



THE JUDICIARY



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A
ELCLA E008 OF 2025

JOB KIIRU NDUATIAPPELLANT
VERSUS
KIAMIRO BUILDING CO. LTD RESPONDENT

(Being an appeal against the ruling delivered on 13th February 2025 in Murang'a MCELC 96 of 2022 by Hon. E.M. ANALO)

JUDGMENT

(1) In this appeal, the Appellant seeks only one order.

(a) The setting aside of the ruling dated 13-2-2025 which was on the application dated 18-11-2024 which had sought the review of the judgment dated 6-2-2024.

(2) The grounds of appeal are as follows.

The learned trial magistrate erred in law and fact-

- (i) by his failure to interpret properly the import of Section 80 of the Civil Procedure Act and Order 45 rule 1(1) of the Civil Procedure Rules, 2010,**
- (ii) in his failure to find that the Appellant had satisfied the requirements provided for under Order 45 rule 1 of the Civil Procedure Rules and**
- (iii) by disregarding the averments in the supporting affidavit to the application on how the Appellant was able to acquire a copy of the letter dated 22-8-2028 and by finding the delay in the filing of the application for review was not adequately explained.**

(3) The facts of the case according to the Respondent are as follows. One, on 11-1-2018 the parties entered into a lease agreement whereby the Respondent leased its property Murang'a Municipality/Block 2/53 to the Appellant and Henry Gakinya Chege for a period of 5 years

and one month. The monthly rent was agreed at Kshs 80,000/= per month for the 1st and 2nd years, Kshs.84,000/= for the 3rd and 4th years and Kshs. 88,200 for the 5th year and one month. Two, the Appellant and his co-tenant fell into rent arrears of Kshs. 1,232,000/= by January 2021. The Respondent proceeded to attach the movable property of Appellant and his co-tenant through Kangethe Enterprises in a bid to recover the rent arrears. The Appellant filed a case in the Business Premises Rent Tribunal which is Tribunal case No. E153 of 2021. Before the Tribunal could make a ruling in the matter, Henry Gakinya Chege withdrew the case. This meant that the attached goods could be auctioned. When the auctioneer went to auction the goods, he found that they had been moved away to an unknown destination. Finally, in the plaint dated 16-12-2021, the Respondent sought recovery of the rent arrears among other reliefs.

(4)The fact of the case according to the Appellant and his co-tenant are as follows. One, it is true that they were tenants of the Respondent. Two, on 25-3-2021, the terms of the lease were re-negotiated and this made the relationships between the parties a controlled tenancy. Thirdly, they obtained orders from the tribunal restraining the respondent from auctioning the proclaimed goods but it continued harassing the Appellant even after he obtained the restraining orders by closing down the demised premises. Upon vacating the premises, the Appellant sought to withdraw the tribunal case since the tribunal no longer had jurisdiction after the vacation of the suit premises. Fourthly, when the Appellant took over the premises, they were not habitable or fit for use and had to be overhauled. The cost of the renovation was Kshs. 1,931,191. The renovation involved a new water piping system, a new roof, new electrical systems, new counter , new gypsum ceiling and floor among others. They were not able to take away the improvements at the time they vacated the premises because the Respondent leased them to a new tenant. The co-tenant counterclaimed for the said improvements to the tune of Kshs. 1,931,191.

(5)In his judgment dated 6-2-2024, the learned trial magistrate found in favour of the Respondent entering judgment as per the plaint. He also dismissed the counterclaim by the Appellant.

(6)After about 9 ½ months, the Appellant filed the notice of motion dated 18-11-2024 seeking to set aside the judgment dated 6-2-2024 on three grounds.

- (a) Discovery of a new and important matter or evidence which was not within his knowledge by the time the decree was passed.**
- (b) Mistake or error apparent on the face of the record.**
- (c) Sufficient reasons to allow review, setting aside and varying of the judgment.**

The new evidence according to the Appellant was a notice of termination of lease that he had written to the Respondent. It was in form of a letter but he had produced only one copy and he did not have a duplicate. The said letter was very crucial to his defence since it proved that he had indeed terminated the tenancy. It was dated 22-8-2018.

The motion was opposed by the Respondent on the grounds that it did not meet the threshold for review.

(7) In his ruling dated 13-2-2025 the learned trial Magistrate dismissed the motion by the Appellant for the reason that he was not convinced that the Appellant was unaware of the letter dated 22-8-2018. Secondly, the Appellant had not moved the court during the pretrial conference to notify the Respondent to produce the said letter. Thirdly, the timing of the application was questionable because it had been filed when the Appellant was faced with imminent execution. Fourthly, the motion had been filed after inordinate delay.

It is the dismissal of the motion dated 18-11-2024 that precipitated the filing of this appeal.

(8) Counsel for the parties filed written submissions dated 23-1-2026 and 18-2-2026 respectively.

The Appellant's Counsel identified the following issues for determination.

- (a) whether there was discovery of new and important matters or evidence to warrant the review sought.**
- (b) Whether there is any error apparent on the face of the record.**
- (c) Whether there was any other sufficient reasons to warrant review.**

(9) I have carefully considered the appeal in its entirety including the memorandum, the grounds, the record, the notice of motion dated 18-11-2024 and the ruling dated 13-2-2025. This being a first appeal, this court must reconsider and re-evaluate a fresh the evidence before the lower court in both the judgment and the motion dated 18-11-2024. This court is expected to draw

its own conclusions as it is not bound by the findings of the lower court. It should however bear in mind that it did not hear or see the witnesses as they testified and make allowance for this. See **Selle and another vs. Associated Motor Boat Company Ltd and Others [1968] E.A 123.**

- (10) Guided by the grounds of appeal, I find the following to be the issues for determination.
- (i) **Whether the learned trial magistrate interpreted Section 80 and Order 45 of the Civil Procedure Rules correctly.**
 - (ii) **Whether the learned trial magistrate disregarded the supporting affidavit by the Appellant regarding how the Appellant acquired a copy of the letter dated 22-8-2018.**
- (11) Regarding the first issue, I find that the learned trial magistrate correctly interpreted the law on review under **Section 80** of the Civil Procedure Act and **Order 45 rule 1 (1) of the Civil Procedure rules.**

For a decree or order to merit a review by the court it must meet the following criteria.

- (a) Discovery of a new and important mater or evidence which was not within the knowledge of the Applicant or could not be produced by him at the time the decree was passed or,**
- (b) Some mistake or error apparent on the face of the record or**
- (c) Any other sufficient reason.**

If one fits into any of the categories mentioned above, he may then seek review. There is one rider though. An application under this order must be filed without unreasonable delay.

- (12) Applying the above creteria to the facts of this case, I am in agreement with the learned trial magistrate that the Appellant was aware of the letter from 22-8-2018. It was not something new to him. Yet in his defence dated 1-2-2022 he did not mention it even in passing yet it should have been a key pillar of his defence. In the amended defence and counterclaim, again there is no mention of this letter or termination yet the said defence is dated 14-2-2023 more than 4 years after the said letter. The trial magistrate was justified in rejecting this alleged letter as new evidence. He was also justified in finding that there was inordinate delay in filing the motion almost ten months after the judgment sought to be reviewed.

- (13) As for the second issue, I find that in the supporting affidavit, the Appellant restricted himself to only discovering the letter after the decree. He did not aver that there was an error on the face of the record or a mistake. The trial magistrate could not venture into an area that was not pleaded. He exhaustively dealt with the issue of the letter and I find no fault at all with his finding. I have no doubt in my mind that the motion was frivolous and an abuse of the court process and I find it to be so, just like the trial magistrate did.
- (14) In conclusion and for the reasons given, I find **no merit** in the Appellant's appeal which I **dismiss** with costs to the Respondent.

It is so ordered.

Dated, Signed and Delivered virtually at Murang'a this 29th day of April, 2026.

**M.N. GICHERU
JUDGE.**

Delivered online in the presence of; -
Court Assistant – Jackline
Appellant's Counsel – Mr. Mbugua
Respondent's Counsel – Mr Njuguna