



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC LAND CASE NO. E016 OF 2024 (OS)

JOSEPH KIOKO TUTA.....1ST
PLAINTIFF

KYALO TUTA.....2ND
PLAINTIFF

VERSUS

TITUS WAMBUA NGOLOMA.....
.....DEFENDANT

RULING

1. This ruling is in respect of an unopposed notice of motion dated 20/10/2025, filed by the defendant. It is presented as being made under **Sections 1A, 3A and 80** of the **Civil Procedure Act, Cap 21** of the Laws of Kenya, **Orders 45 and 51, Rule 1** of the **Civil Procedure Rules 2010**, and all enabling provisions of the law and the defendant seeks the following orders from this court: -

a. THAT the Honourable Court be pleased to review, set aside and/or vacate the ruling and orders issued on the 3rd June 2025 and all the consequential orders arising therefrom.

b. THAT the cost of the application be provided for

2. The motion is supported by the grounds set out in the body thereof and the defendant's supporting affidavit, sworn on the instant date. In brief, he states that the court issued a ruling on 3rd June 2025, directing that the file in **Kithimani MCELC No. E019 of 2022 (Kioko Tuta vs. Titus Wambua Ngoloma)** be provided for purposes of consolidation with this matter. Nevertheless, at the time of the ruling, **Kithimani MCELC No. E019 of 2022** had already been heard and determined, with judgment delivered on 23rd December 2024. As a result, and without the court's knowledge, a ruling was issued consolidating the two matters. The defendant believes that, had the court been aware of these facts at the time, it would have reached a different conclusion. He respectfully submits that there is sufficient cause to warrant review and setting aside of the ruling and all consequential orders.

3. When the matter was brought before this court for hearing on 29/10/2025, **Mr. Mbuvo**, for the defendant, made oral

submissions and urged the court to grant the motion. Accordingly, after hearing counsel and thoroughly examining the motion, including its grounds and affidavit, the sole issue for determination is **whether the motion meets the legal threshold for review of the orders issued in the impugned ruling.**

4. With respect to this issue, the relevant provisions governing the review of court decisions are set out in **Section 80** of the **Civil Procedure Act** and **Order 45, Rule 1** of the **Civil Procedure Rules**. **Section 80** 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.”

5. **Further, Order 45 Rule 1 (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.”

6. The salient conditions brought out in **Order 45 Rule 1 (1) of the Civil Procedure Rules**, such as the *discovery of new and important matter, mistake, and sufficient cause*, have to be proved by an applicant, and in dealing with such applications, the court has to exercise its judicious discretion. As concerns prevailing jurisprudence on the issue at hand, the recent court of appeal decision of [**Nderitu & 6 others v Assests Recovery Agency \[2024\] KECA 1612 \(KLR\)**](#), which this

court associates itself with, stated as follows on the grounds for review based on a new and important matter: -

“This rule allows the court to revisit its decisions in light of new and significant evidence that was not available during the original proceedings despite due diligence. It serves as an essential tool for ensuring that justice is not compromised by the unavailability of crucial evidence during the original trial despite due diligence. The primary ground for review under the said Order is the discovery of new and important evidence that could not have been presented earlier despite due diligence. 24. For the applicant, however, to benefit from this provision of the law, she or he must demonstrate that they exercised due diligence in trying to obtain the evidence during the original proceedings, meaning the evidence was genuinely not within their knowledge, grasp and or reach or could not be produced despite reasonable efforts. The court scrutinizes the applicant’s efforts to ensure that the claim of new evidence is legitimate and not a result of negligence or lack of effort. Additionally, the new evidence must be significant enough to potentially alter the

outcome of the case, not trivial or merely corroborative of existing evidence. The court further considers whether the new evidence could have led to a different judgment outcome, if it had been presented initially. See generally National Bank of Kenya Ltd vs. Ndungu Njau [1997] eKLR, Francis Origo & Another vs. Jacob Kumali Mungala [2005] eKLR and Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited [2014] eKLR.

25.To successfully apply for a review, the applicant must clearly specify the new evidence and how it was discovered, demonstrate its significance and potential to alter the outcome and provide proof that the evidence was not available at the time of the original proceedings despite reasonable efforts to obtain it.”

7. Accordingly, in the circumstances of this case, the defendant has indicated that the basis for review is the existence of a new and important matter that was not previously within the knowledge of the court. To substantiate this claim, he has submitted a judgment from the lower court, namely, **Kithimani PM ELC No. 19 of 2022 - Titus Wambua Ngoloma v. Kyalo Tuta & Another**, delivered on 23rd December 2024. This decision was issued significantly after this court had given

directions regarding the hearing of the application on 11th July 2024, which was the subject of the impugned ruling.

8. With this in mind, this court concurs with the defendant's averments that this document was not within the court's knowledge when it reserved the matter for ruling. It is also unfortunate that, even after the lower court rendered its judgment, none of the parties moved the court to arrest the impugned ruling. Had such an application been made, this court would, obviously, not have issued an order transferring the lower court file to it for hearing and determination since, at the time of the impugned ruling, there was no file capable of transfer or consolidation.

9. Be that as it may, the grounds set forth by the defendant meet the threshold of **Order 45 Rule 1 (1)** of the **Civil Procedure Rules**, as he has demonstrated that after the exercise of due diligence, which was not within his knowledge, the judgment could not be availed to the court at the time when the impugned ruling was rendered. Consequently, this court finds that the notice of motion dated 20/10/2025 is merited and shall be allowed, with costs being in the cause. For clarity, this ruling has not interfered with the substantive hearing of this matter. Thus, the impugned ruling will be reviewed in part, particularly at *paragraph 30*, leading to the following final disposition orders: -

I. The ruling dated 3/06/2025 is reviewed and, in particular, paragraph 30, which is to read as follows:

“In the end and for the reasons and findings stated above, this court hereby issues the following orders: -

a) The notice of motion dated 11/07/2024 is hereby dismissed with costs being in the cause.”

II. A mention shall be given for purposes of pretrial directions.

III. Costs shall be in the cause.

Orders accordingly.

Delivered and Dated at Machakos this 3rd day of March, 2026.

**HON. A. Y. KOROSS
JUDGE
03.03.2026**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms Kanja Court Assistant

Mr. Mbuvo for respondent

No appearance for other parties