



**Mutembei & 2 others v Kingangi t/a Spikas Beach Gardens Limited & 2 others  
(Civil Appeal E274 of 2024) [2026] KEHC 5956 (KLR) (30 April 2026) (Ruling)**

Neutral citation: [2026] KEHC 5956 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E274 OF 2024  
FN MUCHEMI, J  
APRIL 30, 2026**

**BETWEEN**

**LAWRENCE MÜTEMBEI ..... 1<sup>ST</sup> APPLICANT  
JOE MBUTHIA WAINAINA ..... 2<sup>ND</sup> APPLICANT  
GEORGE KURIA MUNYUA ..... 3<sup>RD</sup> APPLICANT**

**AND**

**JANE WAMBUI KINGANGI T/A SPIKAS BEACH GARDENS  
LIMITED ..... 1<sup>ST</sup> RESPONDENT  
PATRICK NG'ANG'A ..... 2<sup>ND</sup> RESPONDENT  
RAPHAEL KINYANJUI NG'ANG'A ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The application dated 23<sup>rd</sup> September 2025 seeks for orders of review of judgment delivered on 3<sup>rd</sup> July 2025 by Mr. Justice Benjamin Njoroge who was in this court for service week dealing with appeals, this being one of them. The applicants are the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents in the appeal. The appellant/1<sup>st</sup> respondent herein opposed the application through a Replying Affidavit sworn on 10<sup>th</sup> December 2025.

**The Applicants' Case**

2. The applicants state that the appellant/1<sup>st</sup> respondent filed a suit against them at the Small Claims Court in Ruiru being SCCC/E322/2024 vide Statement of Claim dated 20<sup>th</sup> May 2024. The applicants further state that the learned adjudicator rendered her judgment on 13<sup>th</sup> September 2024 dismissing the claim and awarding them costs. Being aggrieved with the said judgment, the appellant lodged an appeal against the entire judgment of the trial court vide the Memorandum of Appeal dated



11<sup>th</sup> October 2024 in the instant court. Upon hearing the appeal the court delivered its judgment on 3<sup>rd</sup> July 2025 finding that the trial court did not have jurisdiction to hear and determine the dispute between the parties and struck out the appellant's claim. The applicants argue that the court made a determination on the issue of jurisdiction of the Small Claims Court which issue was not pleaded thus unilaterally framing its own issue without notice and according parties a hearing on the same in contravention of Articles 47, 48 and 50 of *the Constitution*.

3. The applicants state that the appellant's claim arose out of alleged tortious acts attributable to them and out of which her premises/property was allegedly damaged and thus the trial court was properly clothed with jurisdiction to entertain the claim under Section 12(1)(c) of the *Small Claims Court Act*. The applicants argue that the dispute between them did not relate to title or possession of land and neither did it relate to any of the other causes of action expressly excluded from the jurisdiction of the Small Claims Court under Section 13(5) of the *Small Claims Court Act*. Thus, the applicants further argue that there is sufficient cause to warrant a review of the impugned judgment.

### **The 1<sup>st</sup> Respondent's Case**

4. The 1<sup>st</sup> respondent states that the court on its own motion determined the issue of jurisdiction, an issue/prayer that had not been pleaded by either party therefore denying them the benefit of being heard on the same. The 1<sup>st</sup> respondent further states that she was clear as to what she was seeking before the trial court and she was deliberate on the choice of forum in the first instance. The 1<sup>st</sup> respondent argues that the court not only determined the unpleaded issue but also took away costs awarded to the respondents by the trial court without due justification.
5. Parties disposed of the application by way of written submissions.

### **The Applicants' Submissions**

6. The applicants rely on Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules and submit that the court unilaterally framed its own issue on jurisdiction of the lower court and determined the same without giving the parties a chance of being heard on the same which contravened their right to a fair hearing under Article 50 of *the Constitution*. The applicants argue that the appellant's claim before the trial court was that they maliciously directed storm water to her premises which caused extensive damage thereto for which she sought compensation in the sum of Kshs. 971,852/- allegedly incurred on repairs. Thus, her case was founded on the law of tort specifically the tort of trespass which falls under the jurisdiction of the Small Claims Court under Section 12(1)(c) of the Act.

### **The 1<sup>st</sup> Respondent's Submissions**

7. The 1<sup>st</sup> respondent submits that the matter before the trial court was one of tortious claim for damage of property and the appellant sought special damages for the sum of Kshs. 972,652/- which was within the jurisdiction of the court as per Section 12(1)(c) of the Act.
8. The 1<sup>st</sup> respondent further submits that this court was not justified in striking out the claim in the lower court as the issue of jurisdiction was never raised in the lower court. The current court acted suo moto and denied the parties an opportunity to be heard on the issue in contravention of Section 22(b) of the *Civil Procedure Act*. Relying on the cases of *Jeremy Mark Block vs the Kenya Forest Service & amp; Others* (ELC Pet 1396 of 2014) and *Nakumatt Holdings Limited vs Commissioner of Value Added Tax* [2011] eKLR, the 1<sup>st</sup> respondent submits that her right to a fair hearing was breached and she ought to have been given a chance to be heard.



9. The 1<sup>st</sup> respondent further submits that the appellate court did not have justifiable reasons to take away the awarded costs by the lower court.

## The Law

### Whether the application is merited

10. Order 45 of the Civil Procedure Code sets out the parameters for an application for review as follows:-

Rule 1 (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 a review of judgment to the court which passed the decree or order made or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case which he applies for the review.

11. It then follows that Order 45 provides for three circumstances under which an order for review can be made. The applicant must demonstrate to the court that there has been 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. Secondly, the applicant must demonstrate to the court that there has some mistake or error apparent on the face of the record. The third ground for review is worded broadly; an application for review can be made for any other sufficient reason.

12. The applicants have raised the ground of ‘for any other sufficient reason’. The phrase ‘any other sufficient reason’ was illuminated in the case of Republic vs Cabinet Secretary for Interior and Co-ordination of National Government ex parte Abullahi Said [2019] eKLR:-

A court can review a judgment for any other sufficient reason. In the case of Sadar Mohammed vs Charan Singh & Another {1963} EA 557 it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter.) Mulla in the Code of Civil Procedure (writing on Order 47 Rule 1 of the Civil Procedure Code of India), the equivalent of our Order 45 Rule 1, states that the expression, ‘any other sufficient reason’ means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground

set out.....would amount to an abuse of the liberty given to the tribunal under the Act to review its judgment.

I also find useful guidance in Tokesi Mombili & Others vs Simion Litsanga [2004] eKLR where the Court of Appeal held as follows:-

In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not



be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.

Where the application is based on sufficient reason it is for the court to exercise its discretion.

13. From the foregoing, the applicants have not demonstrated any discovery of new matter. On the issue of any error apparent on the face of the record, the Court of Appeal in the case of *Muyodi vs Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243, considered what constitutes a mistake or error apparent on the face of the record, and stated as follows:-

In *Nyamogo & Nyamogo vs Kogo* (2001) EA 174 this Court said that an error on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may be conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal.

14. The applicants have failed to show any error on the face of the record. The applicants have grounded their application on the issue of jurisdiction, which is not self evident and requires an elaborate argument. It requires detailed examination, scrutiny and elucidation of facts. It is therefore my considered view that the contentions raised by the applicants require a long drawn out process of arguments by both parties for the court to make a final decision. As such, it is my view that those are grounds for appeal rather than review as they relate to the substance of the matter.
15. The applicants have brought the present application 2 months after the impugned decision was made. It is trite law that an application for review ought to be made without unreasonable delay. The applicants have not advanced any reasons for the two month delay before filing the current application. Based on the reasons discussed, it is my considered view that the applicants have not met the threshold to warrant the orders sought for review.
16. Accordingly, I find that the application dated 23<sup>rd</sup> September 2025 lacks merit and is hereby be dismissed with costs to the 1<sup>st</sup> respondent.
17. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 30<sup>TH</sup> DAY OF APRIL 2026.**

**F. MUCHEMI  
JUDGE**

