

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND COURT AT KAKAMEGA**  
**ELCC CASE NO. E472 OF 2014**

**HENRY MADAKWA OMUNYOKHO.....PLAINTIFF**

**VERSUS**

**CHARLES            ONDAKO            OMUNYOKHO.....**  
**DEFENDANT**

**RULING**

**Introduction**

1. Before court is a notice of motion dated 22<sup>nd</sup> April 2025 filed by the plaintiff seeking the following orders;

**a) THAT the honorable court be pleased to review, vary and/or set aside the judgment and decree of this court delivered on 18/09/2023 which judgment and decree dismissed plaintiff's case, declared that Butsotso/Shikoti/7164 and Butostso/ Shikoti /7165 to be the only valid titles created from land parcel known as Butsotso/Shikoti/2310 and defendant to have costs of the suit.**

- b) THAT the honorable court be pleased to direct, order and find that Butsotso/Shikoti/7164 and Butostso/Shikoti/7165 are not the only valid titles as the same do not exist in any cadastral map in government survey and the said parcels of lands were never rightfully created from land parcel known as Butsotso/Shikoti/2310 and that Land parcel No. Butsoso/ Shikoti/7122 and parcel No. Butsoso/Shikoti/7123 per copy of title deed on court among others also emanated from Butsotso /Shikoti/2310.**
- c) THAT the Hon. court erred in not appreciating the effect of the Court of Appeal HCCA No. 202 of 1996 and which appeal set aside the earlier decisions including CMCC NO. 792 of 1989 and refereed parties to Land Dispute Tribunal.**
- d) THAT the Honorable court do consider, admit and allow discovery on decision of the Land Dispute Tribunal Lurambi Division Case No. 41 of 96 and its effect on the foregoing.**
- e) THAT the Honorable court do order the Land Registrar Kakamega and County Head Surveyor to appear before court to explain the disparity discovered on the titles at lands records conflicting with surveyors record on the necessary and rightful parcels.**

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

2. The application is anchored on the grounds on its face and the affidavit sworn by the applicant. The applicant's case is that the judgment of the court made on 18<sup>th</sup> September 2023 has errors and that there was a misapplication of the law on the facts and previous decision in Kisumu HCA NO. 202 OF 1996 which set aside PMCC NO. 792 OF 1989.
3. The applicant further argued that this court erred in dismissing the plaintiff's case and declaring that parcel Nos. Butsotso/Shikoti/7164 and Butsotso/Shikoti/7165 as the only validly created titles from parcel No. Butsotso/Shikoti/2310, when those titles emanated "from PMCC NO. 792 OF 1989 where the case PMCC OF 1992 was cancelled by Kisumu HCA 202 OF 1996." That the applicant is aggrieved with the judgment as it has prejudiced his right to property.
4. The application was opposed. Alex Kwatera Ondago the defendant/respondent filed replying affidavit sworn on 25<sup>th</sup> August 2025. He stated that judgment herein was

delivered on 18<sup>th</sup> September 2023, costs taxed on 30<sup>th</sup> October 2024 and a notice of appeal filed on 25<sup>th</sup> September 2023. That the applicant has already filed appeal being Kisumu CA NO. E263 OF 2023. That the applicant's application dated 24<sup>th</sup> October 2023 is pending.

5. He maintained that since there is an active appeal No. E263 OF 2023, the application herein is misconceived and does not meet the threshold set out in section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. That this court lacks jurisdiction to issue the orders sought.
6. Further that there is no discovery of new matters, or an error apparent on the face of the record or a sufficient cause to warrant a review. That parcel Nos. Butsotso/Shikoti/7122 and 7123 do not exist as the said subdivisions were nullified through orders issued in Kakamega Misc. Application No. 95 of 1997.
7. Further that parcel Nos. Butsotso/Shikoti/7164 and 7165 were issued pursuant to orders issued in Kakamega

PMCC NO. 792 OF 1989 and that the said judgment was appealed against vide Kakamega HCC Civil Appeal No. 20 of 1995 which was dismissed and a subsequent appeal vide Kisumu Court of Appeal Civil Appeal No. 201 of 1996 was dismissed and titles for Butso/Shikoti/7164 and 7165 were upheld.

8. In a rejoinder, the plaintiff swore a replying affidavit dated 18<sup>th</sup> November 2025. He stated that Civil Appeal No. E263 of 2023 has never been heard, and no pretrial directions have been taken, hence the plaintiff is free to seek review. He maintained that there was no inordinate delay. That he discovered a letter dated 31/03/2014 by the Regional Survey Office to the County Surveyor.

9. The application was canvassed by way of written submissions. On record are submissions filed by the applicant dated 28<sup>th</sup> January 2026; which the court has duly considered.

### **Analysis and determination**

10. The court has carefully considered the application, the response thereto as well as the submissions. The only

issue that arise for determination is whether the applicant has met the threshold for grant of orders of review.

11. The power to grant review is provided for in section 80 of the Civil Procedure Act and the conditions upon which review can be granted are in Order 45 Rule 1.

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 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.**

**(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."**

12. Essentially, section 80 of the Civil Procedure Act grants the court the jurisdiction to consider a review application, while Order 45 of the Civil Procedure Rules sets out the rules that restrict the grounds upon which review may be granted to;

**a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;**

**b) On account of some mistake or error apparent on the face of the record, or**

**c) For any other sufficient reason; and whatever the ground of the application, there is a requirement that the same has to be made without unreasonable delay.**

13. In the instant case, the applicant's position is that this court erred in finding that parcel Nos. Butsotso/Shikoti/7164 and 7165 were the only valid titles yet those titles do not exist. He stated that the court should consider that the applicant has discovered the decision in Land Disputes Tribunal in Lurambi in Case

No. 41 of 1996. His position is that the evidence on record should have led this court to arrive at conclusions that favoured the plaintiff and therefore the court misapprehended the facts.

14. As clearly indicated in Order 45 Rule 1 of the Civil Procedure Rules, review can only be based on the three conditions being discovery of new evidence that could not be availed even with exercise of due diligence, error apparent on the face of the record or sufficient cause. The applicant's argument that he has just discovered a decision of the Land Disputes Tribunal in case no. 41 of 1996, is not plausible as he has not demonstrated that he could not find the decision on exercise of due diligence.

15. On the argument that this court was wrong, misapprehended the facts and misapplied the law, are matters that can only be raised on appeal, as this court has no jurisdiction to consider whether its application of the law was wrong, as that will amount to the court sitting on appeal of its own decision.

16. The judgment having been made on 18<sup>th</sup> September 2023 and the application herein having been made on 24<sup>th</sup> April 2025, a period of about 19 months, in my view, amounts to inordinate delay. The fact that the appellant has challenged this courts judgment on appeal and is also before me arguing that this court erred in the conclusions arrived at in the judgment, amounts to an abuse of the court process.
17. The upshot is that I find no merit in the application dated 22<sup>nd</sup> April 2025, which I dismiss with costs to the defendant/respondent.
18. It is so ordered.

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

**A. NYUKURI  
JUDGE**

**In the presence of;**

Mr. Edaki for the plaintiff/applicant

No appearance for the defendant/respondent

Court Assistant: Delphine.