Sikalieh (Suing as the Chairman of Karen & Langata District Association) v De La Salle Brothers & 5 others (Environment and Land Petition 071 of 2024) [2025] KEELC 5685 (KLR) (29 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5685 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND PETITION 071 OF 2024

AA OMOLLO, J

JULY 29, 2025

BETWEEN

SAMORA SIKALIEH (SUING AS THE CHAIRMAN OF KAREN & LANGATA DISTRICT ASSOCIATION) ..... PETITIONER

AND

DE LA SALLE BROTHERS ..... 1ST RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT ..... 2ND RESPONDENT

THE CEC MEMBER , PHYSICAL PLANNING AND LAND USE OF NBI CITY COUNTY ..... 3RD RESPONDENT

THE CS MINISTRY OF LANDS ..... 4TH RESPONDENT

THE CHIEF LAND REGISTRAR ..... 5TH RESPONDENT

THE ATTORNEY GENERAL ..... 6TH RESPONDENT

RULING

1. The Petitioner/Applicant filed a Notice of motion dated 19th February 2025 supported by an affidavit sworn by Samora Sikalieh on the same date seeking for the following orders;
    1. Spent
    2. Spent
    3. Spent
    4. This Honourable Court be pleased to review its Ruling delivered on 6th February 2025 where it dismissed the Petition filed in ELC Petition No. E071 of 2024: Samora Sikalieh suing as the

chairman of Karen & Langata District Association [KLDA] Versus De La Salle Brothers & 5 Others for being res judicata.

5. The Honourable Court be pleased to review the Ruling dismissing the Petition in ELC Petition No. E071 of 2024: Samora Sikalieh suing as the chairman of Karen & Langata District Association [KIDA] -Vs- De La Salle Brothers & 5 Others with half costs and substitute it with an Order admitting the Petition for hearing and determination on merits.

6. The Petition be reinstated for hearing on the merits and be heard on a priority basis.

7. Costs of this application be in cause.

2. The Application is based on the grounds that on 6th August 2024, the Applicant lodged an appeal with the Nairobi County Liaison Committee challenging development approvals allegedly granted in contravention of constitutional and statutory planning provisions and the Liaison Committee dismissed the appeal on 20th August 2024 for being time-barred, without awarding costs.

3. That aggrieved by the said ruling, the Applicant filed ELC Petition No. E071 of 2024 citing violations of constitutional rights and statutory planning obligations and on 6th February 2025, the Environment and Land Court dismissed the Petition as res judicata, based on a previous decision in ELC Petition No. E027 of 2022 (KLDA v Nairobi City County & Others).

4. The Applicant state that the Court erroneously found similarity in parties and issues between Petitions No. E027 of 2022 and No. E071 of 2024 noting that the suit properties in the two cases are different being LR No. 28712 and LR No. 7943.

5. That also parties are different in the two suits being in Petition No. E027 involve NEMA, PSC, and Aprim Consultants while Petition No. E071 involves De La Salle Brothers and relevant land authorities.

6. The Applicant stated that ELC Petition No. E027 was dismissed for lack of jurisdiction and not on merits and that also Petition No. E071 raises distinct constitutional issues not previously addressed.

7. The Applicant also stated that there is new and compelling evidence being discovery of a registered Trust as the actual owner of LR No. 7943 (not De La Salle Brothers, a non-juristic entity).

8. The Applicant argued that the 1st Respondent has no legal capacity to apply for or receive development approvals and the development approval dated 17th November 2022 is null and void ab initio.

9. Further, the Applicant stated that the petition raises serious issues affecting environmental rights and public participation as the development poses environmental and planning risks to the Karengata area and its dismissal prejudices their rights under Articles 10, 42, 47, 48, 50 & 70 of *the Constitution*. The Applicant stated that the Court has jurisdiction to review its decision under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.

10. The application was vehemently opposed by the 1st Respondent vide a replying affidavit sworn by Bro. Prof.Paulos W.Mesmer on 12th March 2025 and the 2nd and 3rd Respondents vide replying affidavit sworn on 12th March 2025 by Wilfred Masinde, the Deputy Director, Planning and Compliance in the Urban Development & Planning office of the 2nd Respondent.

11. The 1st Respondent stated that the application is disguised as a review but is in reality an appeal. He added that the Applicant has already filed a Notice of Appeal and requested proceedings thus cannot pursue both review and appeal simultaneously.

12. The 1st Respondent stated that the Application is frivolous, malicious, and speculative, especially in admitting intent to amend the Petition after reinstatement. They Respondent contend that once the ruling was delivered on 6th February 2025, the Court became functus officio and cannot revisit its decision or re-examine the merits of the case.

13. That the application invites the Court to reopen the case and arrive at a new decision, which is beyond the scope of review powers. The 1st Respondent state that there is no error apparent on the face of the record and that the alleged "errors" require a re-evaluation of evidence and reasoning, not correction of obvious or clerical mistakes adding that the issues raised in the Application were either already determined or could have been raised earlier.

14. The Respondent stated that the court's decision was based not just on ELC Petition No. E027 of 2022, but also on County Liaison Committee Appeal No. E017 of 2024 and that the ruling considered the relevant factors under Section 7 of the *Civil Procedure Act*, thus arriving at the res judicata finding.

15. They contend that the approval document, PM-4, shows the permission was issued to "The Brothers of the Christian Schools" which is a valid legal entity and adds that the issues around proper parties or ownership should have been addressed in the initial Petition, not now. Nonetheless, by admitting the suit was filed against a non-juristic entity, the Applicant confirms the Petition was fatally flawed and reinstating the Petition would amount to litigating against a non-existent party, which is impermissible.

16. They stated further that the application is an attempt to delay and frustrate the Respondents' lawful development of their property infringing on their constitutional rights to property as provided under Article 40 of *the Constitution* 2010. The 2nd and 3rd Respondents stated that the application fails to pass the test set out under Order 45 Rule 1 of the Civil Procedure Rules,2010.

Submissions

17. The Applicant filed submissions dated 20th March 2025 while the 1st Respondent filed submissions dated 11th April 2025.

18. The Applicant gave a background of the case that on 6th August 2024, they filed an Appeal with the Nairobi County Liaison Committee citing constitutional violations, non-compliance with planning laws, and disregard for the Karengata LPDP and Zonation Policy. That the Committee dismissed the Appeal on 20th August 2024 for being time-barred and advised the County Executive to maintain a public register of development applications.

19. Dissatisfied, the Applicant filed ELC Petition No. E071 of 2024, alleging constitutional breaches but the 1st Respondent challenged the court's jurisdiction on grounds of res judicata and on 6th February 2025, the Court dismissed the Petition, ruling that the matter had already been determined in the year 2023 decision by Lady Justice Mbugua in Sikalie (Chairman) v Nairobi City County Government & Others.

20. The Applicant submitted that the ruling delivered on 6th February 2025 dismissing the Petition on the ground that it was res judicata should be reviewed on the ground that there has been discovery of new compelling and pertinent information and/or evidence. That he discovered the 1st Respondent is a non-juristic entity and there exists a Trust duly registered under the Trustees (Perpetual Succession Act) Cap 164 Laws of Kenya, which is the legal owner of the property LR No. 7943 thus the 1st Respondent lacks the legal recognition and capacity to hold, operate, or benefit from approvals and/or permits issued by the 2nd, 3rd and 4th Respondents.

21. As such, the dismissal of ELC Petition No. E071 of 2024, poses a real and imminent threat to the Applicant since the 1st Respondent being a non-juristic entity is likely to proceed with the implementation of the Nairobi City County Change of User Approval, PLUPA-COU-000497 N, issued on 17th November 2022 which conduct would grossly contravene *the Constitution*, the *Physical and Land Use Planning Act* [PLUPA] and Physical and Land Use Planning (General Development Permission and Control) Regulations 2021.

22. The Applicant also stated that on the ruling in subject, there are errors apparent on the face of the record and clear-cut oversight to which their application is hinged on. He outlined the errors apparent on the face of the record as follows;

    i. The Court's determination as regards the commonality of issues in Petition No. E071 of 2024 vis-à-vis Petition No. E027 of 2022.

    ii. By applying the conjunctive test under Section 7 of the *Civil Procedure Act*, the holding of this court on the similarity of parties and subject matter in Petition No. E071 of 2024 and in Petition No. E027 of 2022 is erroneous.

    iii. The distinction of the suit properties is clear-cut. The suit property in Petition No. E027 of 2022 was LR No. 28712 whereas the suit property in Petition No. E071 of 2024 is LR No. 7943 which is owned by a registered trust.

    iv. In Petition No. E027 of 2022, KLDA commenced suit against the Parliamentary Service Commission and Aprim Consultants whereas in Petition No. E071 of 2024, KLDA sued, inter alia, the De La Salle Brothers, the County Executive Committee Member Physical Planning and Land Use, the CS Ministry of Lands & Physical Planning.

    v. The core issue for determination in Petition No. E027 of 2022 was premised on the unlawful and illegal approvals whereas in Petition No. E071 of 2024, the Petitioner raised substantive constitutional and legal issues and sought for different and extensive prayers which were not similar in the prior Petition. Notably, in Petition No. E071 of 2024 for an Order of Mandamus directing the County Executive Committee Member Physical Planning and Land Use to within 30 days of the order of this court to prepare and maintain a register in accordance with Section 62(1) & (2) of the *Physical and Land Use Planning Act*.

23. The Applicant also argues that the Ruling overlooked substantive constitutional and statutory issues, including the failure of the 2nd and 3rd Respondents to maintain a public register as required under Section 62 of the *Physical and Land Use Planning Act* (PLUPA) and the 4th Respondent's failure to issue guidelines for public access to the same which failure violates Articles 10, 42, 47, 48, and 50 of *the Constitution*.

24. The Applicant highlights that the impugned Change of User, allowing development of an 800-resident tertiary college in a residential zone, contravenes the Karengata Zonation Policy and the preconditions set out in the Approval Letter dated 17th November 2022, thereby violating Sections 56-59 of PLUPA.

25. In support of his case, the Applicant cite the case of Northern Block Residents Ltd v Canaan Residences LLP & Others (ELC Pet E090 of 2024), where the court granted conservatory orders to halt development where constitutional rights to a clean and healthy environment were at stake, Northern Block Residents Ltd v Gigiri Mart Ltd & Others (Petition E063 of 2024), which held that court had jurisdiction to hear constitutional questions, even when planning matters overlapped with specialized tribunals and also Patrick Musimba Ltd v China Railway No. 10 Engineering Group Co. Ltd & Another [2025] KEELC 1231 (KLR), where the court ruled that failure to notify a petitioner

about planning approvals constitutes a violation of constitutional rights and cannot be dismissed on technicalities.

26. The Applicant asserts that the court has jurisdiction to review its ruling based on errors apparent on the face of the record and the emergence of new, compelling evidence, as held in Standard Chartered Financial Services Ltd v Manchester Outfitters Ltd [2016] eKLR and John Florence Maritime Services Ltd v Cabinet Secretary for Transport & Infrastructure [2021] KESC 39 (KLR).

27. That also, awarding costs to the 1st Respondent which is a non-juristic entity was improper and should be reviewed.

28. On the other hand, the 1st Respondent stated that in an attempt to whittle down their averment that the Applicant cannot choose both appeal and review at the same time, filed a notice of withdrawal of the filed Notice of Appeal and written submissions dated 12th March 2025 which he argued was an afterthought and filed grounds of opposition to it.

29. With regard to the Applicant's application for review, the 1st Respondent submitted that the court having dismissed the Petition for being res judicata became functus officio and cannot reopen the case.

30. That the application is an invitation to the court to sit on its own appeal as held in the case of Mogaka v National Land Commission & 5 Others [2022]KEELC 2618(KLR) noting that the Applicants had already filed a Notice of Appeal against the ruling in subject and even requested for proceedings for the purposes of the appeal.

31. The 1st Respondent further stated that the Application for review is incompetent because it was filed during the existence of the Notice of Appeal and in support cited the case of Multipurpose Co-operative Society Ltd V Serser & 3 Others (Civil Appeal 160 of 2018)[2023]KECA 441(KLR) which held that when the appellant filed a notice of appeal, it is deemed to have instituted an appeal and as soon as that happened, it was not open to the appellant to seek review of the judgement from which the appeal or the intended appeal accrued from.

32. The 1st Respondent submitted that the errors alluded to by the Applicants in their application do not pass the test laid out by the Court of Appeal in the case of Muyodi vs Industrial and Commercial Development Corporation & Another [2006]1EA 243 cited in the case of Mogaka v National Land Commission & 5 Others [2022] KEELC 2618(KLR) because the issues raised require a long drawn process of reasoning.

33. They submitted that the grounds for review cited by the Applicants constitute grounds for an appeal against the ruling and not review and in support cited the case of Nge'endo v Sorathia Investment Limited & 4 Others [2024] KECA 583 (KLR).

34. The 1st Respondent also submitted that the new evidence relied on by the Applicants bears no probative value and has no relevance to the decision of this court in the impugned ruling. That whether the approval was addressed to a non-juristic entity does not change the fact that this court lacks jurisdiction to hear and determine the suit and in support relied on the case of Kabita & 4 Others v Kariuki [2023] KECA 1551 (KLR).

35. That the Applicant is also required to demonstrate that indeed they acted with due diligence and the existence of the evidence was not within their knowledge citing the case of Rose Kaiza V Angelo Mpanju Kaiza [2009] KECA 422 (KLR) AND Rose Kaiza v Angelo Mpanju Kaiza[2009] KECA 422 (KLR).

Analysis and Determination:

36. I have read the application filed herein together with the supporting affidavit, the replying affidavits by the respondents and reviewed the submissions filed by the Applicant and 1st Respondent in support of their respective cases. The main issue for determination is whether the applicant has met the threshold for the grant of orders of review as sought.

37. The governing law on review is section 80 of *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. Order 45(1) states as follows:

> "(1) Any person considering himself aggrieved:
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> a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> 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 order made or made the order without unreasonable delay."

38. The 1st Respondent stated that the Applicant had resorted to appeal the impugned ruling having filed a notice of appeal making the instant application for review incompetent. It appears after the 1st Respondent served the Petitioner/Applicant proceeded to file a notice of withdrawal of the filed Notice of Appeal they had lodged. However, the 1st Respondent submitted that the review having been filed during pendency of the Notice of Appeal, the same should be dismissed.

39. The Court of Appeal in the case of in Gerald Kithu Muchanje v Catherine Muthoni Ngare & another [2020] eKLR held that one must elect either to file an appeal or to apply for a review thus a party cannot exercise the two options at the same. Thus, the Applicant having filed a Notice of Appeal, was prohibited from filing an application for review but having withdrawn the said notice, I hesitate to hold the application as incompetent.

40. Nonetheless, I will examine the grounds relied on for review by the Applicant to access whether they met the threshold. The review is premised on the ground of error/ mistake apparent on the face of the record and discovery of new and important evidence. The Applicant stated that they have come to the knowledge that the 1st Respondent is a non-juristic entity, thus not capable of owning property or seeking for the development approval granted by the 2nd and 3rd Respondents.

41. I shall be guided by the decisions cited herein above that mere discovery of said information which was not considered during determination of the said impugned ruling is not sufficient. The Applicant has to demonstrate that the new information could not after the exercise of his due diligence was not within his knowledge or could not be produced by him at the time when the ruling was delivered.

42. In the case of Rose Kaiza -v- Angelo Mpanju Kaiza C.a. Civil Appeal No 225 of 2008 [2009 eKLR], the Court of Appeal while discussing the ground of new and important matter or evidence as a basis

of review cited with approval the following passage from Mulla's Civil Procedure Code 15Th Edition at page 2726 thus:

> " Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the discovery of new evidence, it must be established that the Applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the Petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of new and important matter which was not within the knowledge of the party when the decree was made." Emphasis added.

43. The 1st Respondent stated that the alleged new information was availed to the Applicant when they served them with their pleadings before hearing of the application whose orders are sought to be reviewed. The information is captured under paragraph 5 of the replying affidavit sworn on 3rd October, 2024 on behalf of the 1st Respondent. The replying affidavit was sworn in opposition to the Petitioner's application dated August 2024.

44. The Applicant was made aware of their capacity which has not changed and which capacity could have been obtained by conduct a search at the land's registry to know the ownership of the suit property. In the affidavit sworn in support of the present application, the Petitioner does not elaborate how the information served on them now should be treated as new and important information within the meaning of order 45 of the Civil Procedure Rules.

45. The Applicant also outlined the grounds that there an error apparent on the face of the record. The yardstick for determining whether there was an error or otherwise was settled by the Court of Appeal in National Bank of Kenya Ltd vs Ndungu Njau Civil Appeal No. 211 of 1996 (UR) where it held:-

> " 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."

46. Similarly, in Paul Mwaniki vs National Hospital Insurance Fund Board of Management [2020] eKLR the court stated:

> " 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 a 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 proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for review."

The court went on to say:-

> " The term 'mistake or error apparent' by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation of the facts or the legal position. If an error is not self-evident and detection

thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for purposes of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/ decision. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it."

47. The similarity of parties in Pet 027 of 2022 is only with respect to the Petitioner and the Nairobi County Government who was also the petitioner and a Respondent in Pet 027. It is true that the parcels of land where the impugned developments are to be undertaken and the proponents of the said developments are different. However, the Applicant is misleading in stating that Petition 027 of 2022 was not determined on merits going by the determination of Mbugua J in paragraphs 36 and 37 of the Judgement.

48. The Petitioner/Applicant further deposed that the court erred in finding that the issues raised for determination in petition 027 of 2022 and this petitioner were related. They contend that in the current petition, they have raised substantive constitutional and legal issues and sought for different prayers. I have reviewed the reliefs sought in petition 027 and the current petition and still find no difference. In both Petitions, what is challenged is the development approvals granted to the proponents of the development and a prayer for permanent injunction against the proponents from undertaking the said impugned developments.

49. Despite the conclusion that the orders sought in both petitions are similar, I agree to revise the orders on the account that the development complained are to be undertaken in different parcels of land by different developers. There was an error/mistake on the part of the court to apply the doctrine of res judicata wholesomely where not all the parties were litigating under the same title (the persons issued with the development approvals granted under different circumstances).

50. The nature of the error pointed out cannot be said to be used to fill up gaps in the evidence of a losing party. The facts as pleaded have not changed and there is no dispute that the 1st Respondent in this case cannot litigate through the Interested Parties (Parliamentary Service Commission and Aprim Consultants) in Petition 027 of 2022.

51. The application for review is therefore allowed in terms of prayer 5, 6 and 7 of the motion as follows:

    a. The Order/ Ruling delivered on 6th February 2025 dismissing the Petition with half costs for being re judicata is reviewed and is hereby set aside.

    b. The Petition is re-instated to be heard on its merits

    c. Each party to bear their respective costs of this application

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY 2025

A. OMOLLO

JUDGE