Mbugua & 85 others v Ministry of Lands & 59 others (Civil Application E096 of 2023) [2025] KECA 1134 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KECA 1134 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPLICATION E096 OF 2023

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

JUNE 20, 2025

BETWEEN

PAUL NDIRANGU MBUGUA & 85 OTHERS & 85 OTHERS & 85 OTHERS & 85 OTHERS & 85 OTHERS ..... APPLICANT

AND

THE MINISTRY OF LANDS & 59 OTHERS & 59 OTHERS & 59 OTHERS & 59 OTHERS & 59 OTHERS ..... RESPONDENT

(Being an application for review of the ruling/orders of this Court (Warsame, Mativo, & Gachoka, JJ. A.) dated 22nd November 2024 determining the applicants' reference from the decision of a single judge (G.W. Ngenye, J.A) dated 24th April 2024 in Nakuru ELC Case No.338 of 2014 as consolidated with Nakuru ELC Case No.334 of 2014)

RULING

1. The history of this litigation is set out in sufficient detail in the ruling of this Court (Warsame, Mativo and Gachoka, JJ.A.) delivered on 22nd November 2024, the subject of this application for review. The said ruling determined the applicants' reference to a full bench of this Court pursuant to Rule 57 (1) (b) of the Court of Appeal Rules, 2022 against a single Judge ruling (G. W. Ngenye, JA.) dated 12th April 2024, in which the learned Judge dismissed with costs the applicants' application seeking extension of time to file and serve their record of appeal upon the 4th to 60th respondents.

2. Undeterred, the applicants have once again approached this Court by an application dated 31st January 2025 brought under Articles 20, 48 and 159 (2) (d) & 259 of *the Constitution*, Sections 3 (2), 3A and 3B of the *Appellate Jurisdiction Act*, Rules 1 (2) of the Court of Appeal Rules, 2022 and other enabling provisions of law, beseeching this Court to review and/or sets aside its aforesaid decision, and instead, allow the said reference and extend time within which they can file their memorandum

of appeal and record of appeal against the Judgment and decree of the Environment and Land Court (ELC) in Nakuru ELC Case No. 338 of 2014 by 14 days.

3. The application is premised on the grounds that: (a) the notice of appeal dated 3rd March 2021was filed within the statutory timelines and as such is still valid having not been struck out;

   (b) their appeal is arguable and it raises triable issues and it has a high probability of success;

   (c) the delay in filing their memorandum of appeal and the record of appeal was occasioned by delay in obtaining certified typed proceedings and the judgment sought to be appealed against;

   (d) on or about 13th September 2024 during the pendency of the reference, they obtained a certificate of delay, during the hearing of the reference they were not allowed to address the issue;

   (e) the review is premised on discovery of new and important evidence which could not have been produced at the time the hearing of their application before the single Judge and also during the hearing of their reference before the full bench;

   (f) the intended appeal will be rendered nugatory and a mere academic exercise to their detriment if the orders sought are not granted;

   (g) the need to obviate injustice outweighs the principle of finality in litigation;

   (h) this Court has residual jurisdiction to grant the prayers sought.

4. The application is supported by the affidavit Paul Ndirangu Mbugua, (the 1st applicant), sworn on 31st January 2025, and his further affidavit sworn on 23rd May 2025. The gist of his averments is that by virtue of being internally displaced persons due to tribal clashes between the Maasai and Kikuyu communities living in Enosupukia area, they were resettled by the Government on diverse dates in December 1994 vide letters of allotment/allocation issued to them for their respective parcels of land measuring 2.5 acres each in Moi Ndabi Settlement Scheme, Phase 1. However, despite the government policy as per the Ndungu Land Report that internally displaced persons were entitled to 5 acres each, unlike internally displaced Maasais and Kalenjins, who were allocated 5 acres each, they were only allocated 2.5 acres. He averred that in the year 2004, the Minister for Lands Hon. Amos Kimunya and the Director of settlement gave them an extra 2.5 acres each to bring them at par with members of the other communities who were allocated 5 Acres and they were issued with letters of offer dated 20th November 2007.

5. In addition, he averred that there was no requirement for them to surrender or vacate the parcels of land issued to them in 1994. However, the Director of Land Adjudication and Settlement and other officials went ahead without following due process and allocated their initial plots in Moi Ndabi Settlement Scheme Phase 1 to the 4th -60th respondents, prompting them to institute Nakuru ELC Case No. 338 of 2014, Paul Ndirangu Mbugua & 85 Others vs. The Ministry of Lands & 59 Others so as to protect their proprietary interests. On their part, the 4th to 60th respondents instituted Nakuru ELC Case No. 334 of 2014 seeking a permanent injunction restraining them from interfering with the land in Phase 1 Moi Ndabi Settlement Scheme. The two suits were consolidated, and subsequently heard and in a Judgment delivered on 25th February 2021, the ELC dismissed their suit and found in favour of the 4th to 60th respondents.

6. Aggrieved by the said verdict, they filed a notice of appeal dated 3rd March 2021 and applied for certified copies of the proceedings to enable them file their record of appeal. Their letter bespeaking proceedings was served upon the 4th to 60th respondents' advocate on 15th April 2021. A certificate of delay was

subsequently issued confirming the period necessary for the preparation of the proceedings to be from 9th March 2021 to 27th June 2022, a period of 475 days, which was about 1 year and 2 months and not 3 years as captured in the ruling delivered by the single Judge on 12th April 2024.

7. He also averred that by an application dated 8th November 2024, they sought to adduce additional evidence, that is, the said certificate of delay, but the full bench of this Court declined to hear the said application and instead proceeded to hear and determine their reference against the decision of the single Judge. In its ruling dated 22nd November 2024, the subject of the instant application, the full bench dismissed their reference. Therefore, the certificate of delay which explained the period of delay was not considered.

8. In his submissions in support of the application, learned counsel for the applicants Mr. Karei, cited Standard Chartered Financial Services Limited & Ano. vs. Manchester Outfitters Limited & Other, Nairobi Court of Appeal, Civil Application No. Nai 224 of 2006 in support of the proposition that this Court has residual jurisdiction to reopen a concluded case where the interests of justice so demands, although, that such jurisdiction will only be exercised in exceptional situations where the need to obviate injustice outweighs the principal of finality in litigation.

9. Counsel maintained that the applicants deserve the review orders sought, and added that the delay in obtaining the certificate of delay was occasioned by a dispute between the applicants and the court registry. Counsel asserted that it is the failure to explain the delay which led to the dismissal of their application for extension of time. He asserted that in dismissing the application, the single Judge stated that there was a delay of over three years, however, the applicants were vindicated by the certificate of delay which confirmed the period the registry took to prepare the proceedings. Counsel maintained that the certificate of delay qualifies to be new evidence, therefore, it justifies the issuance of the review orders sought in this application.

10. Mr. Karei cited the case of Aineah Liluyani Njirah vs. Agha Khan Health Services [2013] KECA 481 (KLR) in support of his assertion that if this court is unable to consider the new evidence, then leave ought to be granted to the applicants to re-file a fresh application for extension of time before a single judge of this Court so as to enable the single judge to consider the implication of the certificate of delay.

11. In opposition to the application, the 4th to 60th respondents filed a replying affidavit sworn on 17th February 2025 by the 4th respondent, Mr. Francis Ngugi Githua and submissions dated 23rd May 2025 which were highlighted by its counsel, Mr. Opar. The deponent averred that the applicants obtained stay of execution of the Judgment delivered on 25th February 2021 and all consequential orders vide ruling delivered on 23rd September 2021 pending hearing and determination of the intended appeal. However, the applicants failed to file the appeal within the period provided under rule 84 (1) and (2) of the Court of Appeal Rules, 2022.

12. He also averred that the single Judge (G. N. Ngenye, JA) dismissed their application dated 31st October 2023 on grounds that the delay was unreasonable, inexcusable and inordinate, since their application was silent on whether the letter bespeaking proceedings was served upon the respondents so that the time it took to prepare the certified proceedings could be taken into account, and even if the applicants were given a benefit of doubt, then time would have begun running on 28th June 2022 and would have ended on 27th August 2022, yet the application for extension of time is dated 31st October 2023 and no explanation was proffered as to why it was not filed earlier. Instead, in a further affidavit, the applicants averred that they regret not supplying the court with a certificate of delay and left it at that.

13. The 4th respondent also averred that the applicants waited until the eve of the hearing of their reference, only to file their application for additional evidence dated 8th November 2024. However, the said

application was not heard since it had not been fixed for hearing as required by the procedure of the court, and, in any event, the 4th – 60th respondents were objecting to the introduction on new introduce after the dismissal of their application dated 31st October 2023. The deponent further averred that the certificate of delay dated 12th September 2024 cannot be introduced at this stage having not been considered during the reference stage.

14. In his submissions in opposition to the application, Mr. Opar, learned counsel for the 4th to 46th respondents cited this Court's holding in National Bank of Kenya Limited vs. Ndungu Njau [1997] KECA 71 KLR that for the court to allow a review, the error or omission must be self-evident, and should not require an elaborate argument to be established. Counsel contended that the applicants seek to review the ruling issued on 22nd November 2024 on grounds that this Court failed to consider the additional evidence in form of a supplementary affidavit. He maintained that this Court under rule 57 is precluded from considering additional evidence not produced before the single judge since the duty of a full bench is to consider whether the single judge took into account an irrelevant matter, which he/or she ought not have taken into account or failed to take into account a relevant matter or that there was misapprehension of the law and evidence or that his or her decision was plainly wrong.

15. We have considered the grounds in support and against the application, the authorities cited by both parties and the law. The applicants' grounds can be condensed into two, namely;

    a. review based on discovery of new evidence, and, whether the application meets the threshold for this Court to exercise its residual jurisdiction in their favour.

16. The applicants laid too much emphasis on the alleged discovery of new evidence as if it was the sole ground upon which the single judge dismissed their application. However, in dismissing their application, the single Judge described the delay in filing the application for extension of time as unreasonable, inexcusable and inordinate because their application was silent on whether the letter bespeaking proceedings was served upon the respondents so that the time the court registry took to prepare the certified proceedings could be taken into account in accordance with the proviso to Rule 84 (1). The import of this is that as provided in Rule 84 (2), the applicants were not entitled to rely on the said proviso. This finding alone extinguishes the appellants' attempt to use the belatedly obtained certificate of delay as a shield and is sufficient to dispose this application.

17. In addition, the single judge mentioned another pertinent point, that is, even if the applicants were given the benefit of doubt, then time would have begun to run from 28th June 2022 and would have lapsed on 27th August 2022, yet their application for extension of time is dated 31st October 2023 and no explanation was provided as to why it was not filed earlier. Clearly, the failure to satisfactorily explain the delay in filing the application for extension of time was a major consideration by the single judge in dismissing their application. The full bench of this Court also saw no basis at all to interfere with this finding of fact, nor could it fault the learned judge for the manner in which she exercised her discretion. Again, this finding was sufficient to dispose the application.

18. We shall now address the applicants' ground citing discovery of new and important evidence. The applicants' case is that at the time this bench heard their reference, they had a pending application seeking to adduce new and important evidence. However, the said application was not heard, instead this bench heard and determined the reference which was dismissed. The new evidence which the appellant sought to introduce is the certificate of delay, which the applicant claims was not available at the time their application for extension of time was heard by the single Judge. Counsel claimed that the delay in procuring the certificate of delay was occasioned by differences between the court registry and the applicants.

19. Introduction of new evidence, particularly at the appellate stage must be allowed through a framework rooted in the principles of fairness and justice, balancing the interests of finality with the need for a just outcome. This typically involves a tripartite test: the evidence could not have been reasonably obtained for the original trial, it must be relevant and credible, and its introduction would likely have a significant impact on the outcome of the case. (See this Court's decision in Rose Kaiza vs. Angelo Mpanju Kaiza [2009] KECA 422 (KLR)) .

20. Therefore, "new and important evidence" for review purposes is evidence which, despite the exercise of due diligence, was not within the knowledge of the party seeking the review or could not have been produced at the time of the original hearing. This evidence must also be relevant and have a potential to alter the judgment if produced during the original proceedings. The party seeking review must demonstrate that he/it made reasonable efforts to discover and produce the evidence during the initial proceedings. The new evidence must be directly relevant to the case and the issues in dispute. The evidence must be of a nature that could have changed the outcome of the case had it been presented earlier. Review is not intended to rectify errors in the judge's reasoning or to re- litigate the merits of the case. In summary, the concept of "new and important evidence" for review purposes involves a stringent standard, focusing on evidence that was undiscoverable and potentially outcome-altering during the initial proceedings. That is not the position here.

21. The Court must be satisfied that the new evidence must not have been discoverable or adducible at the time of the original trial despite exercise of due diligence. Due diligence refers to the level of care and effort that a reasonable and prudent person would exercise in a given situation. According to Black's Law Dictionary, diligence means a continual effort to accomplish something, involving care and caution. It is the meticulousness reasonably expected from a person seeking to satisfy a legal requirement or discharge an obligation

22. As mentioned earlier, the explanation provided by the applicants for their failure to avail the certificate of delay in time is that they had differences with the court registry. No details were provided as to the nature of the differences or when and how it was resolved. This explanation is to say the least shallow and unconvincing. It collapses on several grounds. First, the certificate of delay was not among the documents produced before the single judge. There was no mention of the alleged differences, (if it existed) before the single Judge. Even if, for argument sake we were to entertain the applicants' argument, in their own admission, and tabulation, there was a delay of about 1 year and 2 months and not 3 years as captured in the ruling delivered by the single Judge. However, this inordinate delay of 1 year and 2 months as per their own tabulation, was not explained. The law does not set a minimum or maximum period of delay. However, the delay must be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. The applicants failed to satisfactorily explain the reason for the 1 year and 2 months delay which they conceded. The applicants' belated attempt to explain the delay citing differences with the court registry raises more questions than answers. Similarly, the attempt to blame the full bench for proceeding to hear and determine the reference instead of their application seeking to adduce "new" evidence does not assist their case. The applicants were fully aware that it was their reference which was scheduled for hearing.

23. The other issue is whether the applicants have met the threshold to merit the exercise of this Court's residual jurisdiction in their favour. For starters, it is important to underscore that this Court's

jurisdiction to review its decisions is limited and is to be exercised only in exceptional circumstances. (See this Court's decision in CKO vs. JMO (Civil Appeal (Application) 560 of 2019)

> [2025] KECA 207 (KLR) (7 February 2025) (Ruling).) The Supreme Court in Fredrick Otieno Outa vs. Jared Odoyo Okello & 3 Others, [2017] eKLR listed the exceptional circumstances as follows: (i) if the Judgment, Ruling, or Order, is obtained, by fraud or deceit; (ii) if the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent; (iii) if the court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto; (iv) if the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision.

24. A review of a Judgment is a serious step and a court should be reluctant resort to it, except where a glaring omission or patent mistake or a grave error has crept into the judgment. Minor mistakes of inconsequential import are obviously insufficient. (See the Supreme Court of India decision in Sow Chandra Kanta & Ano. vs. Sheik Habib [1975] AIR 1500, 1975 SCC (4) 457).

25. This Court in Kamau James Gitutho & 3 Others vs. Multiple Icd (K) Limited & Ano. [2019] eKLR acknowledged its residual jurisdiction to re-open its own decision. It however stressed that such jurisdiction is to be exercised with caution and only in exceptional cases. It stated:

> "It follows therefore, that this residual jurisdiction can only be set in motion once the established threshold is met. In other words, the following must be demonstrated: (1) The decision in issue has occasioned injustice or a miscarriage of justice; and (2) The said injustice or miscarriage of justice has eroded public confidence in the administration of justice; and (3) No appeal lies against in the decision in issue. See also this Court's decision in Jimnah Mwangi Gichanga vs. Attorney General [2015] eKLR."

26. This Court in Benjoh Amalgamated Limited & Ano. vs. Kenya Commercial Bank Limited [2014] eKLR stated that it would be reluctant to invoke its residual jurisdiction and review its decision where there is laches or where legal rights of innocent third parties have vested during the intervening period which cannot be interfered with without causing further injustice.

27. As decided cases suggest, this Court's residual jurisdiction can only be set in motion once the established threshold as set out in decided cases is met. A litigant is not entitled to seek a review of a decision rendered by this Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment or ruling pronounced by this Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so. Therefore, whenever the residual jurisdiction of this Court is invoked, the Court must be satisfied that the case falls within the exceptional categories before it can accede to the application and reopen the case. There is no doubt that the decision pursuant to a reference under Rule 57 is final and departure from that principle is justified only in exceptional circumstances. Therefore, the question before us is whether the instant application has surmounted this requirement to be categorized as falling within the exceptions to the general rule. In our view, there are no exceptional or grave circumstances that warrant our alteration.

28. We have carefully weighed the reason(s) urged by the applicant. We have already found that the applicants have failed the test of demonstrating that the belatedly obtained certificate of delay qualifies to be "new" evidence. We have looked at the tests laid down in decided cases as highlighted above. We find nothing to suggest that the applicant has demonstrated exceptional circumstances. The upshot is

that the notice of motion dated 31st January 2025 lacks merit and it is hereby dismissed with costs to the 4th to 60th respondents.

DATED AND DELIVERED AT NAKURU THIS 20TH DAY OF JUNE, 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA CIArb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

Deputy Registrar.