



REPUBLIC OF KENYA



KENYA LAW
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Bwanadi & another (As Administrators of the Estate of Khator Bin Saum Deceased) v Khator & 9 others (Environment and Land Case 414 of 1996) [2025] KEELC 5506 (KLR) (24 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5506 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE 414 OF 1996
YM ANGIMA, J
JULY 24, 2025

BETWEEN

MOHAMED BWANA BWANADI 1ST PLAINTIFF

ABDULRAZAK KHALIFA 2ND PLAINTIFF

AS ADMINISTRATORS OF THE ESTATE OF KHATOR BIN SAUM DECEASED

AND

RISHAD ABDULREHMAN KHATOR 1ST DEFENDANT

LAXMICHAND VIRCHAND KARAMSHI SHAH 2ND DEFENDANT

ALI MOHAMED (DECEASED) 3RD DEFENDANT

ZENA AHMED (DECEASED) 4TH DEFENDANT

AMINA AHMED (DECEASED) 5TH DEFENDANT

ABDULQUADIR SA SHURUTY 6TH DEFENDANT

THE PUBLIC TRUSTEE 7TH DEFENDANT

BURBANK ENTERPRISES LIMITED 8TH DEFENDANT

THE REGISTRAR OF TITLES 9TH DEFENDANT

THE COMMISSIONER OF LANDS 10TH DEFENDANT



RULING

A. Introduction

1. The material on record shows that vide a judgment dated 25.09.2024 the trial court (Hon. Justice Matheka) held that the plaintiffs had failed to prove their claim and proceeded to dismiss their suit with costs to the defendants.
2. It would appear from the material on record that being aggrieved by the said judgment the plaintiffs filed a notice of appeal dated 4.10.2024 under Rule 77 of the Court of Appeal Rules intimating their interest to appeal against the 'whole' of the said judgment.
3. The record shows that soon after filing the said notice of appeal the plaintiffs filed a notice of motion dated 08.10.2024 seeking a stay of execution of the judgment dated 25.09.2024 pending the hearing and determination of their intended appeal to the Court of Appeal. Before the said application could be heard, however, the plaintiffs abandoned it and decided to file an application for review.

B. Plaintiffs' instant application

4. By a notice of motion dated 18.02.2025 expressed to be brought pursuant to Sections 3, 3A, 17 and 18 of the *Civil Procedure Act* (Cap 21), Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules (the Rules), and all other enabling provisions of the law, the plaintiffs sought the following orders;
 - a. That this matter be certified urgent and service be dispensed with ex-parte in the first instance.
 - b. That this honourable court be pleased to grant the firm of Kaltuma Nassir & Associates Advocates leave to come on record for the applicants herein.
 - c. That this honourable court be pleased to review its judgment delivered on 25.09.2024 in ELC No 414 of 1996 where the court dismissed the plaintiffs/applicants suit in totality.
 - d. That this honourable court be pleased to issue summons to the Directorate of Criminal Investigation (DCI) to table its report and findings relating to Plots 193/III/MN and 194/III/MN.
 - e. That this court be pleased to issue any further order as it deems just and convenient in the circumstance of this case.
 - f. That the costs of the application be provided for.
5. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Mohamed Bwana Bwanadi on even date. The gist of the application was that the plaintiffs intended to tender new and additional evidence in the possession of the DCI following an investigation which evidence may lead the court to a different conclusion in the matter. It was not, however, disclosed why such investigation was not conducted earlier and the resultant report tendered at the trial. The material on record shows that whereas the suit was filed in 1996 the hearing was conducted on 04.06.2024, that is, 28 years later.

C. Defendants' responses

6. The record shows that the 2nd defendant filed a replying affidavit sworn by Dipak Laxmichand Shah on 07.05.2025 in opposition to the application. The 8th defendant also filed a replying affidavit sworn



by Seifudin Bhaijee on 14.03.2025 in opposition to the application. The rest of the defendants did not file any responses to the application.

7. The gist of the replying affidavit on record was that an application for review does not lie in law since the plaintiffs had elected to pursue the appellate route by filing a notice of appeal intimating their intention to appeal to the Court of Appeal. It was further pleaded that the plaintiffs had not made out a case for review of the judgment since there was no evidence to show that the new evidence sought to be introduced could not be made available at the trial even after the exercise of due diligence. It was further contended that there was undue delay in filing the instant application since the impugned judgment was delivered on 25.09.2024 and the application for review was not filed until 18.02.2025.

D. Directions on submissions

8. When the application was listed for directions it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the 8th respondent filed its submissions dated 14.05.2015 but the rest of the parties had not filed submissions by the time of preparation of the ruling.

E. Issues for determination

9. The court has perused the plaintiff's notice of motion dated 18.02.2025, the replying affidavits in opposition thereto as well as the material on record. The court is of the view that the following are the main issues for determination herein;
 - a. Whether the plaintiffs are entitled to change advocates.
 - b. Whether there is merit in the plaintiffs' application for review of the decree.
 - c. Who shall bear costs of the application.

F. Analysis and determination

a. Whether the plaintiffs are entitled to change advocates

10. The plaintiffs sought leave of court for the firm of Kaltuma Nassir & Associates Advocates to take over the conduct of the matter in place of their former advocates, Lawrence Obonyo Legal Advocates. There was no opposition to this order by any of the defendants. There was no objection by the former advocates even though it is not clear from the record if they were notified of the application as required under Order 9 Rule 9 of the Rules. The court takes the view that a change of advocates is a procedural issue and that a party has a right to be represented by an advocate of its choice. As such, the court is inclined to grant the leave sought.

a. Whether there is merit in the plaintiffs' application for review of the decree

11. The court has considered the material and submissions on record on this issue. The 2nd and 8th defendants opposed the application on three main grounds. First, that the application was incompetent in view of the pendency of an appeal against the decree. Second, that there was no demonstration of discovery of new and important evidence which could not have been made available at the trial even after the exercise of due diligence. Third, that the application was not filed without undue delay.



12. The material on record shows that although the plaintiffs withdrew their application for stay pending appeal, there is no indication that they withdrew the notice of appeal dated 04.10.2024 in accordance with Rule 83 of the Court of Appeal Rules. In that regard, the court agrees with the 2nd and 8th defendants that the instant application was filed in utter contravention of Order 45 Rule 1 of the Rules hence it is incompetent.
13. The consequence of filing a notice of appeal were considered in the case of *Otieno, Ragot & Company Advocates vs National Bank of Kenya Ltd* [2020]eKLR as follows;

“ Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed it would then pursue the appeal. It was gambling with the law and judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place. There can be no place for review once an intention to appeal has been intimated by filing a notice of appeal. (See: *Kamalakshi Amma vs A. Karthayani* [2001] AIHC 2264)

The respondent’s application for review was thus incompetent, hence the court did not have jurisdiction to grant the orders sought under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.”
14. The above notwithstanding, even if the court were to consider the merits of the application the court is unable to find that any of the grounds for review stipulated under Order 45 rule 1 of the Rules have been established. In particular, there is no evidence on record to demonstrate that there has been discovery of any new and important matter or evidence which could not have been produced at the trial despite the exercise of diligence. There was no indication as to when the alleged fraud was reported to the DCI and when the alleged investigation was concluded. It must be remembered that the plaintiffs had about 28 years to prepare for trial and tender the relevant evidence in support of their claim.
15. Finally, there is no contest that the impugned decree was passed on 25.09.2024. There is also no dispute that the instant application was filed on or about 18.02.2025. The material on record shows that the plaintiffs did not make any attempt to explain the period of delay of about 4 and half months. The court is thus of the view that the plaintiffs are disentitled from the remedy of review on account of the length of delay in filing the instant application.

c. Who shall bear the costs of the application

16. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the 2nd and 8th defendants shall be awarded costs of the application.

G. Conclusion and disposal order

17. The upshot of the foregoing is that the court finds no merit in the plaintiffs’ instant application. Consequently, the notice of motion dated 18.02.2025 is hereby dismissed in its entirety with costs to the 2nd and 8th defendants.



It is so ordered.

RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 24TH DAY OF JULY, 2025.

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Y. M. ANGIMA

JUDGE

In the presence

Gillian – Court Assistant

Mr. Nassir & Mr. Omar for the plaintiffs

Ms. Jamila Mbwana for the 2nd defendant

Mr. Mogaka for the 8th defendant

Mr. S. M. Kimani for the interested party

No appearance for 1st, 3rd, 4th, 5th 6th and 7th defendants

