

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
ELCA NO. E030 OF 2024

KIONGA INVESTMENTS COMPANY - **1ST**
APPELLANT/APPLICANT
JANE NJOKI GICHUR - **2ND APPELLANT/APPLICANT**
VS
DERICK JAMES KIMANI - **RESPONDENT**

RULING

(In respect of the Appellants' application dated 8/10/2025)

1. Vide the Notice of Motion application dated 8/10/2025, which is expressed to be brought under the provisions of Article 159 (2) (d) of the Constitution, Section 80, 1A, 1B and 3A of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, the Appellants/ Applicants substantively seeks orders THAT;
 - a. This Honourable Court be pleased to review, vary and/or set aside its judgment delivered on 30/9/2025.
 - b. Upon such review, the Honourable Court be pleased to reinstate the appeal for hearing and determination on its merits.
 - c. This Honourable Court be pleased to admit and deem as duly filed the Appellants' Supplementary Record of Appeal annexed hereto, upon payment of the requisite court fees.
 - d. Upon admission of the Supplementary Record of Appeal, this Honourable Court be pleased to either reconsider and deliver judgment on the appeal on its merits in light of the complete record now before the Court, or in the alternative, direct that the appeal be heard and determined on its merits.

- e. In the alternative and without prejudice to the foregoing, this Honourable Court be pleased to issue such further or other directions as may be necessary for the expeditious and just disposal of the appeal on its merits.
- f. The costs of this application do abide the outcome of the appeal.
2. The application is premised on the face of it and further supported by the Affidavit of Jane Njoki Gichure, the 2nd Appellant herein, sworn on the same date. The deponent avers that the appeal was dismissed on 30/9/2025 for want of leave to appeal out of time. However, the said leave had in fact been granted in Milimani ELC Miscellaneous Application No. E109 of 2023 vide a ruling delivered on 4/3/2024 by Hon. Justice J.A. Mogeni.
 3. She states that the application granting leave and the corresponding ruling were inadvertently omitted from the initial Record of Appeal. That the omission arose from an excusable oversight during compilation, occasioned by a bona fide belief that the appeal and the miscellaneous application were being processed jointly, following an order of 13/5/2024 by Hon. Justice J.A. Mogeni, ordering that Milimani ELC Miscellaneous Application No. E109 of 2023 be linked with ELC Appeal No. E030 of 2024. The deponent urges that the appellant should not be penalised for this inadvertent mistake.
 4. The deponent asserts that a Supplementary Record of Appeal containing the omitted application and ruling has now been prepared and annexed, marked "JNG-2," and seeks leave to admit it to cure the procedural defect and enable the Court to determine the appeal on its merits. The deponent contends that unless the ruling of 30/9/2025 is reviewed and the Supplementary Record of Appeal admitted, the Appellants will be unjustly deprived of their lawfully granted right of appeal, thereby occasioning grave prejudice and a miscarriage of justice. She argues that the application has been filed without undue delay and that, in the interests of justice, the prayers sought ought to be granted.

The Respondent's Replying Affidavit

5. The Application is opposed by the Respondent herein, Derick James Kimani, vide the Grounds of Opposition and a Replying Affidavit, both dated 12/1/2026. In summary, the Respondent contends that the Application is incompetent and constitutes an abuse of the Court process, as it improperly invokes the review jurisdiction to reopen and effectively appeal a final judgment, contrary to settled principles that review is not a substitute for appeal. He argues that the Applicants have failed to satisfy the mandatory and conjunctive requirements for review, that they have not demonstrated the discovery of new and important evidence, nor established any error apparent on the face of the record.
6. The Respondent states that no sufficient cause has been shown, particularly where the alleged omission concerns matters that were at all material times within the Applicants' knowledge, possession, and control. The omission of documents from the Record of Appeal does not amount to the discovery of new evidence within the meaning of the applicable rules. It is further argued that no error is apparent on the face of the record, and the judgment in question was properly rendered on the material placed before the Court. The Court was under no obligation to search for or import documents from another file, nor to cure defects in a Record of Appeal prepared by the Applicants.
7. He contends that the present Application offends the settled principle of finality in litigation, unduly prejudices the Respondent's legitimate expectation of closure, and improperly seeks to revive a concluded appeal by collateral means. Such an approach runs contrary to established jurisprudence that litigation must, at some point, come to an end.

The Appellant/Applicants' Further Affidavit

8. The Appellant/Applicants filed a Further Affidavit, deposed by Jane Njoki Gichure, sworn on 22/1/2026. The Applicants argue that the grounds for review under Order 45 Rule 1 of the Civil Procedure Rules are

disjunctive, and an applicant need only establish any one of the recognised grounds, including “any other sufficient reason.” The Applicants are not required to demonstrate all grounds simultaneously, contrary to the Respondent’s contention.

9. The Application is stated not to be premised on the discovery of new and important matter, but on sufficient cause arising from the inadvertent omission of a ruling granting leave to appeal out of time from the Record of Appeal. The Respondent’s insistence on proof of new evidence is therefore said to be legally misplaced. It is further deposed that the omission complained of was a procedural lapse attributable to counsel and not a deliberate act or a jurisdictional defect. The ruling granting leave to appeal was validly and lawfully issued by a court of competent jurisdiction, and its omission from the Record of Appeal did not extinguish or invalidate the leave so granted.
10. They argue that inadvertent mistakes or omissions by counsel, when promptly explained and remedied, are recognised in law as capable of constituting sufficient cause, and that such errors ought not to be visited upon litigants who are themselves blameless. The deponent further annexes a screenshot from the Judiciary e-filing portal, marked JNG-1, which evidences this linkage. It is further deposed that the Respondent was neither present nor represented on the mention dates in ELC Miscellaneous Application No. E109 of 2023 and was absent when the Court issued directions linking the files. This is supported by the affidavits of service filed in that matter.
11. The deponent contends that the Respondent’s reliance on the principle of finality in litigation is misplaced, as the principle is not absolute and must yield where strict adherence would cause a disproportionate or unjust outcome, particularly in the absence of demonstrable prejudice. The Respondent has not demonstrated any prejudice arising from the admission of the Supplementary Record of Appeal or the reinstatement of the appeal. Conversely, refusing the

Application would permanently deprive the Appellants of a lawfully secured right of appeal without a hearing on the merits.

12. The application was canvassed by way of written submissions. Both parties filed their respective submissions. The Appellant/Applicants' submissions are dated 31/10/2025, whereas the Respondent's submissions are dated 15/1/2026. The Court has had occasion to read through the said submissions and consider them.

13. The main issue for determination is whether the Appellants have established a case for the Court to review the Orders issued on 30/9/2025.

Analysis and Determination

14. The underpinning legal provision for seeking review 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.”

15. The above provision is further augmented by Order 45 rule 1 of the Civil Procedure Rules that;

“(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.”

16. From the above provisions, it is clear that while Section 80 of the Civil Procedure Act grants the court the power to make orders for review, Order 45 of the Civil Procedure Rules sets out the jurisdiction and scope of review by hinging review on the discovery of new and important matters or evidence, a mistake or error on the face of the record, and any other sufficient reason.

17. Discussing the scope of review, the Supreme Court of India in the case of Ajit Kumar Rath -vs- State Of Orisa & Others, 9 Supreme Court Cases 596 at Page 608 had this to say:-

“The power can be exercised on the Application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” ...means a reason sufficiently analogous to those specified in the rule”.

18. The Court of Appeal in the case of Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (deceased) -vs- Kariuki Marega & Another (2018) eKLR stated categorically that where an Applicant in an Application for review sought to rely on the ground that there was discovery of new and important evidence, strict proof of that ground was required. The Court of Appeal emphasised that an Application based on

the ground of discovery of new and important matter or evidence will not be granted without strict proof of that allegation.

19. It is trite that a Court can review its orders for any other sufficient reason, as provided for under Order 45 of the Civil Procedure Rules. The Court of Appeal in *Shanzu Investments Ltd -vs- Commissioner of Lands* [1993] eKLR, in allowing an appeal against the High Court Ruling declining review for any other sufficient ground, cited with approval the High Court holding in *Wangechi Kimita & Another -vs- Mutahi Wakabiru* CA No 80 of 1985 (unreported) that;

“Any other sufficient reason need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the Court by Section 80 for the Civil Procedure Act. The Court further went on to hold that the other grounds set out in the rule did not in themselves form a genus or class of things with which the third general head could be said to be analogous. The current position would, then, appear to be that the Court has unfettered discretion to review its own decrees or orders for any sufficient reason.”

20. The Applicant relied on Sections 3 and 3A of the Civil Procedure Act, which provide for the inherent powers of this Court, stating that nothing shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. I am also guided by Articles 48 and 159 of the Constitution of Kenya on access to justice.

21. The Applicants aver that their appeal was struck out on 30/9/2025 for want of leave to appeal out of time. However, the said leave had in fact been granted in *Milimani ELC Miscellaneous Application No. E109 of 2023*, vide a ruling delivered on 4/3/2024 by Hon. Justice J.A. Mogeni. They contend that, inadvertently, the Ruling of 4/3/2024 was not included in their record of appeal herein.

22. The Respondent, on the other hand, argues in its submissions that the application is not a genuine review. It is, he says, a procedurally impermissible attempt to re-litigate a dismissed appeal by introducing documents that were deliberately or negligently omitted from the Record of Appeal.
23. It is evident from the annexures attached to the application that leave to appeal out of time was granted by Hon. Justice J.A. Mogeni in Milimani ELC Miscellaneous Application No. E109 of 2023, vide a ruling delivered on 4/3/2024. The ruling was not brought to the court's attention at the time the appeal was struck out.
24. Accordingly, the Application succeeds, and it is allowed to the extent that the orders of this Court issued on 30/9/2025 are vacated and the Appeal is reinstated for hearing on the merits. The application herein is therefore allowed in the following terms.
- a. The judgment delivered on 30/9/2025 is hereby reviewed, varied and/or set aside in its entirety and the appeal is hereby reinstated for hearing and determination on its merits.
 - b. The Appellants' Supplementary Record of Appeal annexed hereto is hereby admitted upon payment of the requisite court fees.
 - c. The costs of this application do abide the outcome of the appeal.
25. It is so ordered

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 26TH DAY
OF FEBRUARY 2026 VIA MICROSOFT TEAMS.**

**J G KEMEI
JUDGE**

Delivered Online in the presence of:

1. Mr. Gakaria is present for Appellants
2. Mr. Kariuki H/B for Mr. Gachugi for the Respondent
3. CA - Ms Yvette Njoroge

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