



**Mwangi (Suing as a Legal Representative of the Estate of Mwangi Kabaiku - Deceased) v Kimiti & another (Environment and Land Case 283 of 2017) [2025] KEELC 5545 (KLR) (23 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5545 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND CASE 283 OF 2017**

**JA MOGENI, J  
JULY 23, 2025**

**BETWEEN**

**RACHEAL NJANGO MWANGI (SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF MWANGI KABAIKU - DECEASED) ..... PLAINTIFF**

**AND**

**HANNAH WANJIRU KIMITI ..... 1<sup>ST</sup> DEFENDANT**

**JOHN NJENGA WANJIRU ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. I have two Applications before me filed by the Plaintiff dated 21/03/2025 and the Defendants dated 16/04/2025. The Application dated 21/03/2025 brought under sections 1A, 1B and 3A of the Civil Procedure and Order 51 of the Civil Procedure seeks the following:
  1. Spent
  2. That the Honorable Court be pleased to order and/or direct the Officer Commanding Station (OCS) in charge of Limuru Police Station to provide police escort and supervision to Petfriend Auctioneers in execution of the Court's decree issued on 8<sup>th</sup> May 2024
  3. That costs of this Application be provided for.
2. The Notice of Motion is supported by the grounds set out in that Motion. Additionally, it is supported by an Affidavit sworn by Rachael Njango Mwangi, the Plaintiff / Applicant.
3. The Defendants/Respondents filed a Replying Affidavit sworn by John Njenga Wanjiru on 14/05/2025 where he avers that he is unable to raise the money that the Court required him to deposit of Kesh 100,000 and instead he offers to deposit Kesh 50,000. He also states that he suffered a fire incident making it difficult for him to raise the money.



4. He further avers that the appeal filed Civil Appeal No. 1006 of 2024 is about to be concluded and that the Advocates have been directed to file submissions and therefore if the Application is allowed the Appeal will be rendered nugatory.
5. The Defendant also averred that since the 1<sup>st</sup> Defendant was deceased having passed on 10/03/2021 that the Plaintiff should have amended the pleadings to reflect this.
6. Counsel for the Applicant in the Notice of Motion Application dated 21/03/2025 relied on the grounds on the face of the Application that the Defendants/Respondents failed to vacate the suit property as per the Court's Judgment delivered on 25/04/2024, and the Decree issued on 8/05/2024 whereby the Defendants were to vacate the suit land within 90 days.
7. Despite the service of the Decree upon the Defendants, they moved the Court on 5/08/2024 seeking stay of execution of the Judgment and the Court through its Ruling dated 9/12/2024 allowed the Application on condition that the Defendants would deposit Kesh 100,000 in Court within 60 days in default the orders of stay granted shall stand dismissed.
8. That the Defendant neglected, failed and/or refused to comply within the period of 60 days which period lapsed around 9<sup>th</sup> February 2025 and thus the stay orders were vacated, leading to filing of the instant Application.
9. The second Application is filed by the Defendants dated 16/01/2025 under Sections 1A and 3A [Civil Procedure Act](#), Order 45 Rules 1 and 2 and Order 51 Rule 6 and other enabling provisions of the law seeking the following orders:-
  - a. Spent.
  - b. Spent.
  - c. That this Honorable Court be pleased to extend the orders of stay of execution of the Decree until this Application is heard and determined.
  - d. That this Honorable Court be pleased to review its orders made herein on 9<sup>th</sup> December 2024 in order to:
    - i. Reduce the amount required to be deposited as security to Kesh 50,000 or as the Court may deem fit.
    - ii. Extend the time within which such sum should be deposited in Court and allow the Applicant to do so.
    - iii. Upon compliance with the orders granted in (d) above this Court be pleased to fully reinstate the orders of stay of execution pending appeal.
10. The Application is supported by the Supporting Affidavit of John Njenga Wanjiru. The grounds on the face of the Application and the Supporting Affidavit are that the current Advocate proceeded as though the 1<sup>st</sup> Defendant was alive yet she was demised and that the Advocate for the Plaintiff and the previous Advocate for the Defendants did not amend the pleadings to reflect this situation.
11. That the Court issued conditional orders against a party who was deceased. Further that the 2<sup>nd</sup> Defendant is seeking ways to comply with the decree of the Court having managed to raise only Kesh 50,000. He further avers that the order of stay lapsed on or about 5/03/2025 when the Defendant failed to deposit the requisite amount as ordered.



12. On 30/04/2025 while all the parties were present in Court, they were directed to have both Applications disposed of by way of written submissions. By the time of penning down the Ruling, the Honourable Court considered both submissions filed by Plaintiff dated 5/05/2025 and for the 1<sup>st</sup> Defendant dated 17/05/2025.

### **Analysis and Determination**

13. A lawsuit can still proceed against surviving Defendants even if one Defendant dies and no substitution is made, provided the cause of action survives against the remaining Defendants as is the case in the present situation.
14. Therefore, it is my opinion that the only issue for determination in this matter is Whether or not the Applicants have made out a case for the grant of the orders sought requiring police assistance in the execution of the Court order.
15. The issue raised by the Defendant about death of the 1<sup>st</sup> Defendant is already settled by the virtue of the fact that the suit was instituted when she was alive. Upon her death the Defendant had a chance to substitute but they chose not to since clearly the cause of action survived the death. Having chosen this route it follows that the Court's action of delivering the Judgment was within the law.
16. It is trite that if a cause of action survives, the death of a Defendant does not automatically cause the entire suit to abate. It only abates with respect to the deceased Defendant if no substitution is made. Therefore, in the instant suit since there was no substitution of the 1<sup>st</sup> Defendant the suit against Hannah Wanjiru Kimiti abated after one year. This is clear from the action of Nelson Njenga Wanjiru who chose to continue with the case.
17. Therefore, the only issue that renders itself for determination is the Application for an order directing the police to provide police escort and supervision in execution of the Court decree. It should be noted that this is a matter where a Judgment has been rendered and a decree issued. The only issue remaining is the enforcement of the decree which requires police supervision. The stay of execution order that was issued lapsed after the 60 days that had been issued upon the Defendants failing in this matter therefore the Court could even give the order for the police to assist with the execution to ensure law and order.
18. The Defendant on the other hand opposed the said Application on the grounds that the orders were made against a deceased Defendant and that he was seeking ways to comply with the order which had already lapsed and had only managed to raise Kesh 50,000.
19. A perusal of the Court record indicates that Judgement in the matter was delivered on 25/04/2024. The Court in its Judgment ordered the Defendant to vacate land parcel No Limuru/Bibirioni.T.355 within 90 days of the delivery of the Judgment failure to which eviction orders would issue forthwith. Since Judgment in the matter was delivered on 25/04/2024, the Defendant had 90 days to vacate the suit property.
20. The 90 days period lapsed around 9/02/2025 without compliance of the Court orders. It is now past the period decreed and the Defendant is still in possession of the suit property. The Defendant has also indicated that he has filed an appeal which is currently active before the Court of Appeal Civil Appeal No. 1006 of 2024. There are no orders of stay from the Court of Appeal therefore there is no order barring the Plaintiff from enjoying the fruits of the Judgment.
21. The Affidavit evidence clearly shows that this Court is only required to execute the Judgement and decree which was granted in favour of the Plaintiff. The Court practice is that all Court orders have to be implemented so that the decree holder may enjoy the fruits of his labour.



22. In normal practice, I do not think there is any principle that says that if you have succeeded in getting a stay order you are precluded from having it extended if it has lapsed as long as you have demonstrated the same to Court. However, I have carefully considered the grounds put forward by the Defendant and I am not convinced that they are plausible.
23. Given the foregoing let me now turn to the prayer sought by the Plaintiff for police supervision of a Court order. Since the Application seeks the services of police in ensuring that the Court order is properly executed, it is necessary for me to make reference to the [National Police Service Act](#) number 11A of 2011.
24. According to Section 24 of the [National Police Service Act](#), it is the duty of the police to maintain law and order and to enforce all laws and regulations with which it is charged, amongst other functions. The provisions of that Section 24 are as follows:
24. Functions of the Kenya Police Service
- a) Provision of assistance to the public when in need;
  - b) maintenance of law and order;
  - c) preservation of peace;
  - d) protection of life and property;
  - e) investigation of crimes;
  - f) collection of criminal intelligence;
  - g) prevention and detection of crime;
  - h) apprehension of offenders;
  - i) enforcement of all laws and regulations with which it is charged;  
and
  - j) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.
25. It is clear from the provisions of Section 24 that there is no explicit reference to implementation of Court orders as one of the functions that the police are required to discharge. According to the Affidavit evidence of the Applicant, they need security of the police during the execution of the Court order. The police are under a statutory duty to maintain law and order. In my view the above provisions are wide enough to include the provision of security on the ground to enable the execution and implementation of the Court order.
26. Additionally, my attention has been drawn to two cases of the High Court where police assistance was sought and obtained by the Applicants for purposes of executing Court decrees and orders. The first case is that of Claire Adamba Okanga v. Godfrey Gichuki Waiharo being Civil Appeal number 69 of 2012 (at Nairobi) in which the Court ordered the officer commanding in charge of the police station to assist the Appellant in enforcing the Court order.
27. The second case in which the Court ordered police assistance in the execution of a Court order is that of Republic v. The Registrar of Societies and others, being Misc Civil Application (J.R.) number 24 of



- 2014 (at Mombasa). That was a case in which the ex-parte Applicants were granted orders directing the police to assist the Court Bailiff in restoring possession of the suit premises to the ex-parte Applicant.
28. That Court went further to require the officer in charge of the police station responsible for the area, where the suit premises were situate to ensure that law, order and peace were maintained during and after the restoration of the ex-parte Applicants into the suit premises.
29. The usage of the police in executing Court orders is clearly recognized by the *Auctioneers Act* Chapter 526 of the Laws of Kenya. This is clear from Rule 9 of the Auctioneer Rules of 1997. The provisions of that rule authorized an auctioneer to apply for police assistance in circumstances where the auctioneer intends to break the door of the premises with the intention of taking possession of the goods or where he expects resistance or intimidation by the Judgement debtor or some other persons.
30. The auctioneer is also authorized to seek police assistance where the auctioneer has reasonable cause to believe that there is likely to be a breach of the peace. The terms of rule 9 are couched in the following language:
- “(1) Where an auctioneer has reasonable cause to believe that -
- (a) he may have to break the door of any premises where goods may be seized or repossessed; or
- (b) he may be subject to resistance or intimidation by the debtor or other person; or
- (c) a breach of the peace is likely as a result of seizure, repossession or attempted seizure of repossession of any property, the auctioneer shall request for police escort from the nearest police station in order to carry out his duties peacefully.
- (2) An Application under this rule shall be by motion by way of a miscellaneous Application support by an affidavit and may be heard ex parte.”
31. I find from that evidence that the Defendant slept on his rights and was indolent. Equity we all know does not aid the indolent but the vigilant. In the light of the cases I have referred to above and the Affidavit evidence, I find that the Plaintiff in the Application dated 21/03/2025 is entitled to the orders that she is seeking from this Court in terms of the prayers in the Notice of Motion.
32. On the second Application filed by the Defendant dated 16/04/2025, the Applicant is seeking review of this Court’s order.
33. Under Section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the Civil Procedure Rules, the Court may review its decision, inter alia: - on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.
34. Having read through the Application and the Grounds of Opposition together with the rival submissions, I am unable to understand why the Applicant has brought a prayer for review since there is no new information that he has pointed this Court to. Again Order 45 rule 1 refers to a consideration of review if there is a mistake or error on the face of the record or any sufficient reason to justify review of a Court order or Judgment.



35. The Supreme Court of India in the case of *Aribam Tuleshwar Sharma v Ariban Pishak Sharma* (1979) 45CC 389, 1979(11) UJ 300 SC, held that:

“The power of review may be exercised on the discovery of new and important matter or evidence which, after exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made, it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercise on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court.”

36. Additionally, the same Court in *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608 stated as follows:

“The power can be exercised on the Application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” ..... means a reason sufficiently analogous to those specified in the rule”

37. In discussing the guiding principles on the issue of review, the Court in the case of *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR pronounced itself as follows:

“I am clear in my mind that the reasons offered by the Applicant do not qualify to be ‘sufficient reason’ within the meaning of the rules cited above nor are they analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1. For this holding I rely on *Evan Bwire vs Andrew Nginda* where the Court held that ‘an Application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the Application or case a fresh.’”

38. The principles which can be culled out from the above noted authorities are: -

- i. A Court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. The expression “any other sufficient reason” appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.



- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/Judgment of a coordinate or larger Bench of the tribunal or of a superior Court.
  - vi. While considering an Application for review, the Court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
  - vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the Court/tribunal earlier.
  - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
  - ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil Court and consequently by the appellate Courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the Court, but such limitations have been provided for in Order 45 Rule 1.
  - x. The power of a civil Court to review its Judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.”
39. In the instant case, the orders that the Court made lapsed without the Applicant having made any attempt to reinstate the same. It is worth noting that the orders were made in the following sequence, the Judgment was delivered on 25/04/2024, the decree to vacate within 90 days rider was made on 08/05/2024, the Ruling to stay the implementation for 69 days was made on 9/12/2024 and it lapsed on 9/02/2025. This Application was filed on 16/04/2025 which is another 60 days from the date of the lapse of the stay earlier issued.
40. Apart from the Defendant talking about his house burning and that he was consolidating resources and had managed only Kesh 50,000 from the Kesh 100,000 he has not proffered a plausible reason for the delay. Further given the order had lapsed it is clear that there is no order to be extended in existence.
41. In the end, the Notice of Motion dated 16/04/2025 does not meet the threshold for an order of review; thus, it is devoid of merit and it is for dismissal.

Disposal Order:

- i. The officer in charge of Limuru Police Station is directed to provide escort and supervision to Petfriend Auctioneers in execution of the Court’s Decree issued on 8/05/2024.
- ii. The expenses arising out of the execution of this Decree will be met by the Applicants.
- iii. The Notice Motion dated 16/04/2025 is unmerited, it is therefore dismissed.
- iv. The cost of both Applications is awarded to the Plaintiff.

**DATED, SIGNED AND DELIVERED AT THIKA THROUGH MICROSOFT TEAMS ON THIS 23<sup>RD</sup> DAY OF JULY 2025.**



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**MOGENI J**

**JUDGE**

In the presence of:-

Ms. Oyandi holding brief for Mrs. Mukira for the Plaintiff

Mr. Njuguna for 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Applicants

Melita – Court Assistant

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**MOGENI J**

**JUDGE**

