



Ndungu & 2 others v Patrick & 5 others (Environment and Land Case E009 of 2024) [2025] KEELC 5975 (KLR) (2 September 2025) (Ruling)

Neutral citation: [2025] KEELC 5975 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E009 OF 2024**

CG MBOGO, J

SEPTEMBER 2, 2025

BETWEEN

**ISAAC KARIUKI NDUNGU 1ST PLAINTIFF
MAKAOPLUS PROPERTIES LIMITED 2ND PLAINTIFF
JAMES MWANGI MUTURI 3RD PLAINTIFF**

AND

**MAINA SHEM KAMAU PATRICK 1ST DEFENDANT
EMBAKASI RANCHING COMPANY LIMITED 2ND DEFENDANT
WALTER KIGERA WAIRERI 3RD DEFENDANT
LUCY NYOKABI MATHENGE 4TH DEFENDANT
DANIEL M KIMANI 5TH DEFENDANT
ANTHONY JAMES MUHORO NJOGU 6TH DEFENDANT**

RULING

1. Before this court for determination is the notice of motion dated 11th December, 2024 filed by the plaintiffs/applicants and it is expressed to be brought under Article 159 (2) (d) of *the Constitution*, Order 45 Rule 1(2), Order 51 Rule 1 of the *Civil Procedure Rules*, Sections 1A, 1B and 3A of the *Civil Procedure Act* seeking the following orders:-
 1. Spent.
 2. That the honourable court be pleased to review its ruling delivered by Honourable Oguttu Mboya J. on 24th October, 2024 and order that the 3rd to 6th defendants/respondents are proper



parties to this suit and enjoin them back to these proceedings to enable the plaintiffs/applicants to adequately prosecute their suit substantively.

3. That the ruling entered against the plaintiffs/applicants on 24th October, 2024 and all consequential orders be set aside.
4. That costs be in the cause.
2. The application is premised on the grounds inter alia that the ruling in this matter was delivered on 24th October, 2024 in favour of the 3rd to 6th defendants pursuant to an application dated 2nd February, 2024 and a notice of preliminary objection dated 5th February, 2024.
3. The application is supported by the affidavit of Dedan Chege, the learned counsel on record for the plaintiffs/applicants sworn on even date. The learned counsel deposed that in the ruling delivered on 24th October, 2024, the court stated that the 3rd to 6th defendants/respondents were directors of the 2nd defendant/respondent and signed the sale agreements in that capacity. Further, that the court confirmed the said defendants/respondents to have received money on behalf of the 2nd defendant/respondent which they relied on representation and/or misrepresentation during the sale transaction. The learned counsel deposed that they obtained records that the 3rd to 6th defendants/respondents are not directors of the 2nd defendant/respondent and in the circumstances, it is only proper that they be joined in these proceedings to enable the court to fully adjudicate on all the issues in particular the extent of their involvement in their fraudulent misrepresentations to the plaintiffs/applicants.
4. The application was opposed vide the replying affidavit of the 1st defendant/respondent sworn on 31st January, 2025 on behalf of the 2nd defendant/respondent. The 1st defendant/respondent deposed that if the plaintiffs/applicants were aggrieved by the decision of this court, they should have filed an appeal, and that it is not possible to enjoin the 5th defendant because he is deceased, and that at the time of filing this suit, it had been four years since his demise. The 1st defendant/respondent further deposed that the sale agreement that is the subject of this suit was executed between him and the 1st plaintiff/applicant on 25th June, 2020, and the 3rd to 6th defendants/respondents were not parties but witnessed the same as officials of the 2nd defendant/respondent. That since the 2nd defendant/respondent is still a party to this suit, any issues that the plaintiffs/applicants believe need to be addressed shall be adequately addressed by the 2nd defendant/respondent. Further, that the reason the 3rd to 6th defendants/respondents witnessed the sale was because the share and plot certificates were still in the name of the company. That had the plaintiffs/applicants done their due diligence prior to the filing of the suit, they would have known that the directors annexed in the CR-12 had no legal capacity to represent the 2nd defendant/respondent for they had been stopped from assuming office duties.
5. The application was further opposed vide the replying affidavit of the 3rd defendant/respondent sworn on 17th December, 2024. The 3rd defendant/respondent deposed that the application is disguised as an appeal and other than referring to Order 45 Rule 1 (2) of the *Civil Procedure Rules*, the application does not reveal the ambit of review in which it is founded. He further deposed that the CR 12 cannot be termed as newly discovered that was not within their knowledge as they could be obtained effortlessly. Further, that the application has not revealed any error apparent on the face of the record, and that the grounds stated therein do not meet the threshold for review.
6. The 3rd defendant/respondent further deposed that in the case of *Embakasi Ranching Company Limited v Registrar of Companies & 14 others* (Commercial Case No. E096 of 2019), the court issued orders of *status quo* that the directors of the 2nd defendant/respondent to remain in office and the ones indicated in the CR-12 to remain as such. He deposed that Hon. Justice Njoki Mwangi having been seized with the earlier orders, she also directed that the newly elected directors whose names are in the



Company's CR 12 be precluded from assuming any office duties. The same position was affirmed by Justice Lucy N. Mbugua in a ruling delivered on 9th October, 2024.

7. The 3rd defendant/respondent deposed that the court decisions having been made by a court of equal and competent jurisdiction have not been set aside and remain in force. Further, that the 5th defendant/respondent is deceased, and that the court having pronounced itself, cannot have a retrial on the merits of the evidence produced post judgment. He contended that the application has been made 40 days which is inordinate delay.
8. The application was canvassed by way of written submissions. The plaintiffs/applicants filed their written submissions dated 6th March, 2025. They raised three issues for determination as listed below: -
 1. Whether the application meets the threshold for review under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules.
 2. Whether the 3rd to 6th defendants were properly struck out of the suit or should be reinstated.
 3. Whether the corporate veil should be lifted to hold the 3rd to 6th defendants personally liable.
9. On the first issue, the plaintiffs/applicants submitted that the CR 12 constitutes new and important evidence that was not available at the time of the ruling, which document established that the defendants were not directors of the 2nd defendant/respondents at the material time contrary to what was assumed in the previous ruling. They submitted that the ruling was on the assumption that the 3rd to 6th defendants/respondents were acting in their official capacity shielding them from liability. While relying on the cases of Nyamogo & Nyamogo Advocates v Kogo [2001] eKLR, Republic v Public Procurement Administrative Review Board & 2 others Ex-parte Pelt Security Services Limited [2018] eKLR and Benjob Amalgamated Ltd & Another v Kenya Commercial Bank Ltd [2014] eKLR, the plaintiffs/applicants maintained that a review is the appropriate remedy due to newly discovered evidence.
10. On the second issue, it was submitted that the striking out of the 3rd to 6th defendants/respondents was premised on an erroneous assumption, and that according to the CR 12, they were acting in their personal capacities. They submitted that the principle of privity of contract dictates that only parties to a contract can enforce or be bound by its terms. Further, that the 3rd to 6th defendants/respondents received personally received part of the purchase price and engaged in the transaction beyond mere representation. To buttress on this issue, reliance was placed in the cases of Savings and Loans Kenya Ltd v Kanyenje Gakombe & Another [2015] eKLR, DT Dobie & Company (Kenya) Ltd v Muchina [1980] KLR and Githunguri Dairy Farmers Cooperative Society Ltd v Erskine & Gathogo Advocates [2018] eKLR.
11. On the third issue, the plaintiffs/applicants submitted that the 3rd to 6th defendants/respondents cannot use the corporate structure of the 2nd defendant/respondent as a shield from liability, given that they actively participated in the transaction. While relying on the cases of Salomon v Salomon & Co. Ltd [1897] AC 22, Prest v Petrodel Resources Ltd [2013] UKSC 34 and Jones v Lipman [1962] 1 WLR 832, they submitted that it is imperative that this courts lifts the corporate veil and holds the 3rd to 6th defendants/respondents personally liable for their actions.
12. The 1st and 2nd defendants/respondents filed their written submissions dated 3rd April, 2025 where they raised three issues for determination as listed below:-
 1. Whether the ruling delivered on 24th October, 2024 should be reviewed.
 2. Whether the 3rd, 4th, 5th and 6th defendants should be enjoined back in the suit.



3. Whether this suit has abated against the 5th defendant for being instituted against a dead person.
13. On the first and second issues, the 1st defendant/respondent reiterated the issues deponed in his replying affidavit. On the third issue, he submitted that the suit has abated against the 5th defendant. He relied on the cases of *C. Muttu v Bharath Match Works* AIR 1964 Kant 293 and *Pratap Chand Mehta v Chrisna Devi Meuta* AIR 1988 Delhi 267.
14. The 2nd defendant/respondent filed its written submissions dated 22nd April, 2025 where it raised two issues for determination as listed below: -
 - a. Whether the instant application meets the threshold set out under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*.
 - b. Whether the ruling of 24th October, 2024 should be reviewed and/or set aside.
15. On the first issue, the 2nd defendant/respondent submitted that a company's CR 12 is a document that can be obtained effortlessly and cannot be termed as evidence that what was not within the knowledge of the plaintiffs/applicants before the ruling was delivered. Further, that the application fails to meet the threshold for grant of review as no sufficient reason has been shown. To further buttress on this issue, the 2nd defendant/respondent relied on the cases of *Waithaka v Bashaeki & 2 others* [2024] eKLR, *Anwar Ali & another v Monica Muthoni & another* [2021] eKLR, *D.J. Lowe & Company Ltd v Bonquo Indosuez* Nairobi Civil Application No. 217 of 1998, *Republic v Medical Practitioners & Dentists Board & another; MIO1 on behalf of MIO2(a Minor) & another (Interested Party); King'ang'a (Exparte)* (Miscellaneous Civil Application 59 & 63 of 2019 (Consolidated) [2021] eKLR, and *Onyango & 2 others v Awaa & 2 others* (Civil Appeal E075 of 2022) [2023] eKLR.
16. On the second issue, the 2nd defendant/respondent submitted that there are two sets of directors i.e. the ones on the CR 12 and the ones in office and that there is an ongoing dispute between the two sets of directors in *Embakasi Ranching Company Limited v Registrar of Companies & 14 Others* (High Court Commercial Case No. E096 of 2019). It was submitted that there are orders to the effect that the directors in office to remain in office while the ones indicated on the CR 12 to remain as such. Further, that these decisions have not been appealed against and remain in force. Reliance was placed in the case of *Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & Another* [2014] eKLR.
17. I have considered the application, replies thereof and the written submissions filed by the respective parties. The issue for determination at this stage is whether the plaintiffs/applicants have established grounds for review of this court's ruling delivered on 24th October, 2024.
18. Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules* provides as follows: -

“ Any person who considers himself aggrieved—

 - (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.”



[Order 45, rule 1.] Application for review of decree or order.

- “(1) 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 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”

19. From the above provisions, it is clear that while Section 80 of the *Civil Procedure Act* grants the court the power to make orders for review, Order 45 sets out the procedure and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.
20. In the case of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR, the Court of Appeal held that:-
- “The main grounds for review are therefore; discovery of new and important matter or evidence, mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.”
21. In analyzing the instant application, the plaintiffs/ applicants have not shown the grounds upon which the review is sought i.e. error apparent on the face of record, discovery of new and important information or any sufficient cause. This issue has been raised in their submissions. In other words, the plaintiffs/applicants left it to the court to decide which ground best fits the circumstances of this case. Secondly, the suit as against the 5th defendant/respondent has abated and while this is so, the plaintiff/ applicant has opted not to speak on the same.
22. Having said that, it appears that the plaintiffs/applicants are seeking review on the grounds that the CR 12 reveals that the 3rd to 6th defendants/respondents were not directors at the time of the transaction and thus they ought to be joined in these proceedings. They have also deliberately failed to speak to the rulings and orders in place concerning the directorship as explained by the 1st and 2nd defendants/respondents. The claim that it is new and therefore important for the court’s consideration is unsatisfactory. The information sought at the companies registry was made after the ruling was delivered. The plaintiffs/applicants sought this information in my view, to attempt to tie the loose ends and fill holes in their case. It has not been shown that there was difficulty in accessing this information before the ruling was delivered. This perhaps explains the delay in filing this application. In my view,



and if the plaintiffs/applicants were to understand the pending issues surrounding the directorship of the 2nd defendant/respondent which are yet to be determined, they would have considered this application.

23. The notice of motion dated 11th December, 2024 lacks merit and it is hereby dismissed. Costs in the cause.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 2ND DAY OF SEPTEMBER, 2025.

HON. MBOGO C. G.

JUDGE

In the presence of:

Mr. Benson Agunga - Court Assistant

Mr. Maina for the 1st Defendant/Respondent

Ms. Njeru holding brief for Mr. Macharia for the 2nd to 6th Defendants/Respondents

Mr. Chege for the Plaintiffs/Applicants

