

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 575 OF 2017**

GRACE WANGARI BUNYI.....PLAINTIFF/RESPONDENT

=VERSUS=

MOSES KIRUTI LEPASO.....1ST DEFENDANT/APPLICANT

GRACE GICHIUHI.....2ND DEFENDANT/APPLICANT

NG'ANG'A OMIKONYO.....3RD DEFENDANT/APPLICANT

STEPHEN NGUGUNA KIMANI.....4TH DEFENDANT/APPLICANT

**RULING**

**INTRODUCTION**

1. The matter scheduled for determination is the Notice of Motion application dated 5th December 2025, filed under a Certificate of Urgency by the 1st, 2nd, 3rd, and 4th Defendants/Applicants. The jurisdiction of this Court is invoked pursuant to Sections 1A, 1B, 3A, and 80 of the Civil Procedure Act (Cap 21), read together with Order 22 Rule 22, Order 45 Rules 1 and 2, and Order 51 of the Civil Procedure Rules, 2010.
2. The Applicants essentially seek to arrest the execution processes currently underway and to disturb the final judgment of this Court. The specific prayers sought in the motion are as follows:

- a) THAT this Honourable Court be pleased to stay execution of the Judgment and Decree delivered on 22nd October 2022 and the Decree Issued on 5th November 2024 in ELC Case No. 575 of 2017, and all other consequential orders, pending the hearing and determination of this application and the intended review.
  - b) THAT this Honourable Court be pleased to review, vary and/or set aside the entire Judgment delivered on 22nd October 2022 in ELC No. 575 of 2017 in favour of the Plaintiff/Respondent.
  - c) THAT upon review, this Honourable Court be pleased to reopen the case for rehearing and allow the Applicants to tender additional evidence material to the fair determination of the suit on merit.
  - d) THAT costs of this application be provided for.
3. The substratum of the application is anchored on the grounds set out on the face of the Notice of Motion, which are further elaborated and sworn to in the Supporting Affidavit of the 1st Applicant, Mosses Kiruti Lepaso, dated 5th December 2025. The Applicants aver that they have met the threshold for review under Order 45 Rule 1 by discovering new and important evidence that was not within their knowledge at the time the judgment was rendered. Specifically, they rely on recently obtained certified criminal proceedings which, they contend, reveal material omissions, contradictions, and procedural defects that strike at the root of the Court's previous findings.
  4. The Applicants depose that during the said criminal proceedings, key concessions were made by witnesses designated as PW6 and PW9. It is the Applicants' contention that PW6 could not produce documents supporting the subdivision that yielded LR 33576,

and that PW9 conceded there was no proof of a lawful transfer of the land in question.

The Applicants maintain that this evidence is critical, and failure to review the judgment will subject them to imminent eviction and irreparable harm, displacing them from land they claim to have lawfully occupied since 1987.

5. The application is further buttressed by a Further Affidavit sworn by the 1st Applicant on 25th March 2026. This subsequent affidavit is filed to draw the Court's attention to parallel enforcement actions initiated by the Plaintiff/Respondent which the Applicants characterize as an attempt to overreach the judicial process and render the present application nugatory. It is deposed that the Plaintiff/Respondent, acting through Kenneth Odhiambo trading as Jenks Auctioneers, instituted Miscellaneous Application No. E052 of 2025 at the Principal Magistrate's Court at Ngong, effectively seeking police escort to carry out the eviction while this Court is still seized of the review application.
6. It is noteworthy that despite having been granted leave by this Court to do so, the Plaintiff/Respondent has not filed any response to the application.
7. The application was subsequently canvassed by way of written submissions, which this Court has duly considered in arriving at this determination.

#### **ISSUES FOR DETERMINATION**

8. I have carefully considered the application, the supporting and further affidavits, and the written submissions filed by the Applicants. The Plaintiff/Respondent, despite having been granted leave by this Court to do so, neither filed a response nor submissions to controvert the application.
9. Arising from the pleadings and submissions, I distil the following three issues for determination:

- i. ***Whether the application meets the threshold for Review under Order 45 Rule 1 of the Civil Procedure Rules; and dependent on the outcome of this issue;***
- ii. ***Whether the interests of justice and the Overriding Objective warrant the reopening of the case for a re-hearing.***

### **ANALYSIS AND DETERMINATION**

10. The power of this Court to review its own judgments is discretionary but must be exercised strictly within the confines of the law. Order 45 Rule 1(1) of the Civil Procedure Rules provides the statutory anchor for this jurisdiction. It states:

*"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 made the*

*order."*

11. The Applicants peg their plea for review squarely on the "discovery of new and important matter or evidence". They aver that subsequent to the delivery of the judgment herein, the 1st Applicant was acquitted in Ngong Criminal Case No. 587 of 2017, wherein the trial

magistrate found that the Respondent failed to prove ownership or produce a valid title for the suit property. Furthermore, the Applicants rely on sworn concessions made during those proceedings by PW9 (the Land Registrar) that the registry lacks the statutory documents (such as Land Control Board consents and mutation forms) to support the subdivision that yielded the suit property, rendering the title null and void.

12. The Supreme Court of Kenya, in the case of *Evan B. Nyairo & 2 Others v. Shell East Africa (as reaffirmed in Pancras T. Swai v. Kenya Breweries Limited [2014] eKLR)*, expounded on this principle, stating verbatim:

*"A review may be granted whenever the court considers that it is necessary to correct an evident error or omission, or where there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made."*

13. Applying these principles, I find that the findings of the criminal court and the categorical concessions by the Land Registrar and the Plaintiff's counsel (PW6) constitute new, compelling, and material evidence that strikes at the very root of the Plaintiff's title. This evidence was not available to the Applicants or this Court during the ELC trial. The Respondent has not filed any affidavit to rebut these weighty allegations. Consequently, the legal threshold for review under Order 45 Rule 1 is fully met.

14. Having found that the application for review has merit, it follows that impugned judgement must be set aside to allow the Applicants an opportunity to adduce the new, compelling, and material evidence. I need not go any farther to determine the other identified issues.

15. In the upshot, I find the Notice of Motion dated 5th December 2025 has merit and is unopposed in any event. I make the following orders:

- A. THAT the Notice of Motion application dated 5th December 2025 is hereby allowed.**
- B. THAT the Judgment delivered on 22nd October 2022 is hereby reviewed and set aside in its entirety.**
- C. THAT the case is hereby reopened for a re-hearing on the merits to allow the Applicants to tender the additional evidence.**
- D. THAT the costs of this application shall abide the outcome of the re-hearing.**

It is so ordered.

**Dated, Signed and Delivered Virtually this 13<sup>th</sup> Day of May, 2026.**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

Mr. Paul Macharia for the Defendants/Applicants

N/A by the Plaintiff/Respondent

Court Assistant: Alex

**M.D. MWANGI**

**JUDGE**