Baya & 2 others v Kitunga & 13 others (Civil Appeal E027 of 2022)
[2026] KECA 643 (KLR) (25 March 2026) (Judgment)

Neutral citation: [2026] KECA 643 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E027 OF 2022

SG KAIRU, KI LAIBUTA & GW NGENYE-MACHARIA, JJA

MARCH 25, 2026

BETWEEN

YAA BAYA ..... 1ST APPELLANT

KENNETH MRAMBA WANJE (APPEALING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF STANLEY KALUME - DECEASED) ..... 2ND APPELLANT

ESTHER KALUME WANJE ..... 3RD APPELLANT

AND

KAZUNGU BAYA KITUNGA ..... 1ST RESPONDENT

KARISA BAYA KITUNGA ..... 2ND RESPONDENT

KATANA BAYA KITUNGA ..... 3RD RESPONDENT

NGUMBAO BAYA KITUNGA ..... 4TH RESPONDENT

KAHINDI BAYA KITUNGA ..... 5TH RESPONDENT

TABU BAYA KITUNGA ..... 6TH RESPONDENT

CHADI BAYA KITUNGA ..... 7TH RESPONDENT

JUMWA BAYA KITUNGA ..... 8TH RESPONDENT

SHIDA BAYA KITUNGA ..... 9TH RESPONDENT

NYEVU BAYA KITUNGA ..... 10TH RESPONDENT

DAMA BAYA KITUNGA ..... 11TH RESPONDENT

KADZO BAYA KITUNGA ..... 12TH RESPONDENT

NYEVU BAYA KITUNGA ..... 13TH RESPONDENT

KAHESO BAYA KITUNGA ..... 14TH RESPONDENT

(Being an appeal from the Ruling and Order of the Environment and Land Court of Kenya at Mombasa (Munyao Sila, J.) delivered on 13th January 2022 in ELC No. 255 of 2005)

JUDGMENT

1. The respondents, Kazungu Baya Kitunga & 13 others as the plaintiffs filed a suit before the Environment and Land Court (the ELC), being Mombasa ELC Case No. 255 of 2055 against the appellants, Yaa Baya & 2 Others.

2. From the outset, we wish to observe that from the record as put to us, the initial pleadings filed by the parties were not included. We note that, by an Order of this Court (Gatembu, Murgor, & Ochieng, JJ.A.) dated 4th March 2025, the parties were directed to appear before the Hon. Deputy Registrar for case management, which included directions on filing of a Supplementary Record of Appeal, to bring on board the missing pleadings. The record shows that during Case Management on 11th March 2025, the issue of filing a supplementary record of appeal was not addressed. The background to the appeal is therefore derived from the summary of facts as contained in the ELC Judgement dated and delivered on 13th July 2017 by Komingoi, J.

3. The record also shows that during the case conference, the Deputy Registrar was informed that the 1st and 3rd appellants were deceased, with the latter being the wife of the 2nd appellant. It is apparent that the Record of Appeal was filed by the 2nd appellant only. The 1st and the 3rd appellants need not have been included in the appeal.

4. We also note that on 4th October 2024, by an order of the Court (Nyamweya, JA.), the 2nd appellant, Stanley Kalume, was substituted for Kenneth Mramba Wanje, as the legal representative of his estate and hence the present title of the appeal.

5. Another critical observation relates to the number of the respondents in the appeal. The header of the Record of Appeal titles the parties as "Yaa Baya & 2 others vs. Kazungu Baya Kitunga & 13 others", which title runs in almost all the pleadings in the record, including orders issued by this Court as well as the trial court Judgment dated 13th July 2017 and the impugned ruling dated 13th January 2022. However, the Memorandum of Appeal at page 3 outlines the parties by name. The respondents total 14 in number. Interestingly, the 10th respondent, Nyevu Baya Kitunga is also listed as the 14th respondent which we are unable to conclude as to whether it was by mistake or that the two names belong to two different persons. We say this because, as we shall observe later in this Judgment, the 14th respondent was mentioned in the trial court judgment as a wife of the deceased Baya Kitunga. Again, the Decree arising from the Judgment which is found at page 16 of the record has only listed 13 respondents (named as Plaintiffs) and 3 appellants (named as defendants).

6. Our take is that, since nearly all pleadings name 14 respondents, we shall leave that number undisturbed. Even if for any reason the 10th respondent is named twice as per the Memorandum of Appeal, no harm is occasioned by the repeated numbering as the outcome of the appeal would only apply to the parties thereto. All we can say is that it is good practice to disclose by writing down the names of parties in the heading to pleadings as it aids the court and other parties reading through a record to know who the serialised parties are, and in whose favour or against who orders may be made. Failure to do so may create a lot of confusion and sometimes mess the Court when it intends to make a particular order or direction to a specific party.

7. Back to the germane issues, the trial court judgement indicates that the 1st appellant, Yaa Baya did not enter appearance or participate in the suit despite proper service, consequent to which an interlocutory judgement was entered against him.

8. In the main suit, the respondents sought:

> "i. A declaration that the respondents have an interest estate (sic) and right of ownership, possession and title to and/or over the said land parcel number Majaoni Block 5A/358 measuring 3.79 Hectares and the Land Registrar Kilifi do immediately issue a title deed to the respondents.
>
> ii. A declaration that the sale agreement between the 1st appellant and the 2nd appellant is null and void ab initio and the 2nd appellant is a trespasser and thus has no estate or interest or right of ownership of possession of title whatsoever or any other right to or over the said 3. 70 Hectares of the property that is Majaoni Block 5A/358 and the registration of the said Majaoni Block 5A/358 in the 2nd appellant's name be cancelled and the 2nd appellant do surrender the title of the property to the Land Registrar Kilifi for rectification.
>
> ii. An order that the 1st and 2nd appellants do meet the costs of, and incidental to, issuing another title deed to the plaintiff for the said land parcel number Majaoni Block 5A/358 measuring 3.70 hectares and the 2nd and 3rd appellants do forthwith and/or within such a period as may be provided by the Court remove any structure or construction thereon."

9. On his part, the 2nd appellant entered appearance on 7th March 2006, and on 24th March 2006, he filed a defence dated 23rd March 2006. The 2nd appellant denied the allegations raised by the respondents in paragraphs 7 to 12 of their plaint and put them to strict proof thereof. In answer to paragraphs 12, 17, 18 to 21 of the plaint, he averred that he filed an application to the High Court seeking to quash the Award of the Bahari Land Disputes Tribunal vide Miscellaneous Application No. 641 of 2005, and that the same was still pending hearing and determination. We note that the said Award dated 7th April 2005, was adopted as a judgment of the court by the Senior Resident Magistrate's Court in Kilifi in Kilifi SRMCC LDT Case No. 4 of 2005.

10. The 2nd appellant further stated that he purchased land parcel No. Majaoni Block 5A/358 (the suit parcel) from the 1st appellant who was its proprietor.

11. On 21st March 2007 by consent of all the parties, the suit against the 3rd appellant was dismissed with costs. During the pendency of the suit, the court issued an order restraining the 2nd appellant from selling or transferring the suit parcel until the suit was heard and determined. This then left the 2nd appellant, Stanley Kalume Wanje, as the only participant in the suit, and who was also the one who initiated the instant appeal, albeit that, as observed above, has since been substituted by Kenneth Mramba Wanje.

12. After considering the evidence, the learned Judge (Komingoi, J.) observed that the 1st to 12th respondents were sons and daughters of the late Baya Kitunga, and that the 13th and 14th respondents the widows of Baya Kitunga; that the widows had an overriding interest in the suit parcel over other respondents and the 1st appellant; that the suit parcel existed as a result of sub-division of Parcel No. Majaoni/Block 5A/47 which was initiated by the 1st appellant; that the sub-division gave rise to two

parcels, namely Majaoni/Block 5A/538 (the suit parcel) and Majaoni/Block 5A/359; that, although the suit parcel was registered in the name of Sidi Baya Kitunga, the eldest wife of the deceased, she held it in trust for herself and the rest of the respondents; and that all the respondents consented to disposing of parcel No. Majaoni/Block 5A/359, and that that is why they were not claiming it.

13. The trial court went on to observe that it was not clear how the suit parcel was transferred into the name of the 1st appellant since as at the time of the transfer, the holder of the title, Sidi Baya Kitunga, was deceased and no succession proceedings were filed in respect of her estate; that, therefore, the transfer was irregular as the 1st appellant did not have the capacity to dispose of property of a deceased person; that in the same vein, the Land Registrar, Kilifi had observed that the original parcel of land could not have been sub-divided without succession proceedings having been filed and a grant of letters of administration issued in respect of the deceased's property. The learned Judge therefore held that the 1st appellant had no capacity to sell the suit parcel to the 2nd appellant; and that the Award of the Bahari Land Disputes Tribunal, which was in favour of the respondents, was binding on the 2nd appellant.

14. Ultimately, the learned Judge concluded by holding that the respondents had proved on a balance of probabilities that they had been dispossessed of the suit parcel; that the 2nd appellant could not conclusively be said to be the owner of the suit parcel, and that he had acquired the title through misrepresentation which amounted to an illegality; and that the exceptions to indefeasibility of a title under Section 26(4)(b) and (c) of the *Land Registration Act*, No.3 of 2012 therefore applied. Accordingly, judgement was entered against the appellants in favour of the respondents jointly and severally, and the respondents' prayers were allowed as prayed with costs. In addition, the 2nd appellant was ordered to remove any existing structures on the suit parcel within 6 months from the date of the Judgement.

15. No appeal was preferred against the said decision. Instead, the 2nd appellant filed a Notice of Motion dated 23rd February 2021 seeking a raft of orders which, by the time of hearing of the application, were spent. This left the trial court to only consider the unspent prayer which sought a review and the setting aside of the judgement delivered on 13th July 2017 by Komingoi, J., the decree arising therefrom and all consequential orders.

16. The application was anchored on the grounds on its face and the 2nd appellant's affidavit sworn on 23rd February 2021. He deposed that he came to know of the trial court judgement in the month of January 2021 when his wife, Esther Kalume Wanje, who was wrongly sued in the suit as the 3rd defendant, was summoned to the police station on allegations that she had trespassed onto the suit parcel; that he tried without success to reach his former counsel; that the impugned judgement was amenable to being set aside and/or varied for the reasons: that the appellants' counsel was not in court during the delivery of the judgement; that the learned Judge (Komingoi, J.) proceeded on a misconceived and/or erroneous position that the award in Bahari Division Land Dispute Tribunal Case No. 8 of 2004 had not been set aside by the High Court; and that the respondents did not have the locus standi to institute the suit.

17. The 2nd appellant deposed that he was apprehensive that, if and after the title deed was issued to the respondents, they would dispose of the suit parcel to third parties and, as a result, he would suffer irreparable loss and prejudice.

18. In response, the 1st respondent filed a replying affidavit sworn on 30th April 2020 on behalf of other respondents by which he deposed that the 2nd appellant did not buy the entire suit parcel but only 1.6 hectares; that he instead caused the entire parcel to be fraudulently registered in his name; that the 2nd appellant apparently entered into a sale agreement with the 1st appellant when he had already caused the transfer and registration of the suit parcel in his name; that it was factual that, by the time

the 2nd respondent fraudulently transferred the suit parcel into his name, it had previously been in the name of Sidi Baya Kitunga who was then deceased, and that, therefore, the trial court was right in concluding that the 1st appellant had no capacity to deal with the property of a deceased person without first obtaining a grant of letters of administration; that the 2nd appellant duly defended the suit, and that, indeed, judgment was delivered in the presence of his counsel contrary to the assertion that it was delivered in his absence; that the 2nd appellant was indolent in failing to follow up on the outcome of the judgment; that the 2nd respondent, instead of appealing the impugned judgement, opted to file two other suits, and, as such, the subject suit was res judicata; that the 2nd appellant had not demonstrated any good grounds for which the trial court judgment ought to be reviewed; and that the application was, therefore, an abuse of the court process and ought to be dismissed with costs.

19. In a ruling dated 13th January 2022, which is the subject of the instant appeal, Munyao, J. (as he then was) struck out the replying affidavit on the ground that it was defective having been signed by one Karisa Baya Kitunga while it was deposed by the 1st respondent.

20. The learned Judge then went on to consider the applicable principles in an application for review under Order 45 rule 1 of the Civil Procedure Rules, 2010 ('the CPR'). He held that the application ought not to have been filed without unreasonable delay; that the application was filed more than three years after delivery of the judgement; that, inasmuch as the judgement was not delivered in the presence of the 2nd appellant's counsel, counsel ought to have exercised due diligence and informed the 2nd appellant that the judgement had been delivered; that the 2nd appellant could not have failed to know of the delivery of the judgement since he filed a suit in the Chief Magistrate's Court at Malindi in March 2020, being CMCC No. 12 of 2020 where he sought injunctive orders against the 2nd respondent and another; that there was no plausible reason as to why the 2nd appellant filed another suit in March 2020, which action could only be termed as an abuse of the court process; and that, therefore, the application was filed after unreasonable delay.

21. The learned Judge observed that the 2nd appellant sought to introduce in the application, the judgement delivered in the year 2007 in Mombasa HCCC Miscellaneous Application No. 641 of 2005; that the 2nd appellant testified in the suit in the year 2011; that it was his duty to present the judgement in the miscellaneous application at the hearing of the trial for whatever purpose, and that, for his failure to do so, he could not fault the trial court for finding that there was no evidence of any judgement that had been delivered in relation to the matter at hand; that, for all intent and purposes, the said judgment was not new evidence or matter which could not be produced at the time of hearing of the trial; and that failure to have introduced it at the hearing was neither an error apparent on the face of the record to warrant a review of the court's judgment.

22. Further, the learned Judge was of the view that the judgement was not solely hinged on the award of the Tribunal. The court was persuaded that the suit parcel was ancestral land, and that the 1st respondent could not sell the entire piece.

23. On the issue of locus standi, it was held that the same ought to have been raised before the judgement was delivered, and that, at the stage of an application for review, the court had become functus officio to address it; and that the only way through which the 2nd appellant could raise the issue was by an appeal, but not a Motion for review.

24. Ultimately, the 2nd appellant's Motion was dismissed with costs.

25. Aggrieved, 2nd appellant filed the instant the appeal which by a Memorandum of Appeal dated 10th March 2022, is anchored on seven (7) needlessly argumentative grounds, of appeal which we have summarised into five (5) grounds. They are that the learned Judge erred in law and in fact in:

    i. failing to find that there was a grave error apparent on the face of the record in that the respondents having failed to take out letters of administration had no locus standi, as a fundamental issue that disallowed them to institute or proceed with the said suit;

    ii. failing to appreciate the extent to which the delay in making the review application was justified by factors, including force majeure during COVID-19 pandemic as well as the failure of the court to deliver the ruling 'by giving notice' to parties as previously agreed;

    iii. failing to appreciate the errors on record being the trial Judge's (Kimingoi, J.) failure to factor in two prior judicially quashed proceedings before the Bahari Land Dispute Tribunal Case No. 8/04 and Kilifi Senior Resident Magistrate's Court and the extent to which it affected the validity of the impugned judgement, severely prejudicing the 2nd appellant;

    iv. failing to exercise the review discretion jurisdiction in the face of obvious errors/mistakes/compelling evidence resulting in a miscarriage of justice; and

    v. failing to take into account the legal principles for exercise of judicial discretion in review and relying on extraneous matters in dismissing the application for review.

26. At the hearing of this appeal, learned counsel Mr. Chianda, holding brief for Ms. Chepkwony appeared for the 2nd appellant. The firm of M/s. Marende Necheza & Company, advocates for the respondents, did not appear. Both parties filed their respective submissions, which we have duly considered as hereunder.

27. Relying on submissions dated 14th March 2023, albeit that no authority was cited, the 2nd appellant faulted the learned Judge for not finding that the respondents did not have the locus standi to file the suit since they did not obtain grant of letters of administration in respect of the estate of the deceased Sidi Baya Kitunga; and that the failure to first obtain letters of administration divested the respondents of the locus standi to be heard, thereby rendering the suit a non- starter and null and void ab initio.

28. The 2nd appellant also submitted that it was erroneous for the trial Judge (Komingoi, J.) to find that the decision of Bahari Land Disputes Tribunal decision had not been disturbed while he testified that he had successfully challenged the decision, and a ruling thereof delivered in his favour.

29. According to the 2nd appellant, the learned trial Judge informed the parties that the judgement would be delivered on notice, and that no notice was ever issued; that the delay in filing the application for review was exacerbated by the COVID-19 pandemic; and that, therefore, he advanced plausible reasons for failure to come to court timeously.

30. We were thus urged to allow the appeal.

31. On their part, the respondents filed written submissions dated 8th September 2025. It was their submission that the failure to take out letters of administration before instituting the suit was not challenged by the 2nd appellant by way of a preliminary objection as was held by the ELC in Kiragu &

2 Other vs. Mbae & 8 Others (2025) KEELC 5813 (KLR) that the issue of locus standi being a pure point of law, ought to be raised and determined at the earliest opportunity.

32. As to whether there were errors apparent on the face of the record since the trial Judge failed to factor in two previous judicially quashed proceedings, it was submitted that the 2nd appellant did not avail the orders and/or rulings before the trial court for consideration in that regard; that the burden of proof lay with the 2nd appellant to demonstrate the existence of the concluded matters; that the 2nd appellant deliberately chose not to avail the ruling in Miscellaneous Application No. 641 of 2005 and ELC Suit No. 255 of 2005 despite being represented by the same Advocate who was in conduct of the appeal on his behalf; and that, for this reason, these were not new matters or evidence that were not within his (the 2nd appellant) knowledge to warrant a review of the trial court judgment.

33. As to the merit of the reasons for the delay, it was submitted that it was upon the 2nd appellant's advocate to follow up with the court's registry on the status of the judgement; that the COVID -19 pandemic could not be an excuse for failure to approach the court without delay since the 2nd appellant filed, at around the same time, CMCC No. 12 of 2020 against the 1st respondent, which was later abandoned; and that, accordingly, no plausible reasons for the delay were advanced by the 2nd appellant to warrant the orders sought.

34. On the whole, it was the respondents' submission that the 2nd appellant did not meet the threshold for review of the trial court's Judgment as provided under Order 45 Rule 1 of the Civil Procedure Rules; and that, accordingly, the appeal should be dismissed with costs.

35. This being a first appeal, the duty of this Court is as stated in rule 31 (1)(a) of the Court of Appeal Rules, 2022 is as follows:

> On appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power to re- appraise the evidence and to draw inferences of fact.

36. We have considered the record of appeal, the respective parties' written submissions and the law. In our view, this appeal turns on the question as to whether the learned Judge (Sila Munyao, J.) (as he then was) acted within the law when he dismissed the 2nd appellant's application seeking orders to review, vary or vacate the judgement delivered on 13th July 2017 by Komingoi J. and the subsequent orders made thereto.

37. Section 80 of the *Civil Procedure Act*, Cap 21 ('the CPA') which provides for review of a decree or order states 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 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.

38. Further, Order 45 Rule 1(1) of the Civil Procedure Rules provides 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 review of judgement to the court which passed the decree or made the order without unreasonable delay.

39. Section 80 aforesaid confers on a court, jurisdiction to review its decree or order while Order 45 Rule 1 structures and limits the purview within which the court will review its decree or order. Order 45 rule 1 provides that review may be sought: on discovery of new and important matter or evidence which, after due diligence, was not within the applicant's knowledge or could not be produced at that time; or on account of some mistake or error apparent on the face of the record; or for any other sufficient reason.

40. Suffice it to note is that the relief for review is a matter within the discretion of the court. By the wording of Section 80 of the CPA that 'the court may make such order thereon as it thinks fit' means that a court must exercise its discretion in a just and judicious manner, not capriciously or at the whim of a party, all taking to mind that the end result is to do justice to all parties. Each case must however be considered under its own circumstances.

41. We are minded that the circumstances upon which an appellate court may interfere with the exercise of judicial discretion as was held in Aga Khan Health Services Kenya vs. Margaret Njoki Njung'e & 2 Others (2016) KECA 785 (KLR), is if it is satisfied either:

"(a) That the Judge misdirected himself or herself on a point of law; or

b. That he or she misapprehended the facts; or

c. That he or she took account of considerations which should not have been taken an account of; or

d. That he or she failed to take account of `some consideration which should have been taken account of; or

e. That the decision, albeit discretionary one, is plainly wrong. (See Mrao Limited vs. First American Bank of Kenya Limited & 2 Others [2003] KLR 126."

42. It is trite law that a review must not be couched as an appeal in disguise. A party cannot use the review mechanism to re- open matters on merits simply because a party is dissatisfied with the outcome of a decision as was held in Nyong'o & Others vs. Attorney General (2026) KECA 200 (KLR).

43. This Court in National Bank of Kenya Ltd vs. Njau (1997) KECA 71 (KLR) outlined the guiding principles to be considered when a court is faced with a review application as follows:

"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 provision of law cannot be a ground for review."

44. In this appeal, the appellant contended that the Judgement delivered in the year 2007 in Mombasa HCCC Miscellaneous Application No. 641 of 2005 (JR) would have assisted the learned Judge, Komingoi, J, to make a just determination. The 2nd appellant submitted that he was not a party to the Bahari Land Disputes Tribunal Case No. 8 of 2004 notwithstanding that he was the registered owner of the suit parcel. He challenged those proceedings by filing the Judicial Review (JR) application whose decision quashed the Award of the Bahari Land Disputes Tribunal. According to him, had the learned Judge (Komingoi, J.) considered the outcome of the JR decision, she would have found in his favour. In essence, the 2nd appellant sought to introduce the JR judgement through a review process.

45. Our considered view is that the JR judgement delivered on 13th February 2007 cannot be synonymous to discovery of new matter which the 2nd appellant could not have obtained upon exercise of due diligence, nor was the failure to obtain it at the hearing of the trial an excusable inadvertent mistake on his part. The 2nd appellant testified before the trial court in the year 2011. The ruling which the 2nd appellant stated would have assisted the ELC in reaching a just determination, was delivered four (4) years before 2011, on 13th February 2007. The 2nd appellant was, in fact, the ex- parte applicant in the Judicial Review proceedings which gave way to the ruling of 13th February 2007. This decision did not therefore come as a surprise to him. We can then only agree with the finding of Munyao, J. (as he then was) that the 2nd appellant had the chance and opportunity to produce the ruling at the hearing for all parties present to interrogate and test it. He failed to do so for reasons best known to himself. Thus, an attempt to introduce the ruling at the review level was no doubt an attempt to use back door means to re-open the case. By all means, the horse had bolted and left the stable!

46. Furthermore, the 2nd appellant was the author of his own misfortune as was observed by the learned trial Judge (Komingoi, J.). After considering the evidence of the previous proceedings concerning the suit parcel as litigated before the Bahari Land Dispute Tribunal, she rendered herself thus:

> "...because they were aggrieved, the plaintiffs took the matter before the Bahari Lands Disputes Tribunal who awarded nine (9) acres to the plaintiffs (now respondents). The said order is in favour of the plaintiffs it was adopted by an order of the Court in Kilifi SRMCC Land Case No. 4 of 2005. The 2nd defendant claimed he had challenged the award but did not produce anything to confirm this."

47. In Otieno, Ragot & Company Advocates vs. National Bank of Kenya Limited (2020) KECA 894 (KLR), this Court cautioned that:

> 'Order 45 rule 1 does not excuse every error or mistake, even if inadvertent. It excuses those mistakes and allows a party to introduce documents which it could not lay its hands on even after the exercise of due diligence...The discretion of the law to grant an order of review cannot be used to help a party who has shown lack of diligence....It was quite clear therefore that the respondent having found out why the Judge decided against it went back to the drawing board and fished out evidence that would bolster its case. This was too late in the day as the horse had already bolted from the stable. The respondent's explanation about how it realised there was a problem was therefore designed to mislead the court and the learned Judge failed to see through this trick. Had he considered this fact, I have no doubt at all, that he would not have allowed the application.'

48. As to the allegations by the 2nd appellant that his former counsel failed to inform him on the outcome of the main suit, the finding of this Court in Peter Muthoka & Another vs. Ochieng & 3 others (2019) KECA 597 (KLR) is instructive that:

> " Whereas we doubt the candidness of the applicant's assertion, it is true that in general the mistake of counsel should not be visited upon a client but it is likewise true that when counsel as an agent is vested with authority to perform some duties and does not perform the same as directed by the principal, such principal should bear the consequences."

49. This Court in the case of Rajesh Rughani vs. Fifty Investments Limited & Another (2016) KECA 829 (KLR) held that:

> "It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy."

50. In view of the foregoing, it rested upon the 2nd appellant to follow up with his counsel on the instructions that he had given him. Needless to be repetitive, we can only emphasise that we have rendered ourselves on the ground upon which we hold the view that the 2nd appellant long knew of the outcome of the trial court decision, and that he could only blame himself for inaction.

51. The 2nd appellant raised as a ground of appeal that the respondents lacked locus standi to institute the suit. The challenge to a person's capacity or lack of it thereof to institute a suit was best placed to be raised as a preliminary point of law before the hearing of the suit. On this score, just as the learned Judge (Munyao, J.) (as he then was) did, we too find that the ground has no merit.

52. In view of the foregoing, we find no reason upon which to fault the good judge (Munyao, J.) (as he then was) for finding that the 2nd appellant did not advance any credible reasons to warrant the review and/or setting aside or varying the judgment of the trial court Judge (Komingoi, J.) delivered on 13th July 2017. Accordingly, we find that the appeal herein is without merit and the same is hereby dismissed with costs to the respondents. We thus uphold the ruling of the ELC at Mombasa (Sila Munyao, J.) (as he then was) delivered on 13th January 2022.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 25TH DAY OF MARCH, 2026.

S. GATEMBU KAIRU, CArb, FCIArb

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA, CArb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR