



**Nyakundi & 2 others v National Social Security Fund & another (Environment & Land Case 74 of 2018) [2025] KEELC 690 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 690 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 74 OF 2018**

**MD MWANGI, J  
FEBRUARY 20, 2025**

**BETWEEN**

**FELIX MECHA NYAKUNDI ..... 1<sup>ST</sup> PLAINTIFF  
STELLA NYABOKE OTWORI ..... 2<sup>ND</sup> PLAINTIFF  
FESTEMAGRA INVESTMENT LIMITED ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**NATIONAL SOCIAL SECURITY FUND ..... 1<sup>ST</sup> DEFENDANT  
MORARA NGISA & COMPANY ADVOCATES ..... 2<sup>ND</sup> DEFENDANT**

*(In respect of the 2nd Defendant’s application dated 6th September 2024 praying for the review of or setting aside of the judgment of the court dated 20th February 2024)*

**RULING**

**Background**

1. Judgment in this case was delivered on 20<sup>th</sup> February 2024 after a full hearing of the case. All the parties including the 2<sup>nd</sup> Defendant, who is the Applicant now, actively participated in the hearing. The 2<sup>nd</sup> Defendant though did not testify in his case neither did he call a witness.
2. The 2<sup>nd</sup> Defendant’s application dated 6<sup>th</sup> September 2024 prays for the review and or the setting aside of the judgment of the court delivered on 20<sup>th</sup> February 2024. It further prays for an order that the 1<sup>st</sup> Defendant be required to account for funds paid to it and to the original buyers of the houses, namely the 3<sup>rd</sup> – 7<sup>th</sup> Defendants.
3. The 2<sup>nd</sup> Defendant’s application is premised on the grounds that;



- a. The 1<sup>st</sup> Defendant failed to disclose that they had received funds from the 2<sup>nd</sup> Defendant and the 3<sup>rd</sup> -7<sup>th</sup> Defendants had also been paid off by the 2<sup>nd</sup> Defendant.
- b. There is miscarriage of justice whereby the titles of the Plaintiffs were cancelled and the 1<sup>st</sup> Defendant had already received funds for the houses.
- c. There is therefore an error on the face of the record that should be corrected by the granting of the orders sought herein.

### **Supporting affidavit.**

4. The application by the 2<sup>nd</sup> Defendant is supported by his own affidavit sworn at Nairobi on 6<sup>th</sup> September 2024.
5. The deponent deposes that his application for review is based on the fact that he has new and important information that is relevant to the case. He has tabulated the alleged new evidence at paragraph 4 of the affidavit.
6. The 2<sup>nd</sup> Defendant accuses the 1<sup>st</sup> Defendant of failing to acknowledge any of the payments by the buyers of the properties and judgment was therefore passed as if no sums of money were paid at all. It is therefore unfair that 1<sup>st</sup> Defendant gets all the houses back as if they never received any money for the same which amounts to double benefits for them.
7. The 2<sup>nd</sup> Defendant alleges that his health has not been good owing to a road accident he had. He states that it was the reason he was unable to present the information at the hearing of the case. He affirms that the entry of judgment in favour of the 1<sup>st</sup> Defendant who failed to acknowledge receipt of funds is an error that this court should review. He avers that he stands to suffer irreparable gross prejudice, harm, loss and damage if the orders sought are not granted.

### **Response by the 1<sup>st</sup> Defendant.**

8. The 1<sup>st</sup> Defendant responded to the 2<sup>nd</sup> Defendant's application by way of a replying affidavit sworn by one Kellen Njue.
9. The deponent deposes that the 2<sup>nd</sup> Defendant's application is misconceived, incompetent, an abuse of the court process and a wastage of the court's valuable time and resources as it has not satisfied the legal grounds for review.
10. It is the deponent's case that the 2<sup>nd</sup> Defendant has not demonstrated that after exercise of due diligence, the alleged evidence was not within his knowledge or could not be produced by him before the delivery of the judgment by this court. The 2<sup>nd</sup> Defendant's allegations that he could not present evidence due to ill health has not been substantiated. His advocate did not seek an adjournment on the basis of the alleged ill health of his client during the hearing.
11. The deponent of the replying affidavit on behalf of the 1<sup>st</sup> Defendant further states that the 2<sup>nd</sup> Defendant had not even filed a witness statement and or any documents in support of his defence yet this case had been filed way back in the year 2016. The 2<sup>nd</sup> Defendant had not bothered to comply with pre-trial directions in terms of filing witness statements and the evidence he is seeking to introduce now, through the application for review.
12. The deponent asserts that from the letter presented by the Applicant from Agha Khan Hospital, the accident being cited as the reason for the inability to present evidence is dated 5<sup>th</sup> March 2024 after the hearing of the case had been concluded.



13. The deponent notes that there has been an unreasonable delay of 9 months since the delivery of the judgment.
14. There were no further affidavits filed. The Applicant did not therefore respond to the issues raised in the replying affidavit of the 1<sup>st</sup> Defendant.
15. The Plaintiffs did not participate in the hearing of the application.

**Directions by the court.**

16. The directions by the court were that the application be canvassed by way of written submissions. The Applicant and the 1<sup>st</sup> Defendant complied and filed their respective submissions which form part of the record of this court.

**Submissions by the parties.**

**A. Submissions by the 2<sup>nd</sup> Defendant/Applicant.**

17. The Applicant submits that the applicable law is order 45 of the Civil procedure Rules. He reiterates that the jurisdiction of the court is being invoked on account of discovery of new and important matter of evidence which after the exercise of due diligence was not within the Applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made. Secondly, on account of an error apparent on the face of the record and finally for any other sufficient reason.
18. The Applicant refers to the case of Pancras T. Swai -vs- Kenya Breweries Limited (2014) eKLR, where the Court of Appeal stated that the words "for any sufficient reason" must be viewed in the context firstly of Section 80 of the *Civil Procedure Act* which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order.
19. The Applicant reiterates that the application discloses sufficient factual basis to warrant a review of the judgment of the court.

**B. Submissions by the 1<sup>st</sup> Defendant/Respondent.**

20. The 1<sup>st</sup> Defendant first and foremost takes issue with the Applicant's supporting affidavit. The documents/exhibits annexed to it are neither securely sealed under seal of the commissioner for oaths nor are they marked with serial letters for identification in total defiance of rule 9 of the Oaths and Statutory Declarations Rules. The Rules require that all exhibits to affidavits be securely sealed thereto under the seal of the commissioner with serial letters of identification.
21. The 1<sup>st</sup> Defendant cites various decisions in support of his submissions on this issue. In Kenya National Union of Nurses –vs- Kiambu County Public Service Board & 5 others (2019) KEELRC 1243 (KLR), the court expunged the Respondent's affidavit and annexures for failure to comply with Rule 9 of the Oaths and Statutory Declarations Rules observing that,

“The law peremptorily uses “shall” to denote that there is no discretion in the choice of affixing the seal and serializing the exhibits forming part of the affidavit. Without the said seal by the commissioner there is no proper affidavit before the court.”



22. In Francis A. Mbalanya –vs- Cecilia N. Waema (2017) KEELC 3356 KLR, the court too held that failure to comply with the [Oaths and Statutory Declarations Act](#)/Rules can only lead to the striking out of the offending documents.
23. The 1<sup>st</sup> Defendant/Respondent therefore urges the court to expunge the documents/exhibits annexed to the Applicant’s supporting affidavit in support of the application. That done, the 2<sup>nd</sup> Defendant’s application would be unsupported and should be dismissed.
24. Without prejudice to the foregoing, the 1<sup>st</sup> Defendant too submitted that the 2<sup>nd</sup> Defendant’s application has not met the threshold for review.
25. The 1<sup>st</sup> Defendant argues that mere discovery of new or important matter or evidence is not sufficient ground for review. The Applicant is obligated to show that such matter or evidence was not within his knowledge even after the exercise of due diligence and that the same could not be produced before the court/tribunal earlier.
26. The 1<sup>st</sup> Defendant notes that during the hearing, the advocate for the 2<sup>nd</sup> Defendant did not seek an adjournment of the hearing on account of the alleged ill health of the Applicant resulting from a road accident. The 2<sup>nd</sup> Defendant had not even filed a witness statement and list and bundle of documents in support of his defence. He therefore had no intention of giving evidence in the case at all. The case had been in court since 2016. Moreover, produced before the court.
27. On the Applicant’s argument on the existence of an error on the face of the record, the 1<sup>st</sup> Defendant relies on the holding in the case of National Bank of Kenya Limited –vs- Ndungu Njau (1997) eKLR, where the Court of Appeal discussed what would amount to an error apparent on the face of the record.
28. The 1<sup>st</sup> Defendant finally submits that the application by the 2<sup>nd</sup> Defendant is an afterthought made after unreasonable delay yet no sufficient reasons have been offered to explain the delay in the filing the application.

#### **Issues for determination.**

29. Having carefully considered the 2<sup>nd</sup> Defendant’s application, the response by the 1<sup>st</sup> Defendant and the submissions filed in this case, the issues for determination in this court’s opinion are;-
  - a. Whether the application meets the threshold for review under Order 45 of the Civil Procedure Rules.
  - b. Whether the annexures/exhibits annexed to the supporting affidavit of the Applicant have been properly marked and sealed.
  - c. What orders should issue in respect to the costs of the application.

#### **Analysis for determination.**

30. Off course, the applicable law in matters review is Section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the Civil Procedure Rules. The guiding principles for an application for review are well settled.
31. Section 80 of the [Civil Procedure Act](#) allows any person who considers himself aggrieved:-
  - a. By a decree or order from which an appeal is allowed by the Act, but from which no appeal has been preferred; or



- b. By a decree or order from which no appeal is allowed by the Act;  
to apply for a review to the court which passed the decree or made the order, and the court is empowered to make such order thereon as it thinks fit.
32. Order 45 rule 1 of the Civil Procedure Rules stipulates the grounds upon which an application for review may be premised on as follows:-
- i. Discovery of new and important matter or evidence which after exercise of due diligence was not within the knowledge or could not be produced by the Applicant at the time when the decree was passed or the order made,
  - ii. On account of some mistake or error apparent on the face of the record,
  - iii. For any other sufficient reason.
33. The Supreme Court of Kenya in Application No. 8 of 2017, Parliamentary Service Commission –vs- Martin Nyaga Wambura & others (2018) eKLR, cited with approval the holding in the case of Mbogo & Ano –vs- Shah (1968) EA and laid down the following guiding principles.
- i. A review of exercise of discretion is not a matter off course to be undertaken in all decisions;
  - ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
  - iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application;
  - iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically;
  - v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review;
  - vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion; and
    - a. as a result, a wrong decision was arrived at; or
    - b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.
34. I started by noting that the Applicant actively participated in the hearing of the case. He was represented by an advocate all through the hearing. He however did not testify neither did he call a witness in his case.
35. As the 1<sup>st</sup> Defendant/respondent has correctly pointed out, the 2<sup>nd</sup> Defendant, who is an advocate of this court and who was represented did not file a witness statement in this matter nor a list and bundle of documents. The case took over 6 years in court. The obvious implication of that failure is that he never intended to testify in this case. I would agree with the 1<sup>st</sup> Respondent that this application is an afterthought.
36. The 2<sup>nd</sup> Defendant too had not filed a claim against the 1<sup>st</sup> Defendant, a co-defendant. His prayer that the 1<sup>st</sup> Defendant be required to account for funds allegedly paid to it by the Applicant and other persons is a latter day attempt to sneak in a claim against a co-Defendant and ultimately re-open the



case, for hearing. He is seeking to have a second bite at the cherry after squandering his opportunity to present his case before the court.

37. The Applicant claims to have discovered new and important matter or evidence. A casual look at what he terms as new evidence shows that it is supposedly evidence of payment of monies to the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendant himself. How could that be a ‘discovery’? The Applicant was the advocate for the Plaintiffs, more particularly the 1<sup>st</sup> Plaintiff in the purported transactions. He was the one who would have made the payments on behalf of his client, if any money was paid at all. This is information then that was in his possession all through as the advocate for the Plaintiffs. It is not new.
38. Even if it were new, mere discovery alone is not a sufficient ground for review. The Applicant must show that such matter or evidence was not within his knowledge, and that even after the exercise of due diligence, the same could not be produced before the court.
39. As the court observed in the case of Alpha Fine Foods Limited -vs- Horeca Kenya Limited and 4 others [2021] KEHC 4068 (KLR), the reason for the above limitation is that it is an indulgence given to a party to get the previous decision altered on the basis of discovery of important evidence which was not within his knowledge at the time of original hearing. An Applicant who relies on such circumstances to obtain a review, ‘should (therefore) affirmatively establish them because the latitude shown to a party by a court is conditional upon strict compliance with that requirement.’
40. The Court further affirmed that;

“ Ordinarily, the expression 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 would refer only to a discovery made since the order sought to be reviewed was passed. An applicant alleging discovery of new and important evidence must demonstrate that he has discovered it since the passing of the order sought to be reviewed.”
41. In his bid to justify that he could not have produced before the court the alleged new evidence, the Applicant has annexed a letter from Agha Khan hospital. The letter is dated 5<sup>th</sup> March 2024 after the hearing of the case had been concluded. The letter does not help his case in any way.
42. Secondly, the Applicant has not demonstrated that the alleged error on the face of the record is an apparent error. The Applicant invites the court to delve into the documents he proposes to introduce.
43. The Court of Appeal in National Bank of Kenya -vs- Ndungu Njau (supra) observed as follows in respect apparent error or omission:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceeds on an incorrect expansion of the law.”



44. During an application for review the court focuses on the decision and not the merits of the substantive motion. A review is not an appeal. The Supreme Court of India clarified this issue in *Ajit Kumar Rath -vs- State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608, when it aptly stated that;

“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.”

45. I have said enough, the 2<sup>nd</sup> Defendant’s application does not meet the threshold for review under Order 45 of the Civil Procedure Rules..

46. On the issue of the annexures on the affidavit in support of the application, the court agrees with the 1<sup>st</sup> Defendant. They are neither marked nor sealed with the seal of the commissioner for oaths. They are not exhibits and cannot be admitted on record. I agree with the court in the case of *Kenya National Union of Nurses –vs- Kiambu County Public Service Board & 5 others* (2019) KEELRC 1243 (KLR). The exhibits/annexures must be expunged from the record. That renders the supporting affidavit incomplete and of no value to the 2<sup>nd</sup> Defendant’s application.

47. That would be another reason to dismiss the application.

48. The upshot is that the 2<sup>nd</sup> Defendant’s application is hereby dismissed with costs to the 1<sup>st</sup> Defendant. It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 20<sup>TH</sup> DAY OF FEBRUARY 2025**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Ayora for the Plaintiffs

Mr. Muuo h/b for Mrs. Mbabu for the 1<sup>st</sup> Defendant

Mr. Onderi h/b for Mr. Makori for the 2<sup>nd</sup> Defendant/Applicant

Court Assistant: Mpoye

