

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KAKAMEGA
ELC CASE NO. 29 OF 2020

ROSALIA AHEMBELWA ASHIVAGA.....1ST PLAINTIFF

JOHNSON ANDUKU MULINYA.....2ND PLAINTIFF

VERSUS

JULIUS LUMUMBA ICHELA.....

....DEFENDANT

AND

MUKAVALE KEVIN T/A MUKAVALE

KEVIN & CO. ADVOCATES.....

.....APPLICANT

RULING

Introduction

1. Before court is a Notice of motion dated 29th September 2025 filed by the defendant seeking orders that;

a) Spent

b) That this Honourable Court be pleased to allow the applicant to come on record for the defendant in the matter in place of the firm of P.L. WASILWA & CO. ADVOCATES.

c) That this Honourable Court be pleased to order eviction of the plaintiffs from the suit being ISUKHA/SHITACHI/917.

d) That costs of the application be provided for.

2. The application is supported by the annexed affidavit of the applicant sworn on 29th September 2025. The applicant's case is that there is an error apparent on the face of the record in the judgment of the court as the court dismissed the plaintiff's claim for adverse possession without ordering eviction of the plaintiff.

3. The application was opposed. The 1st plaintiff filed replying affidavit dated 8th November 2025. He stated that the application is made by a total stranger to the proceedings who lacks capacity. That the court having pronounced itself in the matter is now *functus officio*. That the orders sought had not been counterclaimed. That orders of eviction being sought are substantive orders and ought to be sought by a substantive suit. That there is no error apparent on the face of the record.

4. The 2nd plaintiff filed replying affidavit dated 29th October 2025. He reiterated the averments of the 1st plaintiff and stated that this court was *functus officio* and that the application sought to have this court sit on appeal of its own decision.

Analysis and determination.

5. The court has carefully considered the application, as well as the response. The issue that arise for the court's determination is whether the applicant deserves the orders sought.

6. Order 9 Rule 9 of the Civil Procedure Rules requires a party who intends to change their advocate after judgment, to do so upon obtaining leave of court. Legal representation is a Constitutional right and a party is at liberty to choose or change advocates in any matter before court. In these proceedings, there is no

impediment for the applicant to change his advocates after judgment, therefore leave is hereby granted to the defendant to change his advocates from P.L. WASILWA & CO. ADVOCATES to MUKAVALE KEVIN & COMPANY ADVOCATES.

7. The law that governs review of court decisions is provided for in Section 80 of the Civil Procedure Act and Order 45(1) of the Civil Procedure Rules.

Section 80 of the Civil Procedure Act provides as follows;

“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.**

Order 45 Rule 1 for 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.

- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.**

8. Therefore, for an applicant to succeed in seeking orders of review, he/she must demonstrate that;

- (a) That there is discovery of new and important matter or evidence, which was not in his knowledge or could not be produced by him after exercise of due diligence; or**
- (b) That there is a mistake or error apparent on the face of the record; or**
- (c) That there is a sufficient reason; and**
- (d) An application for review must be made without unreasonable delay.**

9. In the case of *Nyamogo & Nyamogo vs. Kogo [2001] EA 170*; the court discussed the issue of an error apparent on the face of the record, as follows;

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law spares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a new adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”

10. In the instant case, the applicant’s reason for seeking review is that there is an error apparent on the face of the record because in the court’s judgment the court dismissed the plaintiff’s suit but failed to issue orders to evict the plaintiff.
11. The pleadings herein show that the defendant never sought eviction and the court could not give what was

not sought. In any event, the defendant deponed in his replying affidavit that he had sought eviction orders vide ELC 29 of 2016. Therefore, there is no error on the face of the record. This court having executed its mandate fully in this matter, nothing remains, hence the court is *functus officio*.

12. In the premises, save that the firm of Mukavale Kevin & Company Advocates is granted leave to come on record for the defendant herein in the place of P.L. Wasilwa & Company Advocates, I find no merit in the application dated 29th September 2025, which I dismiss with costs.

13. It is so ordered

**DATED, SIGNED AND DELIVERED AT KAKAMEGA
IN OPEN COURT/VIRTUALLY THROUGH
MICROSOFT TEAMS VIDEO CONFERENCING
PLATFORM THIS 11TH DAY OF MARCH 2026**

**A. NYUKURI
JUDGE**

In the presence of;

Mr Shaka for the defendant

No appearance for the plaintiff.

Court Assistant: Delphine