



**Fenysan Construction Limited v Yeri (Environment and Land Case 179 of 2016) [2025] KEELC 5427 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5427 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND CASE 179 OF 2016**

**EK MAKORI, J**

**JULY 17, 2025**

**BETWEEN**

**FENYSAN CONSTRUCTION LIMITED ..... PLAINTIFF**

**AND**

**JOSEPH KASENA YERI ..... DEFENDANT**

**RULING**

1. The application dated March 5, 2025, requests a review of the orders issued on November 12, 2024. The primary reason cited is that this court failed to consider the foreign ownership of the Plaintiff Company, which cannot hold freehold titles in Kenya but instead should hold a 99-year leasehold interest.
2. The application was opposed. The court directed the parties to present their arguments through written submissions. Mr. Sumba, for the Plaintiffs/Respondent, complied. However, no submissions were received from Mr. Otara on behalf of the Defendant/Applicant.
3. This court considers whether review can be granted based on the applicant's arguments and who should bear the application costs.
4. The Respondent contends that the issue of foreign ownership of the Plaintiff Company is key to the case, and allowing execution would lead to enforcing orders that are unlawful and unconstitutional.
5. The Respondents believe the issue of foreign ownership of the Plaintiff Company has long been settled based on the prior rulings of this court.
6. Judgment by consent was entered in this case on September 24, 2019 (Olola J.). Among the orders issued as part of the consent was for 2.8 hectares (7 acres) of land from parcel No. Ngomeni Squatter Settlement Scheme/1XX7 to be divided and registered in the name of the Plaintiff. The Defendant was to sign all necessary transfer and registration documents.



7. After that, the Defendant refused to sign the relevant land transfer documents and instead filed a notice of motion dated 29 November 2023, seeking to set aside the consent judgment.
8. The court, after thorough review, dismissed the application and reaffirmed the validity of the consent judgment.
9. The Defendant, despite being repeatedly asked by the Plaintiff to sign the land control board consent forms, land subdivision forms, and land transfer documents, refused to sign any of these papers. The goal was to frustrate and prevent the transfer of the seven (7) acres of land to the Plaintiff from parcel No. Ngomeni Squatter Settlement Scheme/1XX7.
10. Because the Defendant refused to sign all the relevant land transfer documents, as ordered by consent on September 24, 2019, this court, upon an application dated May 21, 2024, was moved to enforce the judgment or decree by having the Deputy Registrar sign all necessary Land Control Board consent forms, land subdivision forms, and land transfer forms. This will enable the plaintiff or applicant to register the said parcel of land in his name and issue a title deed in his favor, ensuring that the judgment or decree is not rendered irrelevant or in vain.
11. After careful consideration in an elaborate ruling, which is being challenged, dated November 12, 2024, this court agreed to the request by the Plaintiff for the Deputy Registrar of this court to sign the relevant transfer documents.
12. Review is provided under section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. It is important to note that the law prohibits parties from filing a review application after an appeal has been proffered.
13. In the case of *Republic v Cabinet Secretary for Interior and Co-ordination of the National Government Ex parte Abulahi Said Salad* [2019] KEHC 12003 (KLR), the Court (Mativo J., following a series of decisions in this area) held:

“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.”

14. Based on the foregoing, I believe that on February 15, 2024, this court issued a ruling to set aside the consent entered into by the parties involved. The court's decision regarding the issue of foreign ownership of freeholds in this country was summarized as follows:

“The applicant seeks to have the consent entered herein rescinded because the directors of the Plaintiff/Respondent Company are all Italians. In *Mara North Holdings Limited v Sanaet Ole Masek & 4 others* [2015] eKLR, the Court had the following to say on foreigners holding freehold titles in Kenya:

“There is also the other question of how the 3rd respondent, which is wholly owned by foreigners (Canadians) managed to get a freehold title. That may need some explanation for *the Constitution* of Kenya, 2010, which is the supreme law of the land, does, at Article 65, bar the issuance of anything more than a 99-year lease to foreigners. The said provision is couched as follows: -

65.

- (1) A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however, granted, shall not exceed ninety-nine years.
- (2) If a provision of any agreement, deed, conveyance, or document of whatever nature purports to confer on a person who is not a citizen an interest in land greater than a ninety-nine-year lease, the provision shall be regarded as conferring on the person a ninety-nine-year leasehold interest, and no more.
- (3) For purposes of this Article—



- (a) a body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens and
  - (b) property held in trust shall be regarded as being held by a citizen only if all of the beneficial interest of the trust is held by persons who are citizens.
- (4) Parliament may enact legislation to make further provision for the operation of this Article.
25. Unless a company is fully owned by citizens, it is to be regarded as a foreign entity for purposes of Article 65 of *the Constitution*. The 3rd respondent is fully owned by foreigners, and this brings to question the freehold title that they hold.”

Foreigners, by operation of the law, cannot hold freehold titles in Kenya by dint of Article 65 of *the Constitution*. Now, in this application, the applicant pleaded that all the Directors of the Plaintiff/Respondent's Company were all Italians, he did not demonstrate any proof of the same by producing a certificate from the Registrar of Companies showing such foreign Directorship. A look at the record and the consent dated 1<sup>st</sup> of August 2016 shows that one of the signatories to the agreement exhibited a Kenyan identification Card No.10830307. Could he be said to be Italian? The applicant did not even mention whether the land is still intact and has not changed hands, or what use the plaintiff /applicant has put on it. He did not say how much is the whole purchase money he needs to refund and why the Plaintiff/ Respondent could not enter another consent to rescind the Contract they entered way back in 2016. On the consent from the Land Control Board, he has annexed the application for consent. The resolution by the LCB is lacking.

This is one of those cases this Court will find difficulties in setting aside the Consent judgment in place. The upshot is that the application dated 29<sup>th</sup> day of November 2023 is hereby dismissed. Since the other side did not participate, there will be no order as to costs.

15. Based on the previous discussion, I agree with Mr. Sumba's submissions for the Plaintiff— the Court has already decided the issue of foreigners holding freehold titles. It is not an error on record. It is neither a new nor a sufficient reason to review the existing orders. At best, I am being asked to sit on an appeal to overturn my own decision. It is untenable.
16. Having restated the above position multiple times, I believe the Defendant/Applicant, in seeking review of an already settled issue, is vexing the court. No new grounds have been presented to justify the review of the orders issued on November 12, 2024. Therefore, the application dated March 5, 2025, is hereby dismissed with costs.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 17<sup>TH</sup> DAY OF JULY 2025**

**E. K. MAKORI**

**JUDGE**

**In the Presence of:**

**Mr. Sumba, for the Plaintiff**



**Mr. Otara for the Defendant**

**Happy: Court**

