REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL CASE NO. E040 OF 2022

JABAVU VILLAGE LIMITED…….. PLAINTIFF

=VERSUS=

PAUL CURSON AKA PAVEL LUVEDIT VACLAV CURSON ……. DEFENDANT

RULING

1. By a Notice of Motion dated 29th October 2025, brought under Order 9 Rule 9, Order 10 Rule 11, Order 45 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act, and Article 159 (2) (a) and (d) of the Constitution, the Plaintiff/Applicant seeks the following orders:

    i. ***Spent***

    ii. ***That the firm of Ham & Hamsley Advocates be granted leave to come on record in place of the firm of Chesikaw & Kiprop Advocates.***

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iii. That the Honourable Court be pleased to set aside the judgment entered on 27th April 2023 and Decree dated 27th April 2023 and all the consequential orders arising from the same.

iv. That the costs of this application be in the cause.

2. The application is based on the grounds appearing on its face together with the supporting affidavit of Abdikadir Ahmed, sworn on even date.

THE APPLICANT'S CASE

3. The deponent averred that the judgment in this suit was rendered despite a previous decision on the same subject matter having been issued by a Court of concurrent jurisdiction in **ELC No. 993 of 2016, Paul Curzon v Martin Ngao Muthama & 3 others.** He argued that although this Court acknowledged the existence of the said suit, it nonetheless proceeded to deliver judgment, thereby amounting to res judicata.
4. The deponent asserts that the foregoing constitutes an apparent error on the face of the record, warranting a review of the judgment delivered on 27th April 2023. He contends that this Court has inherent jurisdiction to set aside its judgment in such circumstances.
5. He maintained that the application was filed without undue delay, and that no prejudice would be occasioned to the Defendant if the orders sought are granted. Conversely, he

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argued that the Plaintiff would suffer irreparable harm if the judgment is not set aside.

THE DEFENDANT'S CASE

6. The Defendant filed a replying affidavit dated 3rd December 2025, in opposition to the application. He contended that the Court is functus officio and that no sufficient cause has been demonstrated to warrant review or the setting aside of the judgment.
7. He averred that he is the lawful owner of the suit property, as confirmed in the judgment delivered on 16th November 2021 in **ELC No. 993 of 2016, Paul Curzon v Martin Ngao Muthama & 3 others,** which determined the dispute over the ownership of the suit property.
8. He asserted that the Plaintiff was aware of the proceedings and judgment, having attempted to join ELC No. 993 of 2016 through an application dated 15th November 2021, which was subsequently withdrawn. He contended that, despite this knowledge, the Plaintiff instituted this suit without effecting proper service, opting instead for substituted service through a newspaper with limited circulation, thereby allegedly seeking to obtain judgment without his participation.
9. He asserted that the Plaintiff failed to disclose the existence and outcome of ELC No. 993 of 2016 in its pleadings, despite the fact that the issue of ownership had already been determined, rendering the present suit res judicata.

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10. He maintained that the Plaintiff did not demonstrate any entitlement to the suit property in the proceedings culminating in the judgment delivered on 27th April 2023. He argued that the Plaintiff has neither appealed that judgment nor provided a satisfactory explanation for the delay in seeking review.
11. He asserted that the Plaintiff is unlawfully in possession of the suit property and is seeking to defeat the Defendant's rights as declared in the earlier judgment. In light of the foregoing, the Defendant contends that the application is frivolous, without merit, and an abuse of the Court process. In conclusion, he urged the Court to dismiss the application with costs.
12. The application was canvassed by way of written submissions.

THE PLAINTIFF'S SUBMISSIONS

13. The Plaintiff filed its submissions dated 29th January 2026.
14. On behalf of the Plaintiff, Counsel submitted that the present dispute is governed by the doctrine of res judicata, which bars the re-litigation of issues that have been conclusively determined by a Court of competent jurisdiction between the same parties. Counsel argued that when there are two judgments on the same subject matter involving the same parties, the latter proceedings are rendered untenable in law, as the Court is obligated to uphold the finality and binding nature of the earlier determination.

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15. Counsel emphasized that the doctrine serves the dual purpose of ensuring judicial finality and preventing the multiplicity of suits where there is an identity of parties, subject matter, and cause of action. Counsel argued that the Court is barred from reopening the dispute, as doing so would undermine consistency in adjudication and waste judicial resources.
16. Further, reliance was placed on the principles underpinning Section 11 of the Civil Procedure Code, as well as the maxims *interest reipublicae ut sit finis litium* and *res judicata pro veritate accipitur*, to underscore that litigation must be concluded and that a final judgment should be regarded as conclusive.
17. Regarding the Court's discretion, Counsel cited **Waweru v Ndiga [1983] KLR 236**, to submit that although the Court has discretion to set aside a judgment in appropriate circumstances, such discretion must be exercised judiciously so as to prevent injustice arising from inadvertence or excusable error. Further reliance was placed on **Remco Limited v Mistry Jadva Parbat Ltd [2002] 1 EA 233 (CCK),** as cited in **Wayua James & another v Daniel Kipkorong Tarus & another [2014] eKLR**, to emphasize that the Court's discretion is intended to achieve substantive justice and not to aid a party who seeks to obstruct or delay the course of justice.
18. Counsel submitted that when the issues raised are res judicata, the Court lacks jurisdiction to hear the matter and

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must uphold the previous decision to protect the integrity of the judicial process and prevent litigants from engaging in repetitive and vexatious litigation.

THE DEFENDANT'S SUBMISSIONS

19. The Defendant filed his submissions dated 23rd January 2026.
20. On behalf of the Defendant, Counsel submitted that the application does not meet the legal threshold set out in Order 10 Rule 11 of the Civil Procedure Rules. Counsel further submitted that the discretion to set aside a judgment must be exercised judiciously and only where sufficient cause is demonstrated, which has not been established in the present case. To support this argument, Counsel relied on **Shah v Mbogo & another [1967] EA 116**. It was submitted that the impugned judgment was properly reasoned and does not disclose any misdirection of fact or law.
21. Counsel further relied on **Philip Chemwolo & another v Augustine Kubende [1982-88] KAR 103 and Patel v E.A. Cargo Handling Services Ltd [1974] EA 75,** to submit that the primary consideration in an application of this nature is whether there exist triable issues warranting the reopening of the case. Counsel argued that the Plaintiff has not demonstrated any triable issues, as the Court had already exhaustively considered and determined the merits of the claim.

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22. Regarding the issue of delay, Counsel cited **Mohammed & another v Shoka [1990] KLR 463** to argue that an applicant must give a satisfactory explanation for the delay. Counsel maintained that there was an unexplained delay of over two years in filing the application, which disqualifies the Plaintiff from obtaining the relief sought.

23. Counsel further submitted that no error apparent on the face of the record has been established. To support this point, counsel relied on **Benson W. Kaos & 72 others v Attorney General & 85 others [2022] KEELC 1714 (KLR), which adopted the test in Chandrakant Joshibhai Patel v R [2004] TLR 218,** that such an error must be self-evident and not require elaborate argument. Counsel argued that the judgment herein is consistent with the earlier determination in ELC No. 993 of 2016 and therefore discloses no such error.

24. Regarding the doctrine of res judicata, Counsel submitted that the present proceedings offend Section 7 of the Civil Procedure Act as issues concerning ownership of the suit property were conclusively determined in ELC No. 993 of 2016**.** In this regard, reliance was placed on **Okaka v Ojanga & another [2025] KEELC 8259 (KLR)**, where it was held that res judicata applies even to parties who, although aware of the proceedings, fail to participate. Further reliance was placed on **Omondi v National Bank of Kenya Ltd & others [2001] 1 EA 177**, where the Court

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emphasized the need for finality in litigation and that a party should not be vexed twice over the same matter.

25. In conclusion, Counsel submitted that the application is frivolous, vexatious, and intended to deny the Defendant the fruits of a valid judgment. Counsel urged the Court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

26. Having considered the application, the respective affidavits and the rival submissions, the following issues arise for determination:

    a. *Whether the firm of Ham & Hamsley Advocates should be granted leave to come on record for the Plaintiff after judgment; and*

    b. *Whether the judgment dated 27th April 2023 should be set aside.*

27. Regarding the first issue, **Order 9 Rule 9 of the Civil Procedure Rules** provides as follows:

> ***"When there is a change of advocate, 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***

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incoming advocate or party intending to act in person, as the case may be."

28. The purpose of Order 9 Rule 9 is to ensure the orderly conduct of proceedings following judgment and to safeguard advocates from being displaced without prior notice after they have represented a party up to the point of judgment.

29. In **S.K. Tarwadi vs Veronica Muehlemann [2019] eKLR**, the Court observed as follows:

"…In my view, the essence of Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a Judgment is delivered and then sack the advocate and either replace him…."

30. The Plaintiff seeks leave for the firm of Ham & Hamsley Advocates to come on record in place of Chesikaw & Kiprop Advocates. The application is unopposed as no replying affidavit or grounds of opposition have been filed. There being no objection, leave is hereby granted to the firm of Ham & Hamsley Advocates to come on record for the Plaintiff in place of Chesikaw & Kiprop Advocates.

31. Regarding the second issue, the Plaintiff seeks to set aside the judgment delivered on 27th April 2023 and the decree issued pursuant thereto.

32. The Plaintiff's main argument is that the judgment of 27th April 2023 was issued despite an earlier judgment in **ELC No. 993 of 2016, Paul Curzon v Martin Ngao Muthama & 3 others**, which determined the ownership dispute over

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the same property. The Plaintiff asserts that the later judgment is therefore affected by the doctrine of res judicata and constitutes an error apparent on the face of the record.

33. The Defendant contends that the Court is functus officio, that no apparent error on the face of the record has been identified, that the application was filed after an inordinate delay, and that the Plaintiff is unjustly attempting to reopen issues that should have been raised before the judgment or pursued on appeal.

34. **Order 10 Rule 11 of the Civil Procedure Rules** grants the Court discretion to set aside or vary a judgment entered in default of appearance or defence on such terms as may be just.

35. The present judgment is challenged not only as a default judgment but also because it was issued despite an earlier decision rendering it legally untenable. The substance of the application is therefore one for review under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, rather than an application under Order 10 Rule 11 of the Civil Procedure Rules.

36. The law governing applications for review is set out in **Section 80 of the Civil Procedure Act** and in **Order 45 Rule 1 of the Civil Procedure Rules.**

37. **Section 80 of the Civil Procedure Act** provides that;

"Any person who considers himself aggrieved;

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a. ***by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***

b. ***by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."***

38. **Order 45 Rule 1 of the Civil Procedure Rules** provides that:

"(1) Any person considering himself aggrieved;

i. ***by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***

ii. ***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***

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court which passed the decree or made the order without unreasonable delay.

39. In **Benjoh Amalgamated Limited & Another v Kenya Commercial Bank Limited [2014] eKLR,** the Court of Appeal held that:

> ***"In the High Court, both the Civil Procedure Act in Section 80 and the Civil Procedure Rules in Order 45 Rule 1 confer on the court power to review. Rule 1 of order 45 shows the circumstances in which such review would be considered, ranging from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason, but section 80 gives the High Court greater amplitude for review."***

40. Similarly, in **Republic v Public Procurement Administrative Review Board & 2 Others [2018] eKLR,** the Court held that:

> ***"Section 80 gives the power of review, and Order 45 sets out the rules. These rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review."***

41. Regarding the first requirement, the Applicant must show that there is discovery of a new or important matter of evidence which, after due diligence, was not within its knowledge or could not be produced at that time.

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42. In the present case, the Plaintiff has not demonstrated that the material related to ELC No. 993 of 2016 was a new and important matter which, after exercising due diligence, was not within its knowledge or could not have been produced at the time judgment was delivered. Conversely, the record indicates that the existence of ELC No. 993 of 2016 was known. The Plaintiff's concession that the Court acknowledged the earlier proceedings weakens the case for review.

43. If the Court considered the existence of the earlier suit and still delivered judgment, the appropriate remedy for a party aggrieved by that decision was an appeal. A review court is not allowed to reopen the merits simply because a party believes that the Court should have applied different legal consequences to the earlier proceedings.

44. Regarding the second requirement, the Applicant must demonstrate that there is an error apparent on the face of the record. In **Nyamogo & Nyamogo -vs- Kogo (2001) EA 174,** the court held that;

> ***"An error apparent 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 a real distinction between a mere erroneous decision and an error apparent***

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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 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. This laid down principle of law is indeed applicable in the matter before us."

45. Similarly, in **Timber Manufacturers and Dealers vs Nairobi Golf Hotels (K) HCCC No. 5220 of 1992,** Emukule J held that:

> "***For it to be said that there is an error apparent on the face of the record, it must be obvious and self- evident and does not require an elaborate argument to be established."***

46. An error on the face of the record should not necessitate a detailed examination or elucidation of facts.

47. The Plaintiff's complaint is that the judgment of 27th April 2023 was issued despite an earlier judgment in **ELC No. 993 of 2016**. This argument necessarily requires the Court to examine the pleadings, parties, issues, reliefs, and judgment in the earlier suit, then compare them with those in the present suit. It also requires the Court to determine whether the parties litigated under the same title, whether the subject matter was identical, whether the issues were directly and substantially the same, and whether the earlier judgment finally determined the matter now raised.

48. That inquiry is not self-evident from the face of the judgment of 27th April 2023. It requires a substantive analysis and may ultimately disclose grounds for an appeal, but it does not, on its own, constitute an error apparent on the face of the record.

49. The Plaintiff relied on the doctrine of res judicata. Section 7 of the Civil Procedure Act bars a Court from trying a suit or issue where the matter directly and substantially in issue has already been directly and substantially in issue in a previous suit between the same parties or parties under whom they claim, litigating under the same title, before a Court of competent jurisdiction, and has been heard and finally determined.

50. The doctrine prevents parties from being vexed twice over the same matter, safeguards the authority of judicial decisions, and prevents abuse of the court process through repeated litigation.

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51. The plea of res judicata is being raised after the judgment in the very case that is alleged to have been barred. The Plaintiff is inviting this Court to reconsider its decision on the grounds that the suit should not have proceeded in light of a previous determination.

52. Once a Court has rendered judgment, it becomes functus officio except to the limited extent permitted by law, including correction of clerical errors, review under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, execution, or other jurisdiction expressly reserved by statute. The Court cannot sit on appeal over its own judgment by re-evaluating whether it should have reached a different conclusion on jurisdiction, ownership or res judicata.

53. The Court is also required to consider whether there are sufficient reasons to review or set aside the Court's judgment.

54. Discussing what constitutes sufficient cause for purposes of review, the Court of Appeal in **The Official Receiver and Liquidator Vs Freight Forwarders Kenya Ltd (2000) eKLR** stated that:

> ***"These words only mean that the reason must be one that is sufficient to the court to which the application for review is made, and they cannot, without at times running counter to the interest of justice, limited to the discovery of new and important matter***

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or evidence or occurring of an error apparent on the face of the record."

55. Based on the evidence on record, I find that the Applicant has not demonstrated any sufficient reasons to warrant the review of the judgment.
56. Regarding the issue of delay, the Plaintiff contends that the application was filed without undue delay. The record shows that judgment was delivered on 27th April 2023. The present application was filed on 29th October 2025, more than two years later. No satisfactory explanation has been offered for the delay of more than two years.
57. The Plaintiff invoked Article 159(2)(a) and (d) of the Constitution, which requires Courts to administer justice without undue regard to procedural technicalities, but it does not remove jurisdictional thresholds. It cannot be used to extend the review jurisdiction beyond the limits imposed by Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.
58. The Court is equally aware of its inherent jurisdiction under section 3A of the Civil Procedure Act, which exists to prevent abuse of the court process and to serve the ends of justice. However, inherent power cannot be used to override explicit statutory provisions or to grant the Court appellate jurisdiction over its own judgments.
59. The Plaintiff seeks to set aside the Judgment, the decree and all consequential orders. Since the Plaintiff has not established any of the recognized grounds for review, there

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is no lawful basis upon which the decree and consequential orders can be set aside.

60. In the end, I find that the application dated 29th October 2025 partially succeeds only to the extent that the firm of Ham & Hamsley Advocates is granted leave to come on record for the Plaintiff in place of Chesikaw & Kiprop Advocates. The prayer seeking to set aside the judgment delivered on 27th April 2023, the decree issued therefrom, and all consequential orders is dismissed with costs.

RULING SIGNED, DATED, AND DELIVERED VIA MICROSOFT TEAMS THIS 8TH DAY OF MAY 2026.

.....
HON. T. MURIGI
JUDGE

IN THE PRESENCE OF:-

Niboma holding brief for Ojiambo for the Defendant/Respondent

Ahmed- Court Assistant

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