) A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited Bench of the Court.
2) Review of exercise of discretion is not a right but an equitable remedy which calls for a basis to be laid by the Applicant to the satisfaction of the Court.
3) In an application for review of exercise of discretion, the Applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of it's discretion or exercised it whimsically.
4) During such review application in focus is the decision of the Court and not the merit of the substantive Motion subject to the decision under review.
5) An application for review of exercise of discretion is not an appeal or a chance for the Applicant to re-argue his/her application.
6) The Applicant has to satisfactorily demonstrate that the Judge(s) misdirected themselves in the exercise of discretion and;
    a) as a result a wrong decision was arrived at; or

b) it is manifest from the decision as a whole that the Judge has been clearly wrong and as a result there has been an apparent injustice.

The Supreme Court was of course considering an application under **Sections 21(2)** and **24(2)** of the **Supreme Court Act 2011** and **Rule 4(4)** of the **Supreme Court Rules 2012**. I have no doubt, however, that the general principles enunciated therein apply with equal force in an application such as the one now before me. Most importantly, it must be appreciated that an application for review is not an appeal nor an opportunity for the Applicant to re-agitate his case.

11. This Court will be guided by the above principles among others.

12. With regard to prayer **NO 1**, the firm of **MASIGA, OTIENO & ASSOCIATES ADVOCATES** are hereby allowed to come on record and prosecute this Motion.

13. The Defendant has premised the Motion on the ground of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge nor could it be produced when the decree was made. In grounds **NO 4, 5** and **6** of the Motion, the Defendant has pleaded as follows:

4: "That Busia County Registrar in conjunction (sic) while trying to implement the order arising from the impugned judgment, found that it was impractical to implement the same and leave the Court in an embarrassing position."

5: "That even the County Surveyor recommended that the correction required goes to the centre of the judgment and it is only fair that the said judgment be reviewed."

6: "That there have been three contradictory reports with the last report being which could not be accessed by the Applicant during trial."

In his response, the Plaintiff has averred in paragraphs 8, 9 and 10 of his replying affidavit that there are no contradictory reports as alleged, that the report dated 30th January 2025 is erroneous and incapable of implementation and that the Defendant has slept on his rights.

14. To begin with the judgment sought to be reviewed was as a result of the consolidation of three (3) suits being **BUSIA ELC CASE NO 91** of **2013, BUSIA ELC CASE NO 99** of **2019** and

BUSIA ELC CASE NO 86 of **2017** as is clear from the judgment delivered by **A. OMOLLO J** on 7th May 2024. It is also clear that **KEVIN MORRIS WASIKE MATUMBAYI** was the Plaintiff in **BUSIA ELC CASE NO 99** of **2019** in which the Defendant was one **ABDALLA TABATA**. On the other hand, **GABRIEL MUINDI SIMIYU** was the Plaintiff in **BUSIA ELC CASE NO 91** of **2013** in which the Defendant was one **DESTERIO KULUNDU BARASA ONDWASI**. The parties in this Motion are only **KEVIN MORRIS WASIKE** and **GABRIEL MUINDI SIMIYU** yet the judgment sought to be reviewed touches on the rights of other parties namely **DESTERIO KULUNDU BARASA ONDWASI, ABDALLA TABATA, JACOB ETYANG EKASIBA ASUMANI MBAYI, BENJAMIN OTYANGA** and **JOSEPH WANZALA ODEDI** who are impleaded in this Motion. That means that any orders made allowing this Motion will infringe on their rights without hearing them and that would be an affront to the provisions of **Article 50(1)** of the **Constitution** and the rules of natural justice. On that basis alone, I am not inclined to allow the Motion.

15. Most importantly, while the Defendant has stated in paragraph 6 of his grounds that **"there have been three**

contradictory reports” by surveyors, no such reports were availed for perusal by this Court. It is therefore difficult to gauge the value of such reports, if any, for purposes of this Motion. Further although the Defendant has pleaded in ground **NO 9** of the Motion and in paragraph 14 of his supporting affidavit that he **“moves this Honourable Court on account of a mistake, error apparent on the face of the record and for sufficient cause”**, he goes on to plead in ground **NO 4** of the Motion and in paragraph 8 of his supporting affidavit as follows:

> **“That Busia County Registrar in conjunction (sic) while trying to implement the orders arising from the impugned judgment, found that it was impractical to implement the same and leaves the Court in an embarrassing position.”**

The Defendant also avers in paragraph 16 of his supporting affidavit and ground **NO 11** of the Motion as follows:

> **“That the Court was misled into giving judgment, ruling or order under a mistaken belief that the report was true reflection of the land.”**

If it became difficult to execute the decree because of what the County Surveyor discovered post-judgment, that can hardly be described as a mistake or error apparent on the face of judgment. Such a mistake or error, as was held in the case of **NATIONAL BANK OF KENYA LTD -V- NJAU C.A. CIVIL APPEAL NO 211** of **1996 [1997 KECA 71 KLR]**

> **"… must be self-evident and should not require an elaborate argument to be established."**

Similarly, in the case of **NYAMOGO & NYAMOGO ADVOCATES -V- KOGO 2001 E.A 173**, it was also stated by the same Court that:

> **"An error which has to be established by a long-drawn process of reasoning or on points where there may conceivably be two options can hardly be said to be an error apparent on the face of the record."**

When **A. OMOLLO J** crafted the judgment delivered on 7th May 2024, it could not have been conceivable, if indeed that is what the Defendant would like this Court to believe, that the subsequent decree cannot be executed and paints the Court **"as a toothless dog delivering uninformed decisions"** –

see paragraphs 13 and 18 of the supporting affidavit. If **A. OMOLLO J** made an uniformed decision, that can only be a good ground of appeal but not a ground for review – **NATIONAL BANK OF KENYA LTD -V- NJAU** (supra).

16. It is also clear to me that what the Defendant seeks by this Motion is for this Court to re-open and re-hear this case. In paragraph 11 of his supporting affidavit, the Defendant has pleaded thus:

> **11: "That since there exist three contradictory reports two from the same surveyor and another from the County Surveyor, there is great reason for the Court to relook into the matter to satisfy itself as to the correctness of the decision."**

However, as already stated above citing the case of **PARLIAMENTARY SERVICE COMMISSION -V- MARTIN NYAGA WAMBORA** (supra), the remedy of review is not meant to grant an Applicant a second bite at the cherry nor an opportunity to re-litigate the case which has been fully canvassed by the parties and determined on the evidence before the Court. If the trial Court made a decision which is

untenable and cannot be executed, only an appellate Court can correct any error or omission. That is not within the scope nor jurisdiction of this Court in a review application.

17. Finally, the Defendant was required by law to file this motion without unreasonable delay. The judgment sought to be reviewed was delivered on 7th May 2024. This Motion was filed on 5th January 2025 some 8 months later. And although the Defendant has averred in paragraph 21 of his supporting affidavit that **"<u>this application has been made within reasonable time in the circumstances and in very good faith</u>,"** I do not consider a delay of 8 months to be reasonable given the fact that the Defendant knew about the delivery of the judgment of 7th May 2024 as there is no reason advanced to suggest otherwise. The remedy for review of a judgment of the Court is an equitable one to be granted at the discretion of the Court. To benefit from that discretion, the party seeking it must approach the Court with clean hands. There must be full and open disclosure of all available material to enable this Court exercise it's discretion in favour of the party who has approached the Court. In the circumstances of this case, the Defendant has averred in paragraph 3 of the grounds and

paragraph 5 of the supporting affidavit that the new and important matter or evidence **"<u>came into light on 30.1.25</u>"**. This Motion is dated 5th January 2025 meaning that the new and important matter or evidence could only have come to light long after the Motion had been crafted and filed. That does not add up at all. The long and short of all the above is that the Defendant has not been candid with this Court. He has approached the Court with un-clean hands and is therefore un-deserving of the exercise of this Court's discretion in his favour.

18. The up-shot of all the above is that the Notice of Motion dated 5th January 2025 is devoid of any merit. It is hereby dismissed with costs.

BOAZ N. OLAO

JUDGE

<u>26TH FEBRUARY 2026</u>

Ruling dated, signed and delivered by way of electronic mail on this 26th day of February 2026 with notice to the parties.

BOAZ N. OLAO

JUDGE

<u>26TH FEBRUARY 2026</u>