



Makobo (Suing as the Administrator Ad Litem of the Estate of the Late James Makobo Muthwa) v Matungulu Farmers Compnay Limited; Muthusi & another (Intended Interested Party) (Environment and Land Case Civil Suit 769 of 1992) [2025] KEELC 3378 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEELC 3378 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 769 OF 1992**

OA ANGOTE, J

MARCH 27, 2025

BETWEEN

**ANNE MAKOBO DECREE HOLDER
SUING AS THE ADMINISTRATOR AD LITEM OF THE ESTATE OF THE LATE
JAMES MAKOBO MUTHWA**

AND

MATUNGULU FARMERS COMPNAY LIMITED JUDGMENT DEBTOR

AND

JIMNA KALOKI MUTHUSI INTENDED INTERESTED PARTY

NAOMI KALONDU MUNYAO INTENDED INTERESTED PARTY

RULING

Background

1. Before this court for determination are two Motions dated 6th December, 2022 and 2nd November, 2023.
2. In the Motion dated 6th December, 2022 brought pursuant to the provisions of Article 40 of *the Constitution* of Kenya, 2010, Sections A1, 1B, 3A and 80 of the *Civil Procedure Act*, and Order 45 Rule 1 of the Civil Procedure Rules, the Interested Parties are seeking for the following reliefs:
 - i. That this Honourable Court be pleased to enjoin Jimna Kaloki Muthusi and Naomi Kalondu Munyao as 1st and 2nd Interested Parties.



- ii. That this Honourable Court be pleased to review the judgment dated 10th February, 2006 with a view to setting it aside and/or vary it on such terms as it deems fit and expedient in the circumstances.
- iii. That the costs of this application be provided.
3. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Jimna Kaloki Muthusi, the 1st Intended Interested Party of an even date. He deponed that in late 1999, he was approached by the directors of the Judgment Debtor who informed him that they needed to sell a portion of their land parcel no 11391/3 located in Mananja, Machakos County, to finance the process of surveying it so that individual titles could be issued to their respective members/shareholders.
4. He stated that after visiting and viewing the intended parcel for sale, he was impressed and requested to be shown the resolutions that the company members had passed authorizing the sale and that he was supplied with two company resolutions dated 30th November, 1989 and 21st August, 1993.
5. According to the 1st Intended Interested Party, vide the resolution dated 30th November, 1989, it was unanimously resolved that 17 acres would be allocated for the establishment of Tana Market, 97.5 acres that had a workshop would revert to the company and 671 acres would be given to each member.
6. He deposed that in the resolution dated 21st August, 1993, it was resolved that 97.5 acres be sold and the proceeds be used to cater for the surveying process; that after satisfying himself with the propriety of the directors' request and upon his Advocates studying and confirming that the intended sale and purchase was proper and within the law, they agreed that the purchase would be progressive but his occupation would commence upon execution of the initial agreement and that consequently, they executed various agreements commencing in 2002 and at no time did the existence of any court case arise involving the disputed parcel.
7. He stated that it was also agreed that since the sale was exclusively for the purpose of financing the surveying process, payments would be made progressively as per the advancement of the surveying exercise and that after completion of the payment process, and upon his request, the directors of Matungulu Farmers Company Limited confirmed to him that they had no objection to the title being issued directly to his wife, Naomi Kalondu Munyao, as long as he executed a transfer deed as well as indemnity thereto that the company would not be held liable for the consequences of the said transfer should any future claim arise.
8. The 1st Interested Party deposed that On the 11th September, 2017, he executed a transfer/indemnity deed in the presence of the chairman, secretary and treasurer of the Judgment Debtor and a witness and paid the required transfer fees of Kshs 20,000; and that the company took over the process of issuance of title deeds whereupon on the 23rd April, 2019, the same was issued to his wife.
9. According to the Interested Parties, since completion of the purchase, they have intensively and extensively developed the property by constructing farm houses for their staff, investing in necessary farm machinery and an irrigation system and stocking large quantities of fertilizers and that they also have a huge work force working on the numerous crops that they have in different stages including the nascent, vegetative stages and those ready for harvesting.
10. The 1st Intended Interested Party deponed that should any part of the farming activities be stopped, their production process will be severely affected as the seeds and agrovet products like pesticides and herbicides will expire and that the employees will be rendered redundant and their market will suffer huge loss.



11. According to the deponent, on the 12th February, 2021, the Decree Holder and person's unknown to him visited their farm and insisted on taking over the same alleging it belonged to her late father; that he visited the Judgment Debtor who affirmed that as per its records, parcel 12 belonged to it; that he was further informed that the Decree Holder is only entitled to parcel 280 and that he reported the matter to the local area chief who asked the Decree Holder to go to court to challenge the title.
12. Mr. Muthusi stated that after the Decree Holder failed to challenge his title, they filed ELC Case E018 of 2021 against her; that in response, the Decree Holder raised the issue of res judicata which is how he discovered the existence of this matter; that he consulted the Judgment Debtor's directors who were also unaware of the matter on account of the acrimonious handover in 2012 and that they nonetheless informed him that the deceased held one share and was entitled to 6 acres touching on the water zone of River Tana, 105 acres of dry land and 29 acres of the Hillside.
13. The 1st Interested Party deposed that he was further informed by the directors that through a survey exercise, they confirmed that parcel number 280 where the deceased James Makobo was buried had the required acreage being 6 acres of the waterfront, 105 acres of the dry land and 29 acres within Matungulu Hills and that any other claim by the Decree Holders constitute unjust enrichment.
14. According to the 1st Interested Party, had he known about the proceedings, he would have applied to be enjoined before its conclusion; that they are in possession of the suit property and hold a valid title to the suit property which the Plaintiff has not even applied to be revoked and that as it stands, his proprietary interest in the suit property has been trashed without him being accorded an opportunity to be heard.
15. He urged that there are sufficient grounds upon which the court can exercise its unfettered jurisdiction to review the matter, including the fact that there was no resolution passed by the Judgment Debtor to have the said land sold to the Decree Holder nor written evidence of sale; that there is no evidence that he was ever notified of this case, and that he financed the entire survey process to the benefit of the shareholders s per their resolution.
16. In support of the Motion, the Judgment Debtor, through its Chairman, Leonard Munyao Kiiti, swore a Replying Affidavit on 14th June, 2023. He deponed that his late father, Benson Kiiti Kamba, was a shareholder of the Judgment Debtor member number 54 with a share capital of 15,000 shares and that he has since the 1980's attended the company meetings on behalf of his father and is consequently aware of all the issues therein.
17. According to the Judgment Debtor's Chairman, in 1982 or thereabouts, the Judgment Debtor, under the chairmanship of the late Henry Muli resolved to have its land surveyed and allocated to members and that they contracted Mr. Gitau, who purported to be a licensed surveyor to carry out the exercise.
18. He stated that the survey aforesaid had numerous shortcomings, to wit, members were not allocated land that they had settled on leading to some of them being relocated, the allocation did not consider the nature of the terrain, soil type, water frontage and proximity to Masinga dam, members close to the officials were allotted prime parcels, beacons were not put into place and neither were parcel numbers indicated, some members received parcels bigger than their shares and that vide the survey, the deceased James Makobo was allocated plot 12.
19. Consequently, he deposed, on 4th February, 1986, an AGM was held where Henry Muli and his co-directors were voted out and new directors elected into office; that the new directors agreed that the survey by Mr. Gitau was flawed and needed examination and that a committee was formed for this purpose.



20. It was deponed that during this exercise, a total of 45 corrections that needed to be done were identified; that Mr. Gitau informed them that he is only permitted to do 15 corrections beyond which the entire survey process would have to be repeated and that he promised to meet the committee for further deliberations but flew out of the country leaving the entire exercise in disarray.
21. He stated that as a result of the foregoing, the committee reached out to the then District Commissioner of Machakos, Peter Saisi, who upon investigations discovered that Mr. Gitau was not a licensed surveyor and advised them to appoint another surveyor and that on the 30th December, 1987, they appointed Mr. F Munuve Kasyi who visited the land and commenced the survey process all over.
22. The Judgment Debtor's Chairman deposed that it was unanimously agreed between the committee and Mr. Kasyi that the ariel map would be followed and no members would be relocated; that each member would have a portion of the hilly area, plain area and water frontage to enable them access to water and that members whose parcels were touching the water would have two parcels being the plain and water frontage as one parcel and the hilly as the other while those whose parcels were not on the water would get three, one at the water frontage, one plain and the other at the hilly areas.
23. According to Mr Kiiti, in view of the challenge posed in meeting the cost of the survey process, it was decided vide the resolution dated 4th May, 1991 that plot 12 which housed the company workshop would be sold to finance the same; that it was equally agreed that every member would be entitled to 6 acres at the waterfront, 105 acres at the plain and 29 acres at the hilly area and that the deceased, James Makobo, was allotted parcel 280 which has 111 acres covering 6 acres for river frontage and 105 acres for plain area and that he had also land parcel 77 making a total of 140 acres.
24. It was his deposition that the 140 acres owned by the late James Makobo is different from the 120 acres he previously had by the old and invalidated survey; that him and his wife are buried on this parcel of land which by the new survey is identified as Ndithini/Mananja Block 6/280 and that according to the documents availed by the late James Makobo, certificates number 084 and 085 were given pursuant to the survey by Mr. Gitau which was unanimously rejected by members in their meeting of 4th February, 1986.
25. According to the Judgment Debtor, the unsigned letter allegedly from Mr. Muli indicates that the deceased owns plot 1 measuring approximately 22.5 acres and plot 12 measuring 100 acres making a total of 122.5 acres.
26. He stated that however, the register of members prepared by the directors indicate that James Makobo being member no 67 has a total of 120 acres plus 9 acres at the plain area making a total of 129 acres bringing into question how different documents prepared by the same office touching on the same parcels and individuals would have different acreages.
27. He stated that all allocations previously done by Mr. Gitau were rendered obsolete and in line with the new exercise, the deceased had the land he has settled his family on surveyed in his names being parcel Ndithini/Mananja Block 6/280 (parcel 280); that he is also the owner of parcel number Ndithini/Mananja Block 6/77 and that the total acreage claimed by the Decree Holder is made up as follows:
 - i. Plot no 1 - 22.5 acres
 - ii. Plot no 12 (now plot 2.267) - 97.5 acres
 - iii. Plot 280 - 111 acres
 - iv. Plot 77 - 29 acres



28. According to the deponent, even assuming that plots 1 and 77 were to be left out in determining the Decree Holders acreage, he would still be in possession of 207.5 acres as opposed to his rightful entitlement of 140 acres going by F. Munuve Kasyi report and 120 acres by Mr Gitau's report and yet his share capital remains unchanged and that the only explanation for him having been allocated 260 acres beyond his shareholding is the fraud perpetuated by Mr. Gitau and the previous office holders.
29. He averred that to date, parcels 1 and 12 do not exist in any government record, neither does the survey by Mr. Gitau that purported to create them; that it is inconceivable how the two parcels came to be in existence without supporting documents; that the acquisition of land is not an event but a process and must conform to due process of the law and that it is apparent that the proposed Interested Parties application is merited as it stands to correct the scheme hatched by the previous directors to defraud members of their land.
30. In response to the Motion, the Decree Holder filed a Notice of Preliminary Objection dated the 11th April, 2023 premised on the grounds that:
- i. The Intended Interested Party/Applicant lacks locus standi to file the application.
 - ii. The Honourable Court lacks the jurisdiction to entertain the application.
 - iii. The application is frivolous, vexatious and an abuse of the court process.
31. The Judgment Debtor's Motion dated 2nd November, 2023 is seeking for the following reliefs:
- i. That this court do review the judgment dated 10th February, 2006 in such terms as it deems fit and expedient and vary and/or set it aside.
 - ii. That the costs of this application be provided.
32. The Motion is based on the grounds on the face thereof and supported by the affidavit of Leonard Munyao Kiiti, the Chairman of the Judgment Debtor of an even date. His affidavit in support of the application mirrors the affidavit in support of the Interested Applicants' application which I have summarized above.
33. In response to the Motion, the Decree Holder swore a Replying Affidavit on the 17th June, 2024. She deponed that the issues raised by the Judgment Debtor were extensively litigated upon where both parties were given the opportunity to adduce evidence to support their claim and the same are best suited for appeal rather than the review sought.
34. According to the Decree Holder, the Motion discloses no error on the face of the record nor does it disclose any new material; that the Judgment Debtor seeks to legitimize its unlawful sale of the suit property and that should the orders sought be granted, it will be akin to the court sitting on appeal of its own decision.
35. She deponed that contrary to the Judgment Debtor's assertions, Mr. Muli never held the position of Chairman nor did Mr. Gitau survey the company property as alleged; that vide its Judgment, the court, inter-alia declared that her father was the owner of plots 1 and 12 Matungulu and issued permanent injunctive orders restraining the Judgment Debtor from selling, alienating or interfering with the said land and that the Judgment Debtor was duly represented during trial and called witnesses who testified on its behalf.
36. The Decree Holder stated that after considering the evidence and the testimony, the court observed among others that when the advert for the sale of plot 12 was put up in 1991, the survey had not yet



- started and that when the survey was undertaken in 1995, the court had already issued injunctive orders on the 2nd April, 1992.
37. She deposed that in blatant disobedience of the injunctive orders, the Judgment Debtor proceeded with the survey resulting in plot 12 and that the Judgment Debtor had no justification in offering plot 12 for sale as it belonged to her father.
 38. It was her deposition that her father was a lawful member of the Judgment Debtor and was entitled to his property by virtue of having shares; that her father and his kin are buried on plot 1 measuring 22.5 acres which is the only property held by the estate despite the existence of the judgment; that it is ludicrous for the Judgment Debtor to aver that parcels 1 and 12 don't exist yet there is in existence a judgment and decree touching on the very parcels of land and that further, the Intended Interested Parties by their Motion dated 6th December, 2022 make reference to buying and payments in respect of plot 12
 39. She deposed that contrary to the judgment and the decree, the Judgment Debtor has failed and/or refused to execute the necessary documents transferring plot 12 to her father and instead transferred it to Naomi Kalondi Munyao and that it is evident that the Intended Interested Party and the Judgment Debtor do not intend to adhere to the Judgment of the court.
 40. It was deposed that criminal case E795/2022 was preferred against some directors and officials of the Judgment Debtor who were charged with the offence of conspiracy to defraud and that the Motion is a means to sanitize an otherwise unlawful and illegal act.
 41. The Judgment Debtor, through its Chairman, Leonard Munyao Kiiti, filed a Supplementary Affidavit on 10th December, 2024 in which he reiterated the assertions in his Supporting Affidavit as regards the acreage of the property held by the Decree Holder. He noted that it was confirmed by the surveyor that plot 1 comprises of 22.5 hectares which translates to 111.708 acres, plot 12 is 36.423 hectares translating into 90 acres, and block 6/77 measuring 29 acres.
 42. He deposed that they do not intend to conceal any in-appropriation; that they only received confirmation of the directorship or officials of the Judgment Debtor vide the letter dated 22nd May, 2012 and assumed office in September, 2012 as the previous directors had refused to hand over the office and that they were only able to gather most documents through the directors' proxies as the directors did not have an official office nor was the company secretariat operational.
 43. Due to the foregoing, he noted, they were unaware of the case until 2020 when the Directorate of Criminal Investigations Land Fraud Unit, acting on the complaint of the Decree Holder summoned them; that it is true that the shareholding of a company to the extent of its shares signifies proprietorship in that company to the extent of the shares that one holds and that with the shareholding of Kshs 7, 500, the deceased was entitled to at least 120-140 acres.
 44. He deposed that whereas, as current directors, they were not parties to the proceedings, it is apparent from the record that the injunction alluded to was with respect to plot 12, which means that plot 1 was the subject of the re-survey whose aim was to create equity among the shareholders; that the deceased did not object to the resurveying being done on his plot 1 as it awarded him extra acreage; that the Decree Holder has by seeking more land than he is entitled to, acted unfairly and to the detriment of other shareholders and that courts should provide remedies that would balance legal formalities and ethical considerations.



Submissions

45. The Decree Holder filed submissions in support of the Preliminary Objection on the 14th February, 2024.
46. It was submitted that while the Intended Interested Parties claim to have purchased the property from the Judgment Debtor, with the sale allegedly beginning in 2002, this transaction could not have conferred any legitimate title and that the suit was filed in 1992, and the court issued temporary injunctive orders restraining interference with Plot 12.
47. Furthermore, it was submitted, permanent injunctive orders were granted in 2006. Consequently, it was submitted, it is evident that at the time of the alleged purchase, the Intended Interested Parties could not have acquired a lawful title.
48. It was further submitted that ELC E018 of 2021, filed by the Intended Interested Parties, was dismissed on the ground of res judicata and that this court's jurisdiction is compromised, necessitating the dismissal of the present Motion.
49. It was submitted that the Intended Interested Parties have failed to establish any legitimate rights or interests in the suit property and have previously attempted to litigate the same issues in ELC E018 of 2021. In light of these factors, it was urged, the Motion is unmerited and should be dismissed with costs.
50. The Judgment Debtor's counsel submitted that it is well established that orders for review may be sought on the ground of "any other sufficient reason," and that as held in *Nairobi City Council v. Thabiti Enterprises Limited* [1997] eKLR, such reasons need not be analogous to the other considerations under Order 45 of the Civil Procedure Rules.
51. Counsel argued that the present case warrants a review of the judgment, as there is a need to balance the equitable interests of over 300 shareholders of the Judgment Debtor against the Decree Holder's alleged attempt to unjustly acquire more than what is deserved.
52. It was further submitted that the Decree Holder's claim of 230.708 acres, despite being entitled to only 140 acres amounts to unjust enrichment and constitutes an unconscionable act. In support of this argument, reliance was placed on *Macharia Mwangi & 87 Others vs Davidson Mwangi Kagiri* [2014] eKLR.
53. Counsel contended that it is clear from the law that the Decree Holder has been converted into a trustee on behalf of 330 shareholders of the Judgment Debtor and that his registration as the owner of the suit property is subject to overriding interests under Section 28 of the *Land Registration Act*, in the form of a trust.
54. In conclusion, it was urged that the court should set aside the Judgment and order that the suit property reverts to the Judgment Debtor for the benefit of the shareholders. Alternatively, it was proposed that the matter be heard afresh, allowing any party wishing to present further or necessary evidence to do so.
55. The proposed Interested Parties filed submissions to the Motion of 6th December, 2022 on the 20th January, 2025. It was submitted that the 2nd Proposed Interested Party holds the title to Block 6/267 (formerly Plot 12), which is the subject of these proceedings.
56. Counsel argued that the Intended Interested Parties' title is protected under Section 26 of the *Land Registration Act*, and for a proper determination of whether the title was lawfully acquired, they must be admitted into the proceedings.



57. As the registered title holder, it was submitted, the 2nd Intended Interested Party has the requisite locus standi in this matter. Reliance was placed on the cases of Michael Muohi Gatune & 19 Others vs Luka Kimeu Mutevu, ELC 1159 of 2000, and Pamet Ole Keseet vs Sylvia Moi & 3 Others; Ndegwa Kabogo (Interested Party) [2021] eKLR.
58. It was further submitted that the Intended Interested Parties are bona fide purchasers, as recognized in Samuel Kamere vs Lands Registrar, Kajiado [2015] eKLR. Counsel argued that they have not only made substantial payments towards the purchase price but have also undertaken significant developments on the property.

Analysis & Determination

59. This suit was commenced in 1992. However, the court is not in possession of the original file. Although the court ordered for the reconstruction of the file, it would appear that neither the Decree Holder nor the Judgment Debtor has the entire record. What was supplied to this court are copies of the pleadings and proceedings held by the Directorate of Criminal Investigations. Indeed, the Plaint is missing in the supplied pleadings.
60. Having considered the Motions, objections and submissions, the issues that arise for determination are:
- i. Whether the Preliminary Objection dated the 11th April, 2023 is competent and if so, merited?
 - ii. Whether the Judgment Debtor has met the threshold for the review of the judgment dated the 10th February, 2006?
 - iii. Whether the Intended Interested Parties should be joined into these proceedings?
61. The threshold of a Preliminary Objection was set out by the Court of Appeal in the locus classicus case of Mukisa Biscuits Manufacturing Co. Ltd. vs West End Distributors (1969) EA 696 at 700 wherein Law, JA stated that:
- “...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
62. Newbold, P further held as follows:
- “A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”
63. The Supreme Court in the case of Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others [2014] eKLR re-affirmed the principle as set out in the Mukhisa Case(supra) stating:
- “A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation



or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

64. Vide the Preliminary Objection, it is contended that the Intended Interested Parties lack locus standi; that the court has no jurisdiction and that the Motion is frivolous, vexatious and an abuse of the court process. Considering the submissions in this respect, it is noted that the claim that this court has no jurisdiction is on account of the alleged lack of locus.

65. Locus standi as defined in Black’s Law Dictionary, refers to:

“The right to bring an action or to be heard in a given forum.”

66. It is well established that a party’s capacity to institute a suit is fundamental to its validity. The absence of locus standi strikes at the very foundation of a case, rendering it unsustainable. This is a jurisdictional issue and constitutes a pure point of law.

67. However, claims that the suit is scandalous, vexatious and constitutes an abuse of court process are largely subjective assertions requiring examination of pleadings and may call upon the discretion of the court in determining whether or not to strike out the suit. As such, it does not constitute a pure point of law.

68. As previously stated, locus standi refers to the right to bring an action or to be heard in a given forum. Addressing this principle, the court in the case of Alfred Njau and Others vs City Council of Nairobi (1982) KAR 229, noted as follows:

“The term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

69. In the present case, the Decree Holder argues that the Intended Interested Parties lack locus standi because their claim to the suit property arises from an alleged illegal transaction because the property was not available at the time it was transferred to them. However, this argument conflates two distinct legal principles: standing and the legitimacy of a party’s claim.

70. Locus standi pertains to a party’s right to be heard—a threshold issue that determines whether a litigant has a sufficient interest in the subject matter to justify their participation in the proceedings. This is distinct from the substantive merits of their claim, which is a matter for judicial determination after considering the facts and applicable law. The fact that a party’s claim may ultimately be deemed unlawful or unmeritorious does not, in itself, negate their right to approach the court.

71. Accordingly, the assertion that the Intended Interested Parties lack locus standi based on the alleged illegality of their title is misplaced and unsustainable.

72. The law governing the framework of review is set out in Section 80 of the *Civil Procedure Act* and Order 45, Rule 1(1) of the Civil Procedure Rules. Section 80 of the Act 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.”

73. 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 review of judgment to the court which passed the decree or made the order without unreasonable delay.”

74. A reading of the above provision makes it clear that while Section 80 of the *Civil Procedure Act* grants the court the power to make orders for review, Order 45 sets out the jurisdiction and scope thereof limiting it to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.

75. This position was restated by the Court of Appeal in *Benjoh Amalgamated Limited & another vs Kenya Commercial Bank Limited* [2014] eKLR where the court observed that:

“In the High court, both the *Civil Procedure Act* in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review”.

76. Briefly, the background to this matter is that the Decree Holder, as the Plaintiff, instituted this suit vide a Plaint dated 12th December, 1992 where he sought orders restraining the Judgment Debtor from interfering with the suit property as well as special damages. The Judgment Debtor, as the Defendant, refuted this claim asserting that the Decree Holder had been duly issued with his plots and was not entitled to plot 12.

77. Upon hearing the parties, the court, vide the judgment dated 10th February, 2006, found in favour of the Decree Holder finding him the legitimate proprietor of plot 12, the suit property, and restrained the Judgment Debtor from interfering with the same. This judgment is the subject of the present Motion.

78. The first port of call in this respect is a determination of whether the Motion for review was made without unreasonable delay. This is an important consideration as stated by the Court of Appeal in *Francis Origo & Another vs Jacob Kumali Mungala* [2005] eKLR who held:

“...most importantly, the applicant must make the application for review without unreasonable delay.”

79. It is undisputed that the impugned Judgment was delivered on 10th February, 2006. The Judgment Debtor’s Motion was filed on the 2nd November, 2023. This is approximately 17 years later.



80. According to Mr. Kiiti, despite having assumed office in 2012, they, as the new directors of the Judgment Debtor, only became aware of the matter in June 2020 when they were summoned by the Directorate of Criminal Investigations to assist in an inquiry into the case. This, it was deposed, was occasioned by their acrimonious takeover of the Judgment Debtor, as a result of which the previous directors refused to orient them and give them the relevant documents.
81. Even if the court were to accept this assertion at face value at this point, it would still follow that the Motion was filed more than 2 years after the alleged discovery of the suit. With no explanation provided for this delay, the court finds that the lapse of time constitutes unreasonable delay. The court will nonetheless consider the next ambit for purposes of completion.
82. The Motion states on its face that the same is premised on the grounds of error apparent on the face of the record, and the discovery of new and important evidence not available to the court at the time. However, the nature of the error apparent or the new and important evidence not available to the court at the time of the judgment has not been explained.
83. This ground appear to have been promptly abandoned. Indeed, the Judgment Debtor notes it vide its submissions that “the application before you seeks the orders of review of the judgment herein not on account of discovery of new evidence, mistake or error apparent on the face of the record but on the ground of Any other sufficient reason.”
84. The Court of Appeal in *Pancras T. Swai vs Kenya Breweries Limited* [2014] eKLR discussing the ambit of any other sufficient reason stated:

“As repeatedly pointed out in various decisions of this Court, the words, “for any sufficient reason” must be viewed in the context firstly of Section 80 of the *Civil Procedure Act*, Cap 21, 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. In *Sarder Mohamed v. Charan Singh Nand Singh and Another* (1959) EA 793, the High Court correctly held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate. In *Shanzu Investments Limited v. Commissioner for Lands (Civil Appeal No. 100 of 1993)* this Court with respect, correctly invoked and applied its earlier decision in *Wangechi Kimata & Another vs Charan Singh (C.A. No. 80 of 1985)* (unreported) wherein this Court held that

“any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the *Civil Procedure Act*; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”

85. According to the Judgment Debtor, the sufficient reasons warranting the review herein is the need to balance the equitable interests of more than 300 shareholders as against the Decree Holder who seeks to be unjustly enriched getting more acreage than their shares worth. It asserts that the continual claim over plot 12 is not equitable and by law, the Decree Holder holds the said plot in trust for all the other shareholders.
86. In response, the Decree Holder refutes the assertions contending that she is rightfully entitled to the suit property as established by the court. In any event, she asserts, the matters alluded to have already been litigated and do not meet the threshold for review



87. Considering the Judgment Debtor’s argument as set out in its pleadings, it is clear that the same is premised on dissatisfaction with the judgment of the court and the belief that the same has resulted in an unjust outcome. The arguments advanced by Judgment Debtor seek to show that the Decree Holder is not a legitimate owner of the property. This constitutes an attempt to re-litigate the matter which has already been litigated upon and which the Judgment Debtor fully participated.
88. The Judgment Debtor, as a company, is a distinct legal entity separate from its directors and shareholders. This principle, established in *Salomon vs Salomon & Co. Ltd* [1897] AC 22, affirms that a company enjoys perpetual succession, meaning its existence is unaffected by changes in directorship or shareholding. Regardless of any disputes among directors or shareholders, the legal personality of the company remains intact, and it retains the capacity to sue and be sued in its own name.
89. As such, the deponent cannot be heard to argue that the new directors were unaware of the suit, especially when the company was fully represented in the proceedings. The company, being a continuous legal entity, is bound by the actions and representations made on its behalf at all times, regardless of who occupies the directorship. Ultimately, no sufficient reason has been demonstrated for the review of the judgment as framed by the Judgment Debtor.
90. The Intended Interested Parties seeks to have the Judgment set aside and be joined in the proceedings. They opine that the 2nd Intended Interested Party holds a bona fide title to the suit property and that the Judgment has prejudiced their rights to the property without affording them the right to be heard.
91. While, as a general rule, a non-party to a Judgment cannot seek review under Section 80 of the [Civil Procedure Act](#) and Order 45 of the Civil Procedure Rules, exceptions exist where such a party establishes a legitimate interest in the subject matter of the suit, particularly where they claim that their rights have been adversely affected by the outcome.
92. The courts have recognized that where a party was neither aware of nor involved in a matter that has led to adverse orders against them, they may move the court to set aside the Judgment and be joined in the proceedings to ensure that justice is served.
93. Speaking to this, the Court of Appeal in *Merry Beach Limited vs Attorney General & 18 others* [2018]eKLR stated as follows:
- “ However, there are exceptional circumstances that could justify a court to enjoin a party even after judgment has been passed. One such exception is where a matter has been determined and adverse orders have been issued against a party who was neither given notice of the suit nor heard on the issue in dispute. Enjoining such a party a court would also have to set aside the judgement entered to give him/her an opportunity to be heard.”
94. According to the deponent, on the 12th February, 2021, the Decree Holder and people unknown to him visited their farm and insisted on taking over the same alleging it belonged to her late father; that he visited the Judgment Debtor who affirmed that as per its records, parcel 12 belonged to it; that he was further informed that the Decree Holder is only entitled to parcel 280 and that he reported the matter to the local area chief who asked the Decree Holder to go to court to challenge the title.
95. Mr. Muthusi stated that after the Decree Holder failed to challenge his title, they filed ELC Case E018 of 2021 against her; that in response, the Decree Holder raised the issue of res judicata which is how he discovered the existence of this matter; that he consulted the Judgment Debtor’s about directors who were also unaware of the matter on account of the acrimonious handover in 2012 and that they



nonetheless informed him that the deceased held one share and was entitled to 6 acres touching the water zone of River Tana; 105 acres of dry land and 29 acres of the Hillside.

96. The 1st Interested Party deposed that he was further informed by the directors that through a survey exercise, they confirmed that parcel number 280 where the deceased James Makobo was buried had the required acreage being 6 acres of the waterfront, 105 acres of the dry land and 29 acres within Matungulu Hills and that any other claim by the Decree Holders constitute unjust enrichment.
97. The Intended Interested Parties assert that they acquired the suit property from the Judgment Debtor through a series of transactions commencing in 2002. They contend that, upon purchase, they took possession of the property, made substantial investments, and have since been utilizing it for farming activities. They further claim that no adverse claims were made against the property until 2021, when the Decree Holder surfaced, asserting ownership over the land.
98. It is the Intended Interested Parties' case that their production process will be severely affected as the seeds and agrovet products like pesticides and herbicides will expire and that the employees will be rendered redundant and their market will suffer huge loss.
99. The Decree Holder did not file a substantive response to these assertions, opting instead to challenge the Intended Interested Parties' application through a Notice of Preliminary Objection. That omission was fatal, especially recognizing the fact that the provisions of Article 50 of *the Constitution* provides that every person has the right to a fair hearing.
100. The Decree Holder should have responded substantively on the question of whether the Intended Interested Parties were aware of this dispute considering that they are also claiming plot 12, currently registered as Block 6/267 in the name of the 2nd Interested Party.
101. A substantive response by the Decree Holder on whether the Interested Parties were aware of the suit is fundamental considering that the Intended Interested Parties claim that they purchased the suit property in the year 2002, way before the Judgment of 2006, and have always been in possession of the suit property. The Plaintiff should have rebutted this deposition by filing a Replying Affidavit, which she did not do.
102. Indeed, this court is convinced that the Intended Interested parties were not aware of this suit, and the Judgment. That explains why, based on the title they are holding, filed a distinct suit in the year 2021 when they learnt of the Decree Holder's claim.
103. Although the Decree holder has argued that the suit property was sold to the Interested Parties in 2002 during the pendency of an injunction in respect of the suit property, no evidence has been tendered to show that the said orders were registered against the title, and specifically parcel number 267 which was already in existence as at the time the Judgment was delivered, to notify the entire world, including the Interested Parties, about the orders of the court.
104. More interesting is the order of 20th December, 1995 which seems to have vacated the existing orders. In the said order, the court vacated all the rights, title, interest and ownership over plot number 12 and plot number 1 in Ndithini location and all improvements "to secure title documents for the same."
105. This order could be interpreted to mean that plot number 12, the suit property, was to be dealt with in any manner after the issuance of a title document, which seems to have happened when the number changed to parcel number 267 on a date that this court was not informed of.
106. Although by the time the title was issued to the 2nd Intended Interested Party in 2019 the court had made a conclusive finding that the property belonged to the Decree Holder, it has not been disputed by



the Judgment Debtor that all along, the Intended Interested Parties were on the suit property having purchased the same in the year 2002, and were not aware of the suit.

107. That being the case, it is the finding of this court that the Intended Interested Parties were entitled to be heard, and the Decree Holder was under an obligation to join them in the suit.
108. In any event, the Decree Holder has not informed this court why the Judgment of the court has never been executed since 2006. Section 4(4) of the *Limitation of Actions Act* provides that an action may not be brought upon a judgment after the end of 12 years from the date on which judgment was delivered.
109. The Judgment herein has therefore been caught up with the *Limitation of Actions Act*. The setting aside of the Judgment may as well be a gift to the Decree Holder, to give her another chance, if she succeeds at trial, to execute the ensuing Judgment.
110. For those reasons, the court makes the following determinations:
 - a. The Notice of Motion dated 2nd November, 2023 by the Judgment Debtor be and is hereby dismissed with costs.
 - b. The Notice of Motion dated 6th December, 2022 by the Intended Interested Parties be and is hereby allowed as follows:
 - i. Jimna Kaloki Muthusi and Naomi Kalondu Munyao, the Intended 1st and 2nd Interested Parties, be and are hereby joined in this suit as Interested Parties.
 - ii. The Judgment of this court dated 10th February, 2006 be and is hereby set aside.
 - iii. The Interested Parties to file their pleadings within 14 days of the date of this Judgment.
 - iv. Each party to bear his/her own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF MARCH, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Kamau holding brief Swaka for Plaintiff

Ms Kahara for proposed interested Party

Mr. Kahara for Muoki for Defendant

Court Assistant: Tracy

