



**Macharia v Principal Secretary Ministry of Education & another (Environment and Land
Judicial Review Case 1 of 2021) [2025] KEELC 877 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 877 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 1 OF 2021**

JM KAMAU, J

FEBRUARY 27, 2025

(FORMERLY NYAHURURU ELC JR NO. 1 OF 2021)

BETWEEN

TIMOTHY MACHARIA APPLICANT

AND

PRINCIPAL SECRETARY MINISTRY OF EDUCATION 1ST RESPONDENT

**PRINCIPAL SECRETARY MINISTRY OF FINANCE AND NATIONAL
TREASURY 2ND RESPONDENT**

RULING

1. Before me is an Application dated 3/10/2024 by the Honourable Attorney General on behalf of the Principal Secretary, Ministry of Education under Order 45 Rules 1(b), 2(b), Order 22 Rule 25, 32, Order 40 of the Civil Procedure Rules and Section 4(1) of the *Limitation of Actions Act*. The Application is also pegged on Article 40(7) of the *Constitution of Kenya, 2010*. The Applicant seeks for Orders that this court be pleased to issue a temporary injunction against the Respondent, Timothy Macharia, his agents and/or his employees from executing the Orders issued on 14/10/2021 and 31/1/2023 respectively and that the court do review the said Orders. The grounds upon which the Application is predicated are that there exists a Judgment dated 4/10/2018 in favour of the Respondent where he was awarded the sum of Kshs.6,915,000/= . Warrants of arrest have been issued against the Principal Secretary and that the said Respondent has come to discover that the Judgment was made through misrepresentations, i.e. that the suit property Nyandarua Silibwet/1648 was legally the property of Silibwet Primary School. The Respondent further says that the suit was time barred.
2. On his part, the Applicant filed a Replying Affidavit sworn on the 8/11/2024 where he depones that the Application is a waste of time since the matters have been litigated and fully adjudicated upon. That after a full hearing of the parent suit, i.e., Nyahururu ELC No. 182 of 2017 Judgment was delivered on 4/10/2018 which was challenged on 19/11/2018 vide an Application to set the said Judgment aside



and re-instate the suit for hearing and determination was dismissed. There has never been any Appeal preferred against either the Judgment or the said Ruling. Equally, Orders of Mandamus were obtained against the Respondent on 14/10/2021. A Notice was issued to show cause why the Respondent should not be punished and the same was not responded to. This matter is now at the stage of execution and there have been unfulfilled promises of settlement of the same.

3. These are the facts of the case and the grounds and particulars of the Application before the court as well as the Response by the Applicant.
5. Order 45 Rule 1(b) provides for a person aggrieved by a Decree or Order for which no appeal has been allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence was not with 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 Revision of Judgment to the court which passed the Decree or made the Order without unreasonable delay.
5. Section 80 of the *Civil Procedure Act* Cap 21 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.”

6. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -

1.

(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.”

7. In Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR it was held: -

Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other



sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

8. In *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR the Court of Appeal held:-

Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limbs therein stated or “for any sufficient reason.....”

9. Discussing the scope of Review, the Supreme Court of India in the case of *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608. had this to say:-

“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 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”

10. In *Tokesi Mambili and others vs Simion Litsanga* the Court held as follows:-

- i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.
- ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.

11. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 John M. Mativo Judge culled out the following principles from a number of authorities: -

- 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.
12. The case here is not one of discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the Plaintiff's knowledge.
 13. On error apparent on the face of the record, 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 Applicant has not been able to point out any error apparent on the face of the record.
 14. The Application could also not pass the Test of:
".....or for any other sufficient reason....."
which reasons leading authorities hold must be analogous to the other grounds mentioned under the Act and Rules, a reason sufficiently analogous to those specified in the Rule"
 15. In the case of *Evan Bwire V Andrew Aginda* Civil Appeal No. 147 of 2006 cited fin the case of *Stephen Githua Kimani V Nancy Wanjira Waruingi T/A Providence Auctioneers* (2016) eKLR the Court of Appeal held as follows:
"An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence."
 17. The current Application falls under the above category. The effect of allowing it would amount to re-opening the case afresh. Litigation must come to an end. This is not what was envisaged by Section 80 of the *Civil Procedure Act* nor the Rules under Order 45 of the Civil Procedure Rules.
 18. Finally, the Application is irregularly in Court since an Applicant in an Application for Review ought to have annexed a formal extracted Decree or order in respect of which the review is sought.



19. In the case of Suleiman Murunga V Nilestar Holdings Limited & Another (2015) eKLR the court held as follows:

The plain reading of the above provision (referring to Order 45 Rule 1) is that an applicant for review ought to have annexed a formal extracted decree or order in respect of which the review is sought. In essence, judgment or ruling. Thus, where an applicant fails to annex the order sought to be reviewed, an application is defective. In the present application the order that the Defendants sought to be reviewed was not annexed with the result that the Defendant's application was fatally defective. I agree that a formal decree or order is a prerequisite before an applicant can bring himself/herself within the ambit of order 45 of the Civil Procedure Rules as relates to review of the decree or order”

20. No such a Ruling/Order was attached to the present Application which makes the Application fatally defective.
21. The Applicant has also moved the court under Order 21 Rules 25 which is on stay of execution pending suit between Decree Holder and Judgment Debtor. This is not applicable because there is no suit pending between the two parties herein and therefore there is none to be decided upon.
22. The only applicable Rule in Order 22 Rule 32. The same provides as follows:

“Every warrant for the arrest of a Judgment-Debtor shall direct the officer entrusted with its execution to bring him before the court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid.”

23. By bringing himself under this Rule, the Judgment-Debtor has shot himself on the foot. He is like a lamb leading itself to a slaughter-house. We cannot deny him the opportunity. Orders given by the court including Decrees are not mere papers. They must be obeyed. In this case, the Decree-Holder came to court and got Judgment in Nyahururu ECL Case No. 182 of 2017. He then applied for mandamus and succeeded. He is now at the stage of execution.
24. Order 40 of the Civil Procedure Rules cannot let the Judgment-Debtor off hook. Injunctions are meant to protect properties from being destroyed, or wasted to be precise, it is meant to preserve property. This is not the case here. The Decree-Holder is crying to the court to have whatever the court has given him to become a reality. The same must be granted and I do no less.

RULING DATED, SIGNED AND DELIVERED AT NYANDARUA THIS 27TH DAY OF FEBRUARY 2025.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Eric.

N/A for the Applicant

Ms Nanyama for the Respondents

