



THE JUDICIARY



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A
ELCA E021 OF 2021

JACKSON MWANGI GITHUNI.....1ST APPELLANT/RESPONDENT
HUDSON MAINA GITHUNI.....2ND APPELLANT/RESPONDENT
-VERSUS-
LUCY WANGECHI MUIGAI.....1ST RESPONDENT/APPLICANT
LYDIA NJERI MUIGAI.....2ND RESPONDENT/APPLICANT

*(Being an Appeal from the Judgement and Decree of the Senior Principal Magistrates Honourable
E Muriuki Nyagah delivered on 2nd December, 2021 in Murang'a Chief Magistrate Court Civil
Case Number 149 of 2015)*

RULING

1) This ruling is on the notice of motion dated 19-12-2024. The motion which is by the Respondents is brought under **Order 45 rule 1 (1) (a) and (b)** of the **Civil Procedure Rules, Sections 80 (a) and 3A** of the **Civil Procedure Act** and all other enabling provisions of the law.

The motion seeks two orders.

(a) That the judgement and orders of this court dated, signed and delivered on 23-9-2024 be reviewed and or set aside on account of mistakes and errors apparent on the face of the record.

(b) That the costs of this application be provided for.

2) The motion is based on three (3) grounds and is supported by an affidavit of the Respondents dated 23-12-2024. The essence of the grounds and the affidavit is as follows. One, land parcels numbers Loc. 2/Makomboki /1804 and 1805 were registered in the names of the Respondents respectively. Two, the two parcels mutated from L.R. No. Loc. 2/Makomboki/1301 which was registered in the name of David Muigai Mwangi, now deceased. Three, L.R. No. Loc. 2/Makomboki/1301 was among the titles cancelled by a court order issued on 24-2-2022 in Murang'a ELC Case No. 21 of 2019. Four, it is clear that among the titles cancelled in the said judgment was Loc. 2/Makomboki/1301

which was the parent title to the two suit parcels which are subject to this appeal. It was erroneous for the same court to make orders whose effect was to contradict earlier orders made by the same Court. Finally, the judgment in this case was delivered in the absence of the Respondents and their advocate.

For the above and other reasons, the Respondents pray that their motion be allowed.

3) The motion is opposed by the Appellants and their counsel has filed five grounds of opposition dated 4-10-2025.

- (i) The application is misconceived and incompetent.**
- (ii) The application is bad in law, a gross abuse of the process of the court and untenable.**
- (iii) The application is fatally and incurably defective.**
- (iv) The application is frivolous and vexatious.**
- (v) The application is otherwise without merit and should be dismissed with costs.**

Secondly, the second Appellant has sworn a replying affidavit dated 23-2-2026 in which the following is deposed. One, the application has been filed by an advocate who is not on record and it should be struck out. Two, there is no discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Respondents or could not be produced by them at the time the judgment was passed. Three, there is no sufficient reason to review the decree. Four, the judgement only established the Appellants beneficial interest in the land and the judgment in ELC case No 21 of 2019 does not affect this in any way nor does it prejudice the Respondents. Four, the title to Loc. 2/Makomboki/301 did not exist at the time judgment in ELC Case No . 21 of 2019 was delivered on 24-2-222 as it had been closed on subdivision to title No. Loc. 2/Makomboki/1804 and 1805. Finally, the Applicants are asking this court to sit on appeal against its own orders as they are saying the Court make erroneous orders which contradict its earlier ones.

4) Counsel for the parties filed written submissions dated 23-2-2026 and 10-3-2026 respectively.

I have carefully considered the motion in its entirety including the grounds, the supporting affidavit, the replying affidavit, the lower court record, the judgment dated 23-

9-2024, the written submissions by both sides and the law cited therein. I find that the following issues arise.

- (i) **Whether the Respondents' counsel is properly on record.**
- (ii) **Whether the decree dated 24-2-2022 discloses sufficient material on the actual decision in Murang'a ELC Case No. 21 of 2019.**
- (iii) **Whether this court could consider the decree in ELC Case No. 21 of 2019 yet it was not the trial court.**
- (iv) **Whether the motion dated 19-12-2024 meets the criteria for review as per Order 45 rule 1 of the Civil Procedure Rules.**

5) Regarding the 1st issue, I find no evidence to prove that the Respondents' counsel is properly on record. It is a requirement of **Order 9 rule 9** of the **Civil Procedure Rules** that "when there is a change of advocate... after judgement has been passed, such a change... shall not be effected without an order of the court-

(a) **Upon an application with notice to all the parties or**

(b) **Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be. "**

In this case, no court order was ever recorded yet the counsel for the Respondents came on record after the judgment of 23-9-2024. When this anomaly was raised in the affidavit by the 2nd Appellant dated 23-2-2026, the Respondents and their counsel did not file a supplementary affidavit annexing any order made by the court. It is only in the submissions dated 10-3-2026 where I have seen a submission that a consent signed by the firm of Mbiyu Kamau and Co. Advocates the firm of the Respondents' counsel was filed in court on 19-12-2024. Such consent should have been followed by a court order because **Order 9 rule 9** provides a change of advocate such as the one in this case... **shall not effected without an order of the Court.** A supplementary affidavit with the order made by the court was the bare minimum before the Respondents' counsel could be properly on record.

6) As for the second issue, I find that the decree dated 24-2-2022 does not disclose sufficient material on what the court decided and the reasons therefor. Without the full judgement, it is difficult to discount the deposition by the second appellant in paragraphs 8 and 9 of the replying affidavit to the effect that the judgment did not prejudice the Appellant and that the title for L.R. No. Loc. 2/Makomboki/1301 did not exist at the time of judgment in

ELC 21 of 2019 was delivered on 24-2-2022 because the title thereto had been closed on subdivision of L.R No. Loc. 2/Makomboki/1804 and 1805. It is also curious why the Respondents did not attach the entire judgement. The full judgment would have dispelled all the lingering questions on what the judgment was really all about.

7) Looking now at the third issue, I find that it was incumbent upon the Respondents to introduce the decree in ELC Case No. 21 of 2019 to the court. The decree was issued on 8th March 2022. The record shows that the Respondent's counsel appeared before court on 27-9-2023, 30-11-2023, 12-2-2024 and 3-7-2024. By then the decree in ELC Case No. 21 of 2019 had been issued. The Respondent's counsel did not mention the said decree to the court. He did not seek the adduce additional evidence in line with **Section 78(1) (d)** of the Civil Procedure Act which allows the introduction of such evidence on appeal.

That was the only lawful avenue of introducing such evidence. Once such opportunity passed by, there was no other lawful avenue of introducing it to the Court. It is now too late to introduce it.

8) Finally on the fourth issue, I find that the motion does not meet the criteria set in **Order 45 rule 1 (1) (b)** for the following reasons. One, the decree in ELC Case No. 21 of 2019 having been issued on 8-3-2022 and the appeal having come up for directions on several occasions including 3-7-2024, which is over 2 years later, the decree was not a new matter. Two, the said decree was within the knowledge of the Respondents. Three, the judgment was delivered on 23-9-2024 and it was not until 19-12-2024, almost three months later that the current application was filed. These three reasons disqualify the motion from the criteria in **Order 45 rule 1 Civil Procedure Rules**.

9) In conclusion and for the reasons already given, I find **no merit** in the motion dated 19-12-2024 and I **dismiss** it with costs to the Appellants.

Dated, Signed and Delivered virtually at Murang'a this 21st day of April, 2026.

**M.N. GICHERU
JUDGE.**

Delivered online in the presence of :-

Court Assistants – Jackline and Anthony

Appellants' Counsel – Miss Wambui

Respondents' Counsel – Miss Njuguna h/b for Wahome Gikonyo