

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAJIADO
ELCC 504 OF 2017

{Formerly Machakos ELC Case No. 12 of 2014}

MAILUA ESTATES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

PUSHAN MIATO.....1ST DEFENDANT

SELEYIAN MIATO.....2ND DEFENDANT

KETUKEI MIATO.....3RD DEFENDANT

REUBEN OLE NAKUO.....4TH

DEFENDANT

COUNTY LAND REGISTRAR, KAJIADO COUNTY.....5TH

DEFENDANT

THE HON. ATTORNEY GENERAL.....6TH

DEFENDANT

AND

GEOFFREY THIONGO T/A G.N. THIONGÓ & CO. ADVOCATES.....

.....RESPONDENT

RULING

(In Respect of the Plaintiff's application dated 20th April, 2025 seeking review of the entire ruling delivered on 18th December, 2024)

Introduction

1. This ruling concerns the Plaintiff/Applicant's Notice of Motion dated 20 April 2025, brought pursuant to the provisions of Order 45 Rule 1 and Rule 2(2) of the Civil Procedure Rules, 2010, and Article 50(1) of the Constitution, in which the Applicant seeks the following orders:

- a. This Honorable Court be pleased to review its ruling and subsequent order made on 18 December 2024 in its entirety.*
- b. The Plaintiff's Application dated 17 December 2022 be allowed as prayed.*
- c. The costs of this application be in the cause.*

2. The application, which is premised on the grounds set out on its face, is supported by the affidavit of the Plaintiff's counsel, Beatrice Wairimu Kariuki, sworn on 20 April 2025. Counsel deposes that she was instructed by the Plaintiff to file an application dated 17 December 2022 seeking various orders, which encompassed: *leave be granted to the firm of Beatrice Kariuki & Associates to come on record in this matter for the Plaintiff and that the Notice of Change of Advocates dated 17 December 2022 filed alongside the application be deemed as properly on record; Costs incurred by the Respondent in this suit be disallowed in toto; the Respondent be ordered and directed to refund Kshs. 250,000/= paid to him by the Plaintiff as costs in this suit; the Court be pleased to issue a Notice to Show Cause why costs should not be disallowed to the Respondent as provided for under Rule 61 of the Advocates Remuneration Order; and that a Notice to Show cause do issue to the Respondent to Show why he should not refund Kshs. 250,000/= to the Plaintiff being the costs.*

3. Counsel states that although the court rescheduled delivery of its ruling from 4 December, 2024 to 18 December, 2024 on the basis that it was not ready, the court did not raise any issues that it had not seen the Plaintiff's submissions. It was only in its impugned ruling delivered on 18 December, 2024, that the court stated that it had not seen the Applicant's submissions. Further, the court indicated that the Deputy Registrar had informed it that there were no submissions on record.
4. The Deponent asserts that, rendering the ruling without reference to the written submissions was a miscarriage of justice and breach of the Plaintiff's right to fair hearing for it was condemned unheard. According to counsel, the impugned ruling ought to be reviewed since it contains an error apparent on the face of the record because the court never addressed itself on the order whereby she was seeking to come on record for the Plaintiff. The Deponent alleges that the late filing of submissions was not deliberate nor was the delay inordinate. It was occasioned by financial constraints on the part of her client.
5. The Application is opposed by the Respondent through the Replying Affidavit of Geoffrey Thiongo sworn on 23 October, 2025 who states that the court was justified when it failed to consider the Applicant's 'irregular submissions' which were filed three days late without leave contrary to its directive of 13 November, 2024 when the Plaintiff was ordered to file submissions within 7 days. According to the Respondent, the current Application has not met the threshold stipulated in Section 80 of the Civil Procedure Act for review because the Applicant has not demonstrated discovery of any new evidence. The Respondent opines that if the Application is allowed, it will undermine finality of litigation and encourage indolence in complying with court orders.

6. According to the Respondent, the appropriate remedy for the Applicant lies in Appeal and not review. The Applicant is further faulted for failure to serve this Application upon the Respondent despite several reminders. In conclusion, the court is beseeched to dismiss the Application with costs to the Respondent for it is an attempt to reopen a properly determined matter, undermines court orders and is prejudicial to the Respondent.
7. The court directed that the application be canvassed by way of written submissions. This directive was duly complied with by the all the parties. The court has had occasion to read and appraise the submissions in the writing of this ruling.

Issue for determination

8. Upon cautious analysis of the Application, reply by the Respondent as well as submissions on record, the singular issue for determination is *whether the Application has met the threshold for review of the Ruling delivered on 18 December 2024.*

Analysis and Determination

9. A brief background of the proceedings in this matter is necessary, as the application which is the subject of this ruling was filed after the suit had already been determined by way of a judgment. In the judgment delivered on 26 February 2019 by C.A. Ochieng J., a declaration was made to the effect that the 1st to 3rd Defendants had acquired 200 acres of the land parcel No. KAJIADO/MAILUA/684 belonging to the Plaintiff by way of adverse possession.

10. From the time of filing the suit on 7 February 2014, the Plaintiff was represented by the firm of G.N. Thiongó & Co. Advocates. The firm subsequently filed a Notice of Appeal on 6 March 2019, signifying the Plaintiff's intention to challenge the Court's judgment. Thereafter, on 29 March 2019, the firm filed an application before this Court seeking a stay of execution pending the hearing and determination of the intended appeal. That application was dismissed in a ruling delivered on 9 December 2021 by M.N. Gicheru J.
11. Following the appellate process, the Plaintiff's Civil Appeal No. 112 of 2017 was allowed by the Court of Appeal in its judgment delivered on 17 February 2023.
12. Subsequently, on 11 January 2023, the firm of Beatrice Kariuki & Associates filed a Notice of Motion dated 17 December 2022 seeking leave to come on record for the Plaintiff in place of G.N. Thiongó & Co. Advocates. The application, that was strongly opposed by the Respondents, was dismissed in a ruling delivered on 19 December 2024. It is that ruling which the Applicant now seeks to review and which is the subject of this determination.
13. The Court's discretionary power to review its judgement or order is provided for under Section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules. Mativo J (as he then was), espousing the above provisions on review in the case of *Republic vs Advocates Disciplinary Tribunal: Ex parte Apollo Mboya (2019) eKLR*, spelt out the considerations for review as follows;

“The principles which can be called out from the above noted authorities are;

a) A Court can review its decision or either the grounds enumerated in

Order 45 rule 1 and not otherwise.

- b) *The expression “any other sufficient reason”, appearing in Order 45 rule 1 has to be interpreted in light of the other specified grounds.*
- c) *An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.*
- d) *An erroneous order/decision cannot be corrected in the guise of exercise of the power of review.*
- e) *A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgement of a coordinate or larger bench of the tribunal or a superior court.*
- f) *While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of the initial order/decision as vitiated by an error apparent.*
- g) *Mere discovery of new of important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence the same could not be produced before the court/tribunal earlier.*
- h) *A mistake or an error apparent on the ace of the record means a mistake or an error, which is a prima facie visible and does not require any detailed examination.*
- i) *Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The*

words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 rule 1.

j) The power of a civil court to review its judgement/decision is traceable in Section 80 CPC. The grounds on which review can be sought enumerated in Order 45 rule 1.”

14. The Applicant seeks a review of the ruling delivered on 18 December 2024 on the grounds that the decision was rendered without consideration of the Plaintiff's submissions. The Applicant further contends that the Court failed to address the issue of change of advocates, notwithstanding that it was one of the prayers in the Plaintiff's application dated 17 December 2022. On that basis, the Applicant asserts that its right to a fair hearing was violated, as it was effectively condemned unheard.

15. In response, the Respondent maintains that the application does not meet the threshold for review under Section 80 of the Civil Procedure Act (Cap. 21), and that the Applicant has not demonstrated the discovery of any new and important evidence neither an error apparent on the face of the record.

16. I find the Applicant's assertion that the issue of change of advocates was not addressed in the impugned ruling to be misleading. This is because the Court expressly considered and determined that issue, as evidenced by its holding as follows:

“When it comes to compliance with Order 9 rule 9 of the Civil Procedure Rules, I find that the applicant’s counsel has not complied with it because I have not seen any consent from the former counsel for the plaintiff saying that they have no objection to the current counsel coming on record. There is also no application by the current counsel seeking to come on record. This is contrary to Order 9 rule 9 of the Civil Procedure Rules which provides as follows.

“9. When there is a change of advocates, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person 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”.

17. I have carefully considered the Plaintiff’s submissions filed on 23 November 2024, in which the Applicant contends that its submissions were not taken into account by the Court. A review of those submissions reveals that they did not address the issue of whether the change of advocates was effected in compliance with the requirements of Order 9 Rule 9 of the Civil Procedure Rules, or whether the conditions stipulated therein were satisfied.

18. In any event submissions are not evidence upon which a case is determined as held by Mwera, J (as he then was) in Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007:

“Submissions simply concretize and focus on each side’s case to win the court’s decision that way. Submissions are not evidence on which a case is decided.”

19. In the circumstances, I find that the Applicant’s Notice of Motion dated 28 April 2025 does not meet the threshold for review.

20. Accordingly, the application is dismissed with costs to the Respondent.

Ordered accordingly.

Dated, Signed and Delivered Virtually this 30th Day of April, 2026.

M.D. MWANGI
JUDGE

In the virtual presence of:

N/A by the Parties

Court Assistant: Alex

M.D. MWANGI
JUDGE