REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC LAND MISC. NO. E059 OF 2024

JOSEPH KIOKO MATHOOKO
PAUL MAKAU MATHOOKO
RONALD MUSYOKI MATHOOKO
(suing as the legal representative to the estate of
JOEL MATHOOKO NTHENGE……1ST APPLICANT
BEATRICE MUKULU MUISYA……2ND APPLICANT

VERSUS

JONAH KISESE NTHENGE……1ST DEFENDANT

RULING

1. This ruling is in respect of an unopposed notice of motion dated 16 May 2025, filed by the applicants. It is presented as being made under **Sections 1A, 1B,** and **3** of the **Civil Procedure Act, Orders 45 Rule 1** and **51, Rule 1** of the **Civil**

Procedure Rules 2010, and they seek the following reliefs from this court: -

a) ***THAT this honourable court do review and set aside the orders made on 13th February 2025 declining the applicants' leave to order a skeleton file for and further leave to construct the court file in ELC CASE No.390 of 1994 JOEL MATHOOKO NTHEGE AND BEATRICE MUKULU MUTISYA VERSUS JONAH KISESE NTHEGE.***

b) ***THAT this honourable court grants such other relief as it may deem fit.***

c) ***THAT the costs of this application should be provided for.***

2. The motion is supported by the grounds set out in the body thereof and the supporting affidavit of Joseph Kioko Mathooko, sworn on the instant date. In brief, he states that this court dismissed the applicant's application dated 21st November 2024, which sought leave to order a skeleton file and further leave to reconstruct the court file in **ELC Case No. 390 of 1994, Joel Mathooko Nthege and Beatrice Mukulu Mutisya versus Jonah Kisese Nthege,** on the grounds that the Environment and Land Court did not exist in 1994.

3. He explains that this is erroneous as the case was originally **Civil Case Number 390 of 1994,** and judgment was delivered by **J.W. Mwera J***(as he then was)***.** Still, before the judgment could be executed, one of the plaintiffs passed away, requiring substitution to enable execution of the court's judgment. By the time of substitution in 2013, the Environment and Land Court had been established, and it was transferred to the Environment and Land Court and assigned as **ELC Case No. 390 of 1994.** He informs the court that the three current plaintiffs substituted the deceased plaintiff, and the judgment was reissued in the same terms and certified by the Deputy Registrar, and a decree was subsequently extracted and also certified by the Deputy Registrar. When an application for enforcement of the judgment was filed, the parties were informed that the file was missing and that efforts by registry staff to locate it were unsuccessful, despite several written requests.

4. When the matter was brought before this court for hearing on 13 November 2025, **Miss. Sibika,** counsel for the applicants, 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.

5. 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."***

6. **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."

7. In line with established jurisprudence, higher courts have interpreted the aforementioned provisions in this way: -

In Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] KEHC 6379 (KLR), the court summarised the following non-exhaustive principles**:**

"30. The principles which can be culled out from the above-noted authorities are: -

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."

In the decision of the **Court of Appeal in Civil Appeal No. 2111 of 1996, National Bank of Kenya -vs- Ndungu Njau**, which has been cited in a line of court decisions, the court stated as follows on review applications.

> ***"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-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceed on an incorrect expansion of the law."***

8. In this instance, and pursuant to the applicable law and principles, the applicants have emphasised that the basis for review is that this court committed an error in concluding that **ELC Case No. 390 of 1994** did not exist, given that in 1994, this court had not yet been established. This ground for review is deemed permissible, as it is self-evident and does not require elaborate reasoning to substantiate. Essentially, it constitutes an error apparent on the face of the record.

9. Having examined the materials presented before this court, it has been established that a judgment was issued in **Civil Case Number 390 of 1994 (now ELC Case No. 390 of 1994)** by **J.W. Mwera J** *(as he then was)* on 30th January 2002. It appears that this was a High Court case, and upon the establishment of this court, the case was remitted to this court and retained a similar case number as designated initially. To this extent, this court erred in finding that this matter was not an ELC file and thus dismissed the motion before considering it on the merits.

10. The question that subsequently arises is whether the court should now, on the merits, review its order dismissing the application for the reconstruction of the file. After a review of the record, this court is not convinced that the applicants have met the requisite threshold for two reasons. Firstly, under **Section 4 (4)** of the **Limitation of Actions Act,** the judgment is stale. This provision of the law explicitly states as follows: -

> ***"4. (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at***

recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due."

11. The purpose of the above **Section** is to eliminate stale claims and prevent unnecessary harassment of litigants long after a successful party has slept on its rights. If a judgment creditor chooses to ignore a decree, he is prevented from reviving his claim after 12 years have passed. The law prohibits such claims. In **M'IKIARA M'RINKANYA & Another v GILBERT KABEERE M'MBIJIWE [2007] KECA 115 (KLR),** the court explained this provision as follows: -

"The construction given to the corresponding section 4 (4) of the Act by the courts in this country is much wider. All post judgment proceedings including originating proceedings and interlocutory proceedings for execution of judgment are statute – barred after 12 years… Lastly, it is logical from the scheme of the Act, that a judgment for possession of land, in particular should be enforced before the expiration of 12 years because section 7 of the Act bars the bringing of action for recovery of

land after the end of 12 years from the date in which the right of action accrued."

12. In **Isaac Olang Solongo v Gladys Nanjekho Makokha (Being the administrator of the Estate Antonina Makokha (Deceased) & another [2021] KEELC 2750 (KLR),** the court examined the issue of the expiration of a judgment following the death of a decree holder and the subsequent succession of his estate by his successors, and held:

"From the above observations it is clear that the predicament of successors to decree holders whose predecessors die prior to full execution and before expiry of 12 years from the date of judgment is quite complicated when they obtain grants to the deceased's estate after the mandatory 12 year statutory limitation period computed from the date the judgment became enforceable has lapsed; they are absolutely barred by Section 4(4) of the Limitation of Actions Act from executing such judgments."

13. In the present matter, a judgment was delivered in favour of the applicants on 30 January 2002, requiring them or their estate to execute it on or before 30 January 2014. Their failure to do so extinguished the judgment by operation of law. Consequently, the decree issued by the court on 17 October 2018 is a nullity, unenforceable, and devoid of any legal effect, and any order for reconstruction would be an exercise in futility.

14. Secondly, according to the **High Court of Kenya's Registry Operation Manual, Second Edition, pages 33-34,** certain guidelines regarding the procedures for dealing with missed files are outlined. These guidelines are as follows:

> ***"If a file is missing, the Registry will take the following steps:-***
>
> ***a) The Registry Supervisor checks the file movement register to identify the person in whose possession the file was last recorded. The Supervisor instructs him/her to trace the file.***
>
> ***b) If the file is not traced, the Registry Supervisor circulates a memo to all staff in the Station/Registry asking them to check whether***

the file is in their possession. If the file is not found within 24 hours, the Supervisor will notify the Deputy Registrar.

c) The Deputy Registrar then initiates a special search.

d) If the file is not traced after this first search, the Registry Supervisor writes the words 'original file missing', in pencil, on the relevant case register.

e) The Registry Supervisor then enters the details of the missing file in the register of missing files which is maintained by the Registry Supervisor.

f) After a fruitless search of 14 days, the Deputy Registrar issues a certificate to confirm the loss and recommends the reconstruction of the file.

g) Parties are informed of the non-availability of the file in writing by the Deputy Registrar with a recommendation for reconstruction.

h) In the event that a missing file is traced, the date of recovery is recorded in the case register and its availability is communicated to the parties concerned by the Deputy Registrar within 24 hours of its tracing. A certificate confirming the recovery is issued.

i) The file once traced is merged with any skeleton file that may have been opened."

15. In this case, it is clear that the applicants did not follow the proper procedure. They merely stated that their efforts to retrieve the file from the registry and archives were unsuccessful, and that the Deputy Registrar requested more time to locate it. According to the court's understanding of the guidelines, a conclusion that a file is missing can be made only through a written statement from the Deputy Registrar confirming the loss, issuing a certificate, and recommending reconstruction. Only then is a reconstruction application

necessary. Given the reconstruction guidelines, which specify timelines for completing this process, the court concludes that the requirements for reconstruction have not been satisfied.

16. In the end, for the reasons and findings set out above, this court finds that the notice of motion dated 16 May 2025 is not merited. It is dismissed, with the applicants to bear their own costs.

Orders accordingly.

Delivered and Dated at Machakos this 10th day of March, 2026.

HON. A. Y. KOROSS
JUDGE
10.03.2026

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms Kanja Court Assistant

No appearance for parties.