REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC L JUDICIAL REVIEW NO. E009 OF 2023

REPUBLIC .....

APPLICANT

VERSUS

NATIONAL LAND COMMISSION 1ST

RESPONDENT

KENYA RAILWAYS CORPORATION 2ND

RESPONDENT

KHODIYAR LIMITED ..... EX PARTE

APPLICANT

KENYA COMMERCIAL BANK 1ST

GARNISHEE

GOK 2ND

GARNISHEE

NATIONAL BANK OF KENYA 3RD

GARNISHEE

RULING

1. Judgment was entered for the Ex Parte Applicant herein on 26th May 2025 and a resultant Decree issued on the 16th July, 2025. Subsequently, the 1st Respondent filed the Notice of Motion dated 15th September 2025 in which it seeks the following Orders:

a) Spent.

b) That pending the hearing and determination of this Application, this Honourable Court be pleased to review, vary and/or set aside the Decree signed on 16th July 2025.

c) Spent

d) That pending the hearing and determination of this Application, this Honourable Court be pleased to review, vary and/or set aside judgment delivered by the Hon. Justice C. Ochieng' dated 26th May 2025.

e) That the orders issued on 26th May 2025 by the Honourable C. Ochieng' be stayed pending the hearing and determination of this Application.

f) **That the Costs of the Application be provided for.**

g) **Any other or further Orders that this Honourable Court may deem fit and just to grant.**

2. The application is premised on grounds on its face and on the supporting affidavit of Joel Ombati Nyamweya, Director of Valuation and Taxation at the 1st Respondent. He notes that a Decree was issued herein on 16th July 2025, ordering that the 1st and 2nd Respondents pay the sums of Kshs.39,000,000/=, Kshs.38,500,000/= and Kshs.1,564,000/= as compensation for the compulsory acquisition of the suit land.

3. He points out that the 1st Respondent received a request from the 2nd Respondent in accordance with Section 107 of the Land Act 2012, to acquire land on its behalf for the expansion of the ICD Embakasi access road. Further, on that basis, it commenced compulsory acquisition for various parcels of land including the suit land (**L.R. Number**

20281), by publishing Gazette Notice Number 8840 in the Kenya Gazette Vol. CXIX - No. 132 of 8th September 2017, which was a notice of intention to acquire land for the project, including 0.004 Ha of the suit land.

4. He states that the 1st Respondent also published a 'Notice of Inquiries' in the same Gazette Notice informing the owners of the listed properties, that it would be carrying out hearings to claims of compensation for the Interested Parties at the Nairobi West (Wilson Airport) Chief's Office on Thursday, 5th October 2017 but before the Inquiry hearings happened, the 2nd Respondent instructed it to modify the size of the portion of land to be acquired from the suit land, which it did by publishing a corrigendum via Gazette Notice No. 11576 in the Kenya Gazette Vol. CXIX- No. 175 dated 24th November, 2017 where it adjusted the land for acquisition to 0.027 Ha from 0.004 Ha.

5. He confirms that subsequently, in 2018, a valuation was done on the land with a valuation schedule amounting to Kshs.6,171,199/= broken down as; Kshs.4,607,199/= for the value of the land and Kshs.1,564,000/= for the value of developments thereon, which was sent to the 2nd Respondent with a request to release the necessary compensation funds for onward transmission to the Ex parte Applicant. Further, that the 1st Respondent has never issued any Award for the value of the suit land because an entity known as Arusha Stores Ltd also made a claim of ownership of suit land and an Award will only be issued for the value of the land once a dispute over ownership of the said land is resolved.

6. He contends that the Ex parte Applicant has not adduced any other evidence to support the allegation that two portions were acquired from the suit land, in two separate acquisitions. Further, that following the judgement delivered on 26th May 2025, the 1st Respondent went through its records to find copies of the Awards allegedly issued to the

Ex parte Applicant to commence the process of requesting the 2nd Respondent for funds to pay the compensation as ordered by the Court and it was then that it discovered that only one Award (for developments on the suit land) existed in its records.

7. Further, that through its Advocates, the 1st Respondent sent at least three e-mails to the Ex-parte Applicant's Advocates inquiring on when their client would be available to present original copies of their Awards before it, but no response has been forthcoming, thus the Ex parte Applicant deliberately misled the Court by claiming that two portions were acquired from the suit land and presented suspicious Awards to support its claim in an attempt to fraudulently benefit from the compulsory acquisition process done on the suit land.

Responses

8. The 2nd Respondent filed a replying affidavit sworn by Philip J Mainga in support of the 1st Respondent's application. He

avers that the 2nd Respondent's position is that since execution threatened herein concerns public funds, the Court ought to interrogate the issues in a manner that ensures only lawful, verified and properly attributable compensation if any is paid and that public funds are not exposed to avoidable loss, duplication or unjust enrichment.

9. On its part, the Ex parte Applicant filed a replying affidavit sworn by its managing director, one P.J Kakad. He points out that there were two compulsory acquisitions on the suit land, the first being for a portion of land measuring 0.004 Ha vide a Gazette Notice No. 8840 in the Kenya Gazette Vol. CXIX-No. 132 of 8th September 2017 of which an award of Kshs.39,000,000/= was issued vide an Award Notice dated 26th January 2018. The second acquisition was of a portion of the same property, measuring 0.027 Ha vide a Gazette Notice No. 11576 in the Kenya Gazette Vol. CKIK-No. 175 of 24th November 2017, of which the 1st Respondent issued an award of Kshs.38,500,000/= while third Award of

Kshs.1,564,000/= concerned developments on the suit property.

10. He explains that the Ex parte Applicant wrote to the 1st Respondent accepting the said Awards and provided its bank details in anticipation of payment but todate, it has not been compensated thus it was prompted to commence the instant suit. He points out that in the suit, the 1st Respondent admitted to have compulsorily acquired the Ex parte Applicant's parcels of land and further admitted that it had not paid compensation owed, claiming that it was yet to receive funds from the 2nd Respondent. Further, that the 2nd Respondent also admitted that it sought to compulsorily acquire the Ex parte Applicant's parcels of land and after due process was followed, it released Kshs.38.85 billion for land acquisition compensation. He contends that owing to the Respondents' admission, the allegation that the 1st Respondent only issued a notice of intention to acquire 0.027ha through its corrigendum is untrue.

11. He also avers that vide a letter from the Chairman of the 1st Respondent addressed to the 2nd Respondent, the Chairman urged the 2nd Respondent to remit funds for purposes of payment to the Ex parte Applicant so that the Judgment herein is satisfied.

12. On the allegations that another entity by the name of Arusha Stores Ltd is claiming ownership of the suit land, he avers that the claim is unsubstantiated and that the allegation is a delaying tactic hindering the Ex parte Applicant from enjoying the fruits of its judgement. Further, that the 1st Respondent has not demonstrated sufficient cause for Orders of Stay of Execution of the Decree and consequential Orders herein. He reiterates that the 1st Respondent has also failed to demonstrate sufficient grounds for review under Order 45 Rule 3 of the Civil Procedure Rules.

13. He insists that since the two compulsorily acquired portions of the suit land are of different acreage with different gazette

notices and different letter of Awards, there could not have been any confusion in their acquisition. Further, that while the 1st Respondent's point of contention is that it issued an Award of Kshs.6,171,199/=, it has not provided any proof of the same and gazette notices dated 8th September 2017 and 24th November 2017 on portions of land measuring 0.004Ha and 0.027Ha respectively have never been revoked.

14. He avers that the firm of Ken Echesa & Company Advocates who filed the instant application post judgement has not sought for leave to come on record and/or filed a consent of Notice of Change of Advocates pursuant to Order 9 Rule 9 of the Civil Procedure Rules.

15. The instant application was canvassed by way of written submissions.

Submissions

16. The Ex parte Applicant submits that the instant application filed by the

firm of Ken Echesa & Company Advocates is incompetent because the said Advocates failed to comply with Order 9 Rule 9 the of the Civil Procedure Rules.

17. It also submits that the reasons cited for review by the 1st Respondent do not qualify to be any of the grounds prescribed in Order 45 Rule 1 of the Civil Procedure Rules.

18. It is also submitted that pursuant to Order 42 Rule 6 of the Civil Procedure Rules, the 1st Respondent has not demonstrated sufficient cause for Orders of Stay of Execution of the Decree and consequential Orders issued on 16th July 2025, for reasons that no substantial loss is being occasioned on the 1st Respondent, there is no special circumstances as there is no pending Appeal, and the 1st Respondent will not suffer irreparable loss, since execution is a lawful process.

19. It also submits that there is unreasonable delay as the instant application was filed six (6) months after Judgment

was delivered and that despite the Decree herein being a money decree, the 1st Respondent has not offered to provide security.

20. To buttress its averments, the Ex Parte Applicant relied on the following decisions: **Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR**; **Abasi Belinda v Fredrick Kangwamu and another [1963] EA 557**; **Republic v Advocates Disciplinary Tribunal Ex Parte Appollo Mboya [2019] KEHC 6379**; **Gobe v Bora (Environment and Land Appeal E005 of 2023) [2025] KEELC 4300 (KLR) (4 June 2025) (Ruling)**; **Vishram Ravji Halai v Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**; **Antoine Ndiaye vs. African Virtual University [2015] eKLR**; **James Wangalwa & Another V Agnes Naliaka Cheseto [2012] KEHC 1094 (KLR);** and **County Executive of Kisumu v County Government of Kisumu & others (Civil**

Application 3 of 2016) {2017} KESC 16 (KLR), among others which the Court has carefully considered.

21. The 1st and 2nd Respondents did not file written submissions.

Analysis and Determination

22. Upon consideration of the Notice of Motion dated 15th September, 2025 including the respective affidavits and rivalling submissions, the following are the issues for determination:

- **Whether the firm of Ken Echesa & Company Advocates is properly on record.**
- **Whether the 1st Respondent has met the threshold for review of this court's judgement entered on 26th May 2025 and resultant Decree issued on the 16th July, 2025.**

23. On the first issue, the Ex parte Applicant contends that the firm of Ken Echesa & Company Advocates which filed the instant application post judgement has not sought for leave to come on record and/or filed a consent of Notice of Change

of Advocates pursuant to Order 9 Rule 9 of the Civil Procedure Rules, thus it is not properly on record.

24. Order 9 Rule 9 of the Civil Procedure Rules provides that:

> ***'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 incoming advocate or party intending to act in person as the case may be.'***

25. In **Stephen Mwangi Kimote v Murata Sacco Society [2018] eKLR,** the Court observed that:

> *'**Order 9 does not impede the right of a party to be represented by an Advocate of his choice. It only provides rules to impose orderliness in civil proceedings.'***

26. Mativo J (as he then was) stated as follows in **John Gitonga Gachuhi & 4 others v Commissioner of Lands & 5 others [2017] eKLR**;

> ***"The constitution is an effective document that is the basis of our laws. Considering the principles, purposes and objectives of the constitution enumerated above, the right to legal representation, I find myself unable to uphold the objection by the Petitioners counsel that the Respondents counsel is not properly on record. Instead, in exercise of my discretion, I hereby grant an order regularizing his being on record and a further order that the notice of change of advocates and all the documents filed by the said advocate be deemed to be properly on record…."***
> Emphasis Mine

27. See the decisions of **Philip Chemwolo & another vs Augustine**

Kubende (1986) eKLR and **Gideon Mose Onchwati Vs Kenya Oil Company limited and another (2017).**

28. Based on the facts as presented while associating myself with the decisions quoted, I note the replying affidavit by the 1st Respondent, to the main motion seeking judicial review, was actually filed by the Director Legal Affairs of the 1st Respondent and not a Law firm. To my mind, I find that the provision of Order 9 Rule 9 of the Civil Procedure Rules envisaged a situation where the matter had previously been handled by an Advocate which is not the case herein. Further, I opine that Article 159 (2) (d) of the Constitution provides a latitude that whenever there is breach of procedural rules, Courts can disregard the same and allow a party to proceed, so as not to be driven out of the seat of justice. It is my considered view that the failure by the aforementioned law firm to seek leave to come on record for the 1st Respondent cannot be deemed fatal and I will exercise my discretion and grant leave to the Advocate to regularize its representation and decline to strike out the instant application as sought.

29. On the second issue, pursuant to this Court's Decree dated the 16th July 2025, the 1st and 2nd Respondents herein were ordered to pay the Ex –Parte Applicant the sums of Kshs.39,000,000/=, Kshs.38,500,000/= and Kshs.1,564,000/= as compensation for the compulsory acquisition of its portion of land measuring 0.004 Ha vide a Gazette Notice No. 8840 of 8th September 2017, a second portion measuring 0.027 Ha vide a Gazette Notice No. 11576 of 24th November 2017, while Kshs.1,564,000/= was to compensate it, for developments thereon.

30. The 1st Respondent now seeks a review of the said orders on the basis that there was discovery of new information after issuance of the Decree being that the aforementioned two parcels were not compulsorily acquired since vide a corrigendum via Gazette Notice No. 11576 in the Kenya Gazette Vol. CXIX- No. 175 dated 24th November, 2017, it adjusted the land for acquisition to 0.027 Ha from 0.004 Ha. It also contends that the acquired parcel was valued at

Kshs.6,171,199/= broken down as; Kshs.4,607,199/= for the value of the land and Kshs.1,564,000/= for the value of developments done on the said land. It insists that it has never issued any Award for the value of the suit land because there is a dispute of ownership between the Ex parte Applicant and an entity known as Arusha Stores Ltd. The 2nd Respondent supports the 1st Respondent's application.

31. On its part, the Ex Parte Applicant insists that two (2) portions of its property were compulsorily acquired vide gazette notices dated 8th September 2017 and 24th November 2017, respectively which have never been revoked. Further, that when it filed the instant suit, the 1st Respondent admitted to have compulsorily acquired its parcels of land and further admitted that it had not paid compensation owed and claimed that it was yet to receive monies for compensation from the 2nd Respondent. Additionally, that the 2nd Respondent also admitted that it sought to compulsorily acquire its parcels of land and

confirmed to have fully completed its statutory mandate by disbursing a sum total of Kshs. 38.85 billion in compensation funds.

32. It therefore insists that no grounds for review have been established by the 1st Respondent to warrant a review of this Court's orders and that the application for review has been brought after inordinate delay. Further, that the allegation that ownership of the suit land is disputed by Arusha Stores Ltd is unsubstantiated and is a delaying tactic.

33. On review, Section 80 of the Civil Procedure Act gives provides that:

> ***"Any person who considers himself aggrieved; by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or 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."***

34. Order 45 of the Civil Procedure Rules, stipulates inter alia:

> ***"(1) Any person considering himself aggrieved; by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or 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 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 on which he applies for the review."

35. On review, the Court of Appeal stated as follows in **Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2019] eKLR**:

"….an order for review is restricted to parameters set out by the law.."

36. The Court of Appeal also stated as follows on admitting new evidence in review, in the case of **Karanja v Murigi [2025] KECA 517 (KLR):**

"Such evidence must be credible, material to the case, and not merely confirmatory of what was already presented."

37. On the allegation that the application has been brought after inordinate delay, In **Afapack Enterprises Limited v Punita Jayant Acharya (Suing as the Administrator of the Estate of the late Suchila Anatrai Raval) [2018] eKLR,** the Court of Appeal observed as follows while agreeing that a

delay of nine (9) months in filing an application for review was inordinate:

> ***"It is also an important requirement that the application for review should be made without unreasonable delay...."***

38. The Supreme Court stated as follows in the case of **Parliamentary Service Commission v Martin Nyaga Wambora & others [2018] eKLR**:

> ***"We further add that the review window so envisaged is not meant to grant an applicant a second bite at the cherry. It is not an opportunity for an applicant to re-litigate his/her case. Sight should never be lost of the shore that in an application for review, like the one before the Court, at the core of the application is the Court's exercise of discretion. It is the Court/Judge's decision that is impugned and not the substantive application being re-argued..."***

39. From the foregoing, while associating myself with the decisions quoted and relying on the legal provisions cited, I

find that the instant application for review was brought without inordinate delay. I note this suit revolves around compulsory acquisition of land and payment of the amounts from public coffers. The 1st Respondent discovered that there were changes to the land being acquired and also a dispute on ownership of the said land. It further denies issuance of the Award to Ex parte Applicant and insists that it sent at least three e-mails to the Ex-parte Applicant's Advocates inquiring on when their client would be available to present original copies of their Awards before it, but no response has been forthcoming. It argues that the Ex parte Applicant deliberately misled the Court by claiming that two portions were acquired from the suit land and presented suspicious Awards to support its claim in an attempt to fraudulently benefit from the compulsory acquisition, process done on the suit land. In my view, this evidence is credible and material to this case and as a Court I cannot ignore it.

40. Further, from the 1st and 2nd Respondents' averments, it is clear there was discovery of new and important evidence post judgement which, was not available at the point the Court was determining the judicial review application. In the foregoing, I find that the instant application indeed fits the tenets of review and will proceed to review and set aside the judgement of 26th May, 2025 and resultant Decree dated 16th July 2025 and reopen this suit. Further, on the prayer for stay of execution of this Court's judgement pending review, I find the same is spent.

41. In the foregoing, I find the instant Notice of Motion application merited and will proceed to allow it but grant costs to the Ex parte Applicant which will abide the outcome of the suit.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MAY, 2026

CHRISTINE OCHIENG
JUDGE

In the presence of:

Anyango Opiyo for Exparte Applicant

Ms Olalo for Koceyo for 1st Respondent

Samini for 2nd Respondent

Nambirige for 1st Garnishee

Amaasa for 3rd Garnishee

Court Assistant: Joan