



Kiptalam & 3 others (The Administrators of the Estate of Kiptalam Arap Cherunya) v National Land Commission & 3 others; ICDC & 51 others & 51 others (Interested Parties) (Environment & Land Petition 9 of 2019) [2024] KEELC 13852 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13852 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND PETITION 9 OF 2019
JM ONYANGO, J
DECEMBER 18, 2024**

BETWEEN

**JOHN CHERUNYA KIPTALAM 1ST PETITIONER
SAMMY KIPKORIR CHERUNYA 2ND PETITIONER
GRACE CHERUNYA 3RD PETITIONER
JAMES KIPLELE CHERUNYA 4TH PETITIONER
THE ADMINISTRATORS OF THE ESTATE OF KIPTALAM ARAP CHERUNYA**

AND

**NATIONAL LAND COMMISSION 1ST RESPONDENT
CHIEF REGISTRAR LANDS 2ND RESPONDENT
THE LAND REGISTRAR UASIN GISHU DISTRICT 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT**

AND

**ICDC & 51 OTHERS INTERESTED PARTY
COUNTY GOVERNMENT OF UASIN GISHU INTERESTED PARTY
THE ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY
THE NATIONAL YOUTH SERVICE INTERESTED PARTY
JOHN KIPLAGAT CHESANGA INTERESTED PARTY
KIPNGETICH LELMEN INTERESTED PARTY
SILAS KIPTUI INTERESTED PARTY**



ZEDDIE CHEPTOO INTERESTED PARTY
 BETTY CHEBONAROK INTERESTED PARTY
 THOMAS KIPLAGAT INTERESTED PARTY
 JOB KIPNANDI CHEBON INTERESTED PARTY
 LINMAG INVESTMENT INTERESTED PARTY
 LINUS LETTING INTERESTED PARTY
 BROADWAY EDDIBLE OIL PLANT INTERESTED PARTY
 KENYA POST OFFICE SAVINGS BANK INTERESTED PARTY
 ISAAI KIPLAGAT FUNDI INTERESTED PARTY
 KENYA POWER INTERESTED PARTY
 SYLVIA CHEROTICH INTERESTED PARTY
 KABOI ADAN HUSSEIN INTERESTED PARTY
 IBRAHIM ABDULLA INTERESTED PARTY
 HERMANY KUMAR PAVANI INTERESTED PARTY
 FACTOR CONSTRUCTION INTERESTED PARTY
 AMOS MBUGUA KIMANI INTERESTED PARTY
 GAKIBU FRANCIS INTERESTED PARTY
 MBOGO NGARI INTERESTED PARTY
 GEMEKA WENDANI GROUP INTERESTED PARTY
 PHOLIP KOECH INTERESTED PARTY
 KOGO FLATS LIMITED INTERESTED PARTY
 THE ESTATE OF JOHN GAKUO INTERESTED PARTY
 MICHAEL NGOTIE INTERESTED PARTY
 SYMON KIPTORTICH KIMENGICH INTERESTED PARTY
 JOHN KIPLAGAT CHESANGA INTERESTED PARTY
 AGGREY KIPCHIRCHR BETT INTERESTED PARTY
 PLASTICS INDUSTRIES LIMITED INTERESTED PARTY
 IMMACULATE CHEMELI KANDIE INTERESTED PARTY
 ABDUL ASIS KANJI INTERESTED PARTY
 JONEA NYARANGO OGOCHI INTERESTED PARTY
 ELIJAH GESUSU INTERESTED PARTY
 SAMWEL OMBIRO INTERESTED PARTY
 CHARLES INDECHE INTERESTED PARTY
 KHADIJA OMAR INTERESTED PARTY



HUSSEIN EUYO SARANA	INTERESTED PARTY
JOHN WANDIRA NDIGU	INTERESTED PARTY
PAUL MONGARE ONDUKO	INTERESTED PARTY
RUTH WAMBUI	INTERESTED PARTY
MARY NGENDO	INTERESTED PARTY
RADION NTABO	INTERESTED PARTY
PETER GICHABA	INTERESTED PARTY
RITESH KUMAR MANUBHAI	INTERESTED PARTY
WARENG NDOVU ENTERPRISES	INTERESTED PARTY
RUDRA BUILDERS LTD	INTERESTED PARTY
RAMJI DEVJI PATEL	INTERESTED PARTY

RULING

1. Before me is the Petitioners' Notice of Motion Application dated 7th September, 2023 seeking the following orders:-
 - i. That the Honourable Court be pleased to extend the time granted to file the application herein, the application herein be admitted out of time and deemed properly filed.
 - ii. That this Honourable Court be pleased to review and vary its judgement delivered on 27th May 2022.
 - iii. That consequent to the grant of the prayer sought in 1 above, the Honourable Court be pleased to set aside the orders given in the said judgement as Order No (a), Order No (b), Order No (c), Order No (d) and Order No (e) specifically as follows;
 - a. A declaration is hereby issued that compulsory acquisition by the government of 400 acres from the Petitioner's LR NO. 8148, measuring 617 acres, was validly done. That the Respondents are therefore directed that the said acquisition be duly noted on the registers of LR No. 8148, Eldoret Municipality/Block 15/2366, and the subdivisions thereof that have not been allocated to private individuals/entities.
 - b. That a declaration is hereby issued that the Eldoret Municipality/Block 15/2365, measuring 217 acres belongs to the late Kiptalam Arap Cherunya, the Petitioner. That the 3rd Respondent, and County Surveyor, Uasin Gishu, are hereby directed to visit the said Land to confirm and point out for the Petitioner the said parcel's boundaries/beacons within ninety (90) days to enable the administrators of the estate take possession.
 - c. That to avoid the need of further litigation on this issue, the Land Registrar Uasin Gishu is hereby directed to issue the Petitioner with the title document for Eldoret Municipality/Block 15/2365, measuring 217 acres, upon the Petitioner surrendering the original title for LR. No. 8148 to the said Land Registrar for cancellation.



- d. A declaration is hereby issued that any allocation of parcels of land done by the Government, through the Commissioner of Lands, out of Eldoret Municipality/Block 15/2365, that belongs to the Petitioner, is unlawful, null and void. That the 1st and 3rd Respondents are therefore directed to ensure all such allocations and title documents issued thereof, are revoked and or cancelled within ninety (90) days.
 - e. That an order of restraint be and is hereby issued restraining the Land Registrar, Uasin Gishu, National Land Commission [3rd and 1st Respondents], plus those of the 4th to the 52nd Interested Parties whose parcels of land have encroached or are within the Petitioner's land, or any other person whosoever, from further unlawfully entering or trespassing, and or transferring and or dealing in any manner whatsoever with Eldoret Municipality/Block 15/2365, measuring 217 acres.
- iv. That consequent to the grant of prayer 2 and 3 above the Honourable Court be pleased to enter Judgement for the Petitioner in the following terms;
- a. A declaration do and is hereby issued that there was no compulsory acquisition done in accordance with the law by the government of 400 acres from the Petitioner's land being LR NO. 8148, and any act done by the government is null and void.
 - b. A declaration do and is hereby issued that the Petitioner is the bona fide and lawful owner of all that piece or parcel of land being number original title L.R. 8148 Eldoret.
 - c. A declaration is hereby issued that all the allocation of parcels of land done by the Government, through the Commissioner of Lands, out of L.R. NO. 8148 belonging to the Petitioner, is unlawful, null and void. That the 1st and 3rd Respondents are therefore directed to ensure all such allocations and title documents issued thereof, are revoked and or cancelled within ninety (90) days.
 - d. That an order of restraint be and is hereby issued restraining the Land Registrar, Uasin Gishu, National Land Commission [3rd and 1st Respondents], plus the 1st, and 4th to the 52nd Interested Parties or any other person whosoever claiming from them or under them, from further unlawfully remaining, entering or trespassing, and or transferring and or dealing in any manner whatsoever with L.R. NO. 8148.
 - e. That the Honourable Court be pleased to grant any other orders as the circumstances of the case may commend in the interest of justice.
 - f. That the costs of the application be borne by the Respondents in any event.
2. The motion is premised on the grounds set out on the face of it and supported by an Affidavit sworn by John Cherunya who presented the Petitioners' case as follows;- that on 27th June, 2023 the Administrators of the estate of Kiptalam Arap Cherunya - Deceased was granted 14 days within which to file the present application but the time has now lapsed. The reason given for the delay is that he is the one authorised to swear affidavits on behalf of the Estate, but he lost his daughter on 8th July, 2023 and was not in a position to act. That a survey was conducted in the company of representatives of the 2nd, 3rd and 4th Respondent, to complete the compulsory acquisition pursuant to the court's judgment of 27th April, 2022. During the survey exercise, it was established that a major carriageway managed by KeRRA was encroaching on the suit land by 4.33 Acres. It was also established that although a survey plan was prepared, subdivision of the suit parcel measuring 617 Acres was not yet done by amending



the RIM. That the portion of land the court found belongs to the Petitioner does not in fact exist, thus the orders of the court cannot be implemented as no title can be issued on a non-existent parcel of land.

3. It is also the Petitioners' case that the Estate still holds the original title deed to the land, pointing out that the same was not surrendered as required during the conversion to create the two blocks, and further that as per the County Land Registrars report, the two blocks do not exist. That the Petitioners moved the court decreeing the absence of subdivision as it meant that no title can issue the his estate of Kiptalam Arap Cherunya - Deceased even if the land was lawfully acquired. However, the government, through the two reports by the County surveyor and the Land Registrar, had admitted that it had disregarded the law and unlawfully deprived the Estate of its land. According to the Petitioners, these reasons constitute sufficient cause for the court to review its orders as the court cannot act in vain. In addition, that the two reports constitute new evidence which was not available to the Estate. The Petitioners were also not aware that the Respondents had admitted the facts as presented. John Cherunya urged the court to review its judgement in favour of the Estate.
4. The 49th Interested Party swore a Replying Affidavit on 1st November, 2023 opposing the Application on grounds that the alleged new evidence does not demonstrate anything new that is contrary to the findings in the judgement herein. He deponed that the Land Registrar's report is misleading and contradicts the Surveyor's report, which confirms the existence of the two plots Nos. Eldoret Municipality/Block 15/2365 and 2366, their acreages and their owners. He averred that the Land Registrar's report is not new evidence as it is a product of the execution of the judgment herein. Further, that the Petitioners had not demonstrated that they could not have produced the said evidence despite due diligence, and he added that the information has all along been in existence. He also averred that there was no error apparent on the face of the record. He deponed that the court issued orders on existing land which had been properly demarcated, and the Petitioners' argument otherwise is misplaced.
5. According to the 49th Interested Party, the application is an unreasonable afterthought for being brought over a year and a half after the judgement and 8 months after the Registrar's report. That it is also an attempt to re-open and re-litigate their case since the prayers sought are a replica of those in the petition. He termed the instant application as a fresh suit clothed as an application for review, averring that it is highly prejudicial since the court orders in the judgment are yet to be complied with in particular the Petitioners' failure to surrender the mother title. He deponed that the petitioners had failed to satisfy the conditions for review and are thus undeserving of the prayers sought in the Application. He also accused the Petitioners of unexplained, inordinate delay and prayed that it is in the interest of justice that the application be dismissed with costs.
6. Through a Replying Affidavit sworn by Julius Koech, the 2nd Interested party also opposed the application, alleging that the Petitioners have not met the requisite conditions for review of court orders under Order 45 of the Civil Procedure Rules. He deponed that the Petitioners have not supplied any justification for the inordinate delay in bringing the application for review. He deponed that the Petitioners were through the instant application asking the court to sit on appeal of its own decision, since they are challenging the decision of the court on its merits to obtain one favourable to them. He averred that this court lacks jurisdiction to entertain an appeal on a judgment made by a court of concurrent jurisdiction. He deponed that litigation ought to come to an end, yet the Petitioners were seeking to prolong the proceedings by approbating and reprobating on matters that have been settled in a well-reasoned judgement. He prayed that the Application be dismissed with costs to the 2nd Interested Party.
7. The application was also opposed by the 17th Respondent who filed a Replying Affidavit sworn by Edward Mwathi, its property officer, Eldoret Branch. He disputed the alleged discovery of new and



important evidence and averred that a survey had in fact been done in 2005 and the RIM amended. That the surveyor testified to this in ELC No. 41 of 2014, Kogo Flats Limited vs Sammy Cherunya & Another (2019) eKLR, where the Petitioners in fact produced a map showing the subdivision, a letter of conversion by the Land registrar and a letter from the Commissioner of Lands showing the conversion and subdivision of suit land into the 400 Acres and 217 Acres. He thus denied the allegations by the Petitioners to the contrary. He deponed that the instant application is an attempt to have the court sit on appeal over its decision, which it cannot do, and that the Petitioners should have instead approached the Court of Appeal.

8. Mr. Mwathi deponed that there is no new evidence to warrant a review, but rather an administrative issue that ought to be resolved to regularise the records as ordered in the judgment. He also averred that the Petitioners had in fact filed a Notice of Appeal dated 10th May, 2022 against part of the decision, and the 17th Interested Party had filed a Notice of Address for Service dated 19th May, 2022. That while the Notice was still pending and effective they filed the instant Motion for review, yet under the law they cannot concurrently pursue both options as that is an outright abuse of court. He further deponed that the Petitioners Application has not met the legal threshold for review, lacks merit, is misguided and a misrepresentation of the law as well as an abuse of the court process and should be dismissed with costs.
9. The 11th Respondent filed Grounds of Opposition dated 18th January, 2024 opposing the Application on the following grounds:- that the court is functus officio having delivered its judgment on 27th May, 2022; that the Petitioners are seeking to conjure up and introduce new prayers to a petition that has already been determined; that the application does not meet the statutory threshold for review of judgment; that the development of new circumstances is distinguished from the discovery of new evidence and thus cannot form a proper foundation for review and that the Petitioners are intent on holding the parties hostage by spinning the wheels of justice in unending circles contrary to the principle that litigation must come to an end. Further, that in the circumstances the application and prayers sought therein are a procedural and substantive nullity, bad in law, misconceived, disclose no reasonable or arguable grounds and is thus fatally and incurably defective.
10. The 37th - 48th Interested Parties also opposed the Application through a Replying Affidavit sworn by Jonea Nyarango Ogochi who deponed inter alia that the Application raises issues that were determined in the judgement of 27th April, 2022. He deponed that an application for review is not meant to re-litigate or re-open a matter, neither can it call for altering the final orders and findings of the court drawn from reasoning in the entire judgment. He added that the Petitioners had not demonstrated the discovery of new and important matter which on exercise of due diligence was not within their knowledge or could not have been provided at the time. He also deponed that any error on the face of the record must be self-evident and should not require an elaborate argument to be established. He alleged that the instant application has not met the threshold for granting orders of review. Further, that it aims at substantially altering the judgment and is intended to delay the disposal of the matter, and therefore, it should be dismissed with costs.

Analysis and Determination

11. The Application was canvassed by way of written submissions. I have read and duly considered the Application herein alongside the Supporting Affidavit, the responses filed and the submissions by Counsel for the respective parties. The following issues arise for determination:-
 - a. Whether the court should extend time for filing of the instant application;
 - b. Whether the Petitioners have made out a good case to justify the grant of orders for review
 - c. Who shall bear the costs of this application?



a. Whether the court should extend time for filing of the instant application;

12. The first prayer of the Motion seeks an extension of the time for filing the instant Application. The factors to be considered when determining an application for extension of time are found in various judicial pronouncements. One of these is the case of *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR, where the Supreme Court laid down them out as follows:-

- “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

13. I have considered the said prayer alongside the above listed principles. The first question to be answered is whether the applicant has tendered a satisfactory explanation for the delay in filing the instant Motion. On the 27th June, 2023 the Petitioners obtained 14 days’ leave to file the Application herein, which period lapsed on or about 11th July, 2023. The Application was however filed on 8th September, 2023 approximately 59 days after the lapse of the period allowed by court. The reason for the delay as explained by John Cherunya who swore the Supporting Affidavit, is that he lost his daughter on 8th July, 2023 and was not in a position to act in the matter, being the person authorised to swear Affidavits on behalf of the Estate. He deponed that the delay was therefore not intentional and asked the Court to admit the Application out of time.

14. Although no proof has been tendered for the alleged bereavement, it is reasonable that on bereavement, a party may not be in a position to act for some time. This is a justifiable reason, for the failure to file the application within the timeline allowed by the court. I am very much alive to the possible prejudices that the Respondents may suffer as a result of granting this order, in my view however, the delay has been satisfactorily explained. In other words, the explanation tendered by the applicant is plausible and sufficient considering the delay period was only 59 days. I therefore, find that the explanation offered for the delay is sufficient, and that the delay is not inordinate. Consequently, the prayer for extension of time is hereby allowed, and the Application is deemed to have been properly filed.



b. Whether the Petitioners have made out a good case to justify the grant of orders for review

15. Courts have power under section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, to review their decisions. Section 80 of the *Civil Procedure Act* provides as follows:-

“Section 80. Review

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.”

Whereas Order 45 Rule 1 of the Civil Procedure Rules provides as follows:-

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

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.
- (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”

16. From the above provisions, it is clear that Section 80 is the substantive law which grants the court the power to make orders for review, while Order 45 is the procedural law that sets out the jurisdiction and scope of review. Order 45 allows a court to review its own orders only on grounds of discovery of new and important matter or evidence, mistake or error on the face of the record and any other sufficient reason. In the instant case, the Petitioners have advanced two grounds upon which their application for



review is premised, these are that there is an error on the face of the record, and that there is a discovery of new evidence not available at the time of judgment.

17. According to the Petitioners, there is an error apparent on the face of the record by reason of the judge making an order to issue title on a non-existent parcel of land. It was the court's finding herein that the parcel of land belonging to the Estate of Kiptalam Arap Cherunya was subdivided into two portions being Eldoret Municipality/Block 15/2365 and 2366. Portion No. 2365 was found to belong to the Estate whereas Plot No. 2366 was found to have been validly compulsorily acquired by the Government of Kenya.
18. It is the Petitioner's case herein that this subdivision into parcel No. Eldoret Municipality/Block 15/2365 and Plot No. 2366 was never done hence the argument that the Court's order for issuance of a title were made on a non-existent property. The allegation that the subdivision was not done and thus the parcels do not exist is however misleading. This court was referred to the case of Kogo Flats Ltd vs Sammy Cherunya & Another (2019) eKLR, where the Petitioners' themselves acknowledged that the parcel of land previously known as L.R. No. 8148 was subdivided into 2 portions. I have taken time to peruse the judgment in Kogo Flats Ltd vs Sammy Cherunya (Supra), and indeed the court in its summary of the Defendants' (Petitioners') testimonies in part indicated that:-

“DW1 further stated that they filed a Succession Cause and got letters of administration in respect of the estate of his late father on 30th August 2017. DW1 further testified that there was a request from the government to compulsorily acquire 400 acres out of the 617 acres of which they were left with 217 acres, situated at Ndalat-Salient road.

DW1 produced a map showing the subdivision of the 400 acres by the government, a letter of conversion by the Land Registrar and a letter from the Commissioner of Lands dated 17th May 2007 showing the conversion and subdivision of the 400 acres and 217 acres respectively.”

19. The judgment referred to above is a public record, in which one of the administrators of the Estate admitted in court that the subdivision was done and even presented and relied on documents attesting to the said conversion. The fact of the subdivision having been admitted in court, the Petitioners cannot now allege that the court's orders directing the issuance of title were issued on a non-existent parcel. This allegation cannot also be said to constitute the ground of an error on the face of the record as claimed by the Petitioners.
20. Furthermore, it is common knowledge that a 'mistake or error apparent on the face of the record' is one that is self-evident and does not require elaborate arguments to be established. As to what constitutes an error or mistake on the face of the record, in *Muyodi vs Industrial and Commercial Development Corporation & another* (2006) 1 EA 243, the Court of Appeal described it as follows:

“In *Nyamogo & Nyamogo vs Kogo* (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is



certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

21. This position was affirmed by the Supreme Court in *Kibisu vs Republic* (Petition [3 of 2014](#)) (2018) KESC 34 (KLR), which had this to say regarding ground of error or mistake in an application for review:-

“ 50. Further, in an application for correction of errors, the focal point is usually the judgment of the Court/tribunal which is sought to be corrected. An applicant is thus duty bound to specifically point at the particular page/paragraph and/or portion of the judgment where he opines that the alleged error is situated. Suffice it to say, an error cannot be apparent on the face of the judgment when that error requires evidence to be adduced so as to enable the Court to discern it. Needless to say, we fail to fathom why an application for correction of errors could even draw such a huge record like the one before us in this application. The precision of such an application and its clear nature is what clothes the Court with the jurisdiction to even move suo motto: for what is erroneous will occasionally be glaringly obvious.

51. We thus reiterate that an application for review of a Court’s judgment cannot call for the changing and/or altering of the Court’s final orders and findings drawn from the reasoning in the entire judgment...”

22. The Petitioners also alleged that there was a discovery of new evidence not available to the Estate at the time of judgement. In *Wabwire & another v Origi* (Environment & Land Case 112 of 2017) [2024] KEELC 5894 (KLR), the court relied on the decision of the Court of Appeal in *Rose Kaiza vs Angelo Mpanju Kaiza C.a. Civil Appeal No 225 of 2008* [2009] eKLR, where it was held as follows:-

In the case of *Rose Kaiza -v- Angelo Mpanju Kaiza C.a. Civil Appeal No 225 of 2008* [2009] eKLR, the Court of Appeal while discussing the ground of new and important matter or evidence as a basis of review cited with approval the following passage from Mulla’s Civil Procedure Code 15Th Edition at page 2726 thus:

‘Applications on this ground must be treated with great caution and as required by r 4(2)(b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the discovery of new evidence, it must be established that the Applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the Petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of new and important matter which was not within the knowledge of the party when the decree was made’.”

23. A party alleging that there has been a discovery of new matter or evidence, must convince the Court that such evidence could not have been obtained or produced even after the exercise of due diligence at the time when the decree was passed or the order made. The Petitioners have based their claim on the Surveyor’s report dated 19th December, 2022 and the report by the Land Registrar dated 21st February, 2023. I have taken time to read through findings and recommendations made in both reports.
24. The Surveyor’s report explains that there is an existing 36.0m tarmac road on the ground, of which 18.0m was added to the initial road. The 18.0m addition is said to reduce the acreage of Plot Nos. 2365



and 2366 by 2.18 Acres and 2.15 Acres respectively. Plot No. 2365 belonging to the Petitioners is only affected to the tune of 2.18 Acres. The allegation by the Petitioners that their property is reduced by 4.33 is misleading and was clearly made to garner sympathy and deceive the court into granting the orders sought.

25. Moreover, it is trite that 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. The surveyors report indicated that the tarmac road was in existence on the ground as at the date of the report, just 8 months from the date of the judgement. There is no allegation that the tarmac road is a new development, therefore, there is every likelihood that the road was in existence way before the judgment was delivered. Nothing stopped that Petitioners from conducting a survey prior to judgment to verify the position of the road in relation to their land. The Petitioners cannot now allege that they could not obtain this information even with the exercise of due diligence, since it is clear that they could have obtained the same information if they had but exercised a little diligence by undertaking a survey of the land.
26. Justice Mativo in *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR, explained that:-
 - “ 42. For material to qualify to be new and important evidence or matter, it must be of such a nature that it could not have been discovered had the applicant exercised due diligence. It must be such evidence or material that was not available to the applicant or the court as the time of making the decision. Differently stated, the material presented by the applicant does not qualify to be new evidence.”
27. Turning to the Land Registrar’s report, the same does not state that the two parcels do not exist, but that the registers are non-existent due to failure by the Petitioners to surrender the mother title. It is common knowledge that the new registers for the two parcels cannot be opened before the register for the mother title is closed. The failure to surrender the mother title was a fact present and known by all the parties as well as the court at the time of hearing and judgment herein, hence the order for the Land Registrar to issue title on Plot No. 2365 to the Petitioners on surrender thereof. That information cannot therefore be said to be new evidence that has been freshly obtained or come to the knowledge of the Petitioners.
28. The Land Registrar’s report also alludes to the existence of other titles on Plot No. 2366 as a reason why the said office could not issue titles as directed by this court. Even if that is the case, the said titles ought not interfere with issuance of title to the Petitioners over Plot No. 2365 since the two are different and very distinct parcels of land. The existence of titles on Plot No. 2366 is an issue for the Government of Kenya, which acquired the land, to deal with and not for the Petitioners herein since the said portion of land does not belong to them.
29. In any event, in the Land Registrar’s report, it is indicated that the reason they could not issue a title deed to the Petitioners is because they Petitioners did not surrender the mother title. This is itself contrary to the orders of this court, which had directed in its judgment that the title would be issued upon surrender of the mother title. It is clear therefore that the Petitioners have contributed to the prevailing circumstances by failure to surrender the mother title as ordered by this court. This was admitted at paragraph 14 of the Supporting Affidavit to the Motion. The Petitioners cannot rely on their own disobedience of the court orders to seek a review of the very same orders.



30. Moreover, as this court has been informed by the 17th Interested Party, the Petitioners lodged a Notice of Appeal where they indicated that they were aggrieved by part of the judgment herein. This is a clear violation of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, which permit a party to file an application for review only where no appeal had been lodged. Underscoring this principle, in *Francis Origo & another vs Jacob Kumali Mungala* [2005] eKLR, the Court of Appeal in Eldoret cited its own decision in the case of *Kisya Investments Ltd. vs Attorney General and R.L. Odupoy Civil Appeal No. 31 of 1995 (1986) eKLR*, where it was held that:-

“The principal and the only ground of appeal urged before us was that the first defendant having filed a Notice of Appeal which was struck out it cannot by a subsequent application made thereafter proceed by way of a review. We accept this is a sound proposition of law. The correct position appears to us to be as set out by Sarkar on the Law of Civil Procedure, 8th Edition, where at page 1592 it is stated as follows:

‘The crucial date for determining whether or not the term of 0.47 r. 1 are satisfied is the date when the application for review is filed. If on that date no appeal has been filed, it is competent for the Court to dispose of the application for review on the merits notwithstanding of the pendency of the appeal subject only to this that if before the application for review is finally decided, the appeal itself has been disposed of, the jurisdiction of the court hearing the review would come to an end ... Review application should be filed before the appeal is lodged. It if is presented before the appeal is preferred, court has jurisdiction to hear it although the appeal is pending. Jurisdiction of court to hear review is not taken away if after the review petition, an appeal is filed by any party. An appeal may be filed after an application for review, but once the appeal is heard, the review cannot be proceeded with ... A review application is incompetent after appeal is preferred.’

This point was taken before the learned Judge. It does not appear to have been dealt with by him in his considered ruling. In granting the order for review the learned judge, with respect, fell into an error.”

31. It is not clear in this case whether a substantive appeal has been filed, however, annexure EM-1 of the 17th Interested Party’s Replying Affidavit is a Notice of Appeal dated 10th May, 2022 and filed in court on the same date. Some courts have argued that the mere fact that a party has lodged a Notice of Appeal does not amount to an appeal for the purposes of review, since it is just but a formal notification of an intention to appeal. In any event, the filing of an Application for review after a Notice of Appeal is an indication that the Applicant/s is not only gambling with the law, but forum shopping with the aim of landing a decision favourable to them.

32. Be that as it may, engaging in such a discourse at this stage can only be an academic endeavour as this court finds that the Petitioners’ Application herein does not meet the threshold set out under Order 45 Rule 1 of the Civil Procedure Rules. Therefore, this is not a proper case for the court to exercise its discretion in their favour. Accordingly, the prayers seeking review of the court orders contained in the application dated 7th September, 2023 are without merit.

c. Who shall bear the costs of this application?

33. Section 27 of the Civil Procedure grants the Court the discretion to award costs. The award of costs is however not cast in stone, but relies on the courts’ discretion. In exercising this discretion, courts must



not only look at the outcome of the suit but also the circumstances of each case. In *Morgan Air Cargo Limited v Evrest Enterprises Limited* (2014) eKLR the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ‘Cost follow the event’ was driven by the fact that there could be no ‘one-size-fit-all’ situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

34. It is trite law that costs usually follow the event unless special circumstances present themselves. This means that any departure from this general principle can only be for good reasons, which the Supreme Court in *Jasbir Singh Rai & Others vs Tarlochan Rai & Others* [2014] eKLR noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain.
35. In the instant Application, aside from the prayer for extension, the Petitioners did not succeed in obtaining a review yet the said prayers were the crux of this Application. For this reason, the Petitioners cannot be said to have been the successful party. The Respondents, who defended against the Application successfully on the other hand have emerged victorious. The court has not been shown any cause why it should deny victors the costs. For this reason, the court shall exercise its discretion and award the Respondents the costs of this Application.
36. The upshot is that the Petitioners’ Application dated 7th September, 2023 fails. The said Application is thus dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 18TH DAY OF DECEMBER 2024

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J.M ONYANGO

JUDGE

In the presence of;

Mr. Charana for Ms. Wanjiku Nduati for the Petitioners/Applicants

Miss Tusiime for the 17th Interested Party

Mr. Mayiga for Mr. Mwangi for the 49th, 50th and 51st Interested Parties

Mr. Aseso for the 52nd Interested Party

No appearance for the Respondents

Court Assistant: Brian

