



**Republic v District Land Registrar Uasin Gishu District thro' the Attorney General;
Kibet & another (Exparte); Rasowo & 4 others (Interested Parties) (Judicial Review
Application 38 of 2011) [2025] KEHC 3999 (KLR) (28 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3999 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
JUDICIAL REVIEW APPLICATION 38 OF 2011**

RN NYAKUNDI, J

MARCH 28, 2025

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
PROCEEDINGS FOR ORDERS OF CERTIORARI AND PROHIBITION
IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26 IN
THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES, 2010
AND
IN THE MATTER OF KENYA GAZZETTE NOTICE NO. 4974 OF 6TH MAY 2011**

BETWEEN

REPUBLIC APPLICANT

AND

**THE DISTRICT LAND REGISTRAR UASIN GISHU DISTRICT THRO' THE
ATTORNEY GENERAL RESPONDENT**

AND

SALLY K KIBET EXPARTE

ESTHER J KURUI EXPARTE

AND

JOSEPH OUMA RASOWO INTERESTED PARTY

MAURICE OMONDI AKECH INTERESTED PARTY

PASCHALIA OPANY AKETCH INTERESTED PARTY

PHILIP RABURU INTERESTED PARTY

MURIGI WANYOIKE INTERESTED PARTY



RULING

Representation:

M/s Wambua Kigamwa & Co. Advocates

M/s George Sonkule Advocates

1. Before me for determination is Notice of motion dated 24th December, 2024 expressed to be brought under the provisions of section 1A, 1B & 3A of the Civil Procedure Act, Order 45 Rule and Order 22 Rule 22 of the Civil Procedure Rules. The applicant seeks reliefs to wit: -
 - a. Spent
 - b. That there be stay of warrants of arrest issued on 19th December, 2024 against Murigi Wanyoike, pending hearing and determination of this matter.
 - c. That the ruling and/or order of this honourable court made on 17th December, issuing a warrant of arrest against the 5th Interested party/applicant be reviewed.
 - d. That there be an order that the applicant has shown cause why a warrant of arrest should not issue against him based on material now seized of this court.
 - e. That in the alternative the ruling be reviewed, set aside and or vacated forthwith as the application by the decree holder as allowed is grossly incompetent, bad in law as the said was obtained through concealing some crucial evidence of execution.
 - f. The costs be in the cause.
2. The application is anchored on grounds that:
 - a. That the applicant was condemned to pay costs of this matter yet the decree holders had already executed in this matter.
 - b. That the decree holders have consistently concealed the fact that they executed in this cause against a tractor EX GK Chasis No. 304091R4.
 - c. That the failure to place this evidence before this honourable court was due to the fact that the decree holders have been concealing this piece of evidence. That the respondent's response on the court file was a mistake from the court registry hence excusable in the circumstances.
 - d. That there is an apparent error on record as the court was misled and proceeded on the erroneous assumption to believe that there is no execution that has taken place considered the application by the claimant dated 28th April, 2023 on the erroneous assumption that the Respondent had not filed their responses when rendering itself on the merit of the application.
 - e. That be as it may, the application by the decree holder as allowed is per incuriam as it was in total disregard to the duty owed not to mislead this court.
 - f. That it is in the interest of justice that the ruling be reviewed so as to allow the court to appreciate the conduct of the decree holder in this matter as they have come to equity with unclean hands and should not be allowed to benefit from a wrong doing of their own.



3. The ex parte applicants opposed the application on grounds that it did not meet the threshold of review and the applicant if aggrieved ought to file an appeal as per the provisions of section 49 Rule 5 and 7 (1) (b) (x) of the Civil Procedure Rules.
4. The parties filed written submissions which I have endeavoured to summarize as hereunder:

The applicant's submissions

5. Learned Counsel Mr. Sonkule appearing for the applicant gave a factual background and submitted that there was an error apparent on the face of the record. He argued that one of the reasons for issuance of the warrants of arrest was that there was no evidence of execution as alleged by the 5th interested party. That the respondents claimed not to have executed in this matter.
6. It is the applicant's case that vide a ruling dated 26th January, 2022, Justice Ogolla issued a ruling that motor vehicle tractor Ex GK Chasis Number RBX304091 was not available for attachment, which implies that execution had taken place.
7. Counsel submitted that there is no evidence that the respondents ever returned the tractor to the objector. The also concealed material evidence that they sold the tractor rather than returning it to the objector. That at the time of the hearing of the notice to show cause, the 5th interested party informed the deputy registrar that execution had taken place but he did not have any document to that effect because of the clandestine nature of the respondents making sure that such evidence was not available to the 5th interested party and the court.
8. Mr. Sonkule couched one issue for determination which is whether the applicant has made a case to justify the grant the orders of review. He placed reliance on the provisions of section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.
9. Learned Counsel submitted in the affirmative on grounds that there is a piece of evidence which was not available to the court at the time it pronounced itself on the notice to show cause. That piece of evidence is to the effect that execution had taken place. That the 5th interested party has tendered evidence that there is execution that took place. He submitted that this was new evidence that was not available to the 5th interested party and for that reason the impugned ruling ought to be reviewed.

Ex-parte applicant submissions

10. Learned counsel for the ex-parte applicants submitted on the question of jurisdiction and argued that jurisdiction is primordial and it ought to be addressed as a preliminary issue. That the Deputy Registrar rendered a ruling on the 17th December, 2024 of which the 5th interested party seeks to impugn through the fiat review. He submitted that the order sought to be reviewed was made in pursuance of the special powers of the Deputy Registrar under Order 49 Rules 5 and 7 (1) (b) (x) of the Civil Procedure Rules and any person aggrieved ought to challenge the same by way of appeal to a judge in chambers by dint of Order 49 Rule 7(2) of the Civil Procedure Rules, 2010.
11. Counsel submitted further that the 5th interested party has not filed an appeal which is the prescribed mode of dealing with a grievance over the decision of the Registrar. That the court ought to down its tools. In support of this counsel cited the decision in Speaker of National Assembly v Karume, [1992] KECA 42.
12. It is submitted for the ex-parte applicants that for the 5th interested party to opt for a review as opposed to appeal, he has taken the wrong route. Counsel invited the court to consider the decision in Francis Origo & Another v Jacob Kumali Mungala [2005] eKLR.



13. Counsel further argued that even if the jurisdiction to consider a motion for review existed, the application flies against the settled tenets and juridical provisions governing review under Section 80 of the *Civil Procedure Act*. That the issues of the Kenya Gazette notice and notification of sale were matters within the 5th interested party's knowledge and which could be discovered by the exercise of due diligence then. That they cannot amount to new and important matters for purposes of review.
14. Counsel finally submitted that the 5th interested party lacks locus standi to raise the issue of sale of the tractor under the *Disposal of Uncollected Goods Act* as he was not the depositor of the tractor and he is not the objector in respect of whom the objections were allowed. He urged the court to dismiss the application in its entirety.

Analysis and determination

15. The present matter concerns an application by Murigi Wanyoike, the 5th Interested Party, seeking review of a ruling delivered on 17th December, 2024. The application principally turns on alleged procedural irregularities pertaining to execution proceedings, wherein the applicant contends that the decree holders deliberately suppressed evidence of prior execution against his property, specifically a tractor bearing chassis number 304091R4. This concealment, the applicant submits, led the court to proceed on a fundamentally flawed premise that no execution had occurred when adjudicating the decree holder's application of 28th April, 2023. The applicant characterizes this ruling as per incuriam, asserting that the decree holders approached the court with unclean hands, thus contravening the cardinal equitable maxim that one who seeks equity must do equity.
16. The ex-parte applicants on the other hand vigorously oppose this position, contending that the application fails to satisfy the established threshold for review and that the appropriate procedural recourse would have been an appeal under Order 49 Rules 5 and 7(1)(b)(x) of the Civil Procedure Rules.
17. The jurisdiction of the High Court to conduct review is firmly established in the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya and further elaborated in the Civil Procedure Rules, 2010. This statutory framework provides the legal foundation for the Court's authority to examine administrative actions and ensure compliance with principles of legality, rationality, and procedural fairness.
18. Section 80 of the *Civil Procedure 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.”
19. Order 45 Rule 1 of the Civil Procedure Rules, 2010 further provides for review in the following manner: -
 - “ 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.”

20. The Supreme Court has established definitive principles governing judicial review through its jurisprudence. In Application No. 8 of 2017, *Parliamentary Service Commission v Martin Nyaga Wambora & others* [2018] eKLR, the Court endorsed the authoritative findings previously articulated by the East Africa Court of Appeal in the landmark case of *Mbogo and another v Shah* [1968] EA. The Court established the following foundational principles for review:

“(31) Consequently, drawing from the case law above, particularly *Mbogo and Another v Shah*, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:

- i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.
- 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.”

21. The scope and application of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules were comprehensively examined by the High Court in Miscellaneous Application 317 of 2018, *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR. In this decision, the



Court, after conducting a thorough analysis of comparative jurisprudence, articulated and established the following definitive principles to guide the judicial review of its own decisions:

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
- ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
- x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1."

22. The ruling dated 17th December, 2024 reads as follows verbatim:

"In response, the judgment debtor states that it was the 2nd time the decree holder was executing against him. That at first the decree holder took his tractor and sold it. In cross examination he stated that he had sold the said tractor to Joseph Njoroge. He also stated



that he was not aware that the objection proceedings had succeeded and that the tractor Registration No. XGK-chassis No. RBX3040912R4 was not sold. He stated that he had sold the tractor to one Joseph and did not know whether the same had been sold by the auctioneers. The JD clearly indicated that he had not paid any monies neither did he make any proposal on the outstanding amounts.

I also note that the 5th interested party/JD has not denied the fact that the D/H was awarded costs in this matter. He only purported to indicate that the D/H had already executed for the said amounts by selling his tractor which he later indicates had been sold by himself to someone else. In any event, the court through the orders issued by Hon. Justice E. Ogola on 26th January, 2022 stopped the attachment on the said vehicle. There is no proof that execution proceeded after these orders. The 5th Respondents averments do not hold water. This court dismisses the unsubstantiated excuses.”

23. The review jurisdiction under section 80 as read with Order 45 Rule 1 of the Civil Procedure Rules should be contrasted with the Constitutional remedy in any proceedings brought under Art. 22 of *the Constitution*. In a Constitutional litigation, an order of Judicial Review stipulates grant of prerogative writs of prohibition, certiorari and mandamus against a public body, government agency or constitutional organ tasked with the mandate of decision making likely to adversely affect a citizen or a resident of Kenya within any given time. In this respect, the High Court is to exercise its supervisory jurisdiction under Art. 165 (6) & (7) of *the Constitution*. In exercising the power of review in Art. 23, the court’s inquiry is directed primarily to the legality of the decision in issue. For example, whether the decision maker acted illegally, rationally, or improperly in a procedural sense. The merits of the decision are not in issue. Essentially it matters not for example that the impugned public body, agency or tribunal appears to have made the right decision one which given the factual and policy considerations, most objective observers would have agreed with. This remedy should be contrasted with the appropriate remedy of an appeal process. My reading of the grievance by the applicant in this case is aggrieved with the decision by the Deputy Registrar in relation to issues surrounding a judgment debt subsequent taxation and committal to civil jail of the judgment debtor. If indeed the applicant feels strongly that the litigation history and decision made thereafter are simply wrong, the remedy available is that of an appeal process. This distinction between judicial review and appeal is of fundamental constitutional importance and litigants, claimants or applicants should not confuse the two procedural jurisdiction conferred to the High court. Review and appeal must also be contrasted by reference to their legal origins that the rights to judicial review emanates from the common law and in our constitutional democracy it is entrenched in *the constitution*. The legislature went further to enact *fair Administrative Action Act* which makes provisions under section 7 some key elements for consideration when a court of law is faced with a claim under judicial review thus section 7 provides:

- “(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to
- (a) a court in accordance with section 8; or
 - (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.
- (2) A court or tribunal under subsection (1) may review an administrative action or decision, if
- (a) the person who made the decision
 - (i) was not authorized to do so by the empowering provision;



- (ii) acted in excess of jurisdiction or power conferred under any written law;
 - (iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;
 - (iv) was biased or may reasonably be suspected of bias; or
 - (v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;
- (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
 - (c) the action or decision was procedurally unfair;
 - (d) the action or decision was materially influenced by an error of law; (e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;
 - (f) the administrator failed to take into account relevant considerations; (g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;
 - (h) the administrative action or decision was made in bad faith;
 - (i) the administrative action or decision is not rationally connected to
 - (i) the purpose for which it was taken;
 - (ii) the purpose of the empowering provision;
 - (iii) the information before the administrator; or
 - (iv) the reasons given for it by the administrator;
 - j. there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;
 - k. the administrative action or decision is unreasonable;
 - l. the administrative action or decision is not proportionate to the interests or rights affected;
 - m. the administrative action or decision violates the legitimate expectations of the person to whom it relates;
 - n. the administrative action or decision is unfair; or
 - o. the administrative action or decision is taken or made in abuse of power.”

24. Judicial review is concerned with these standards and with the application of legal rules enshrined in the doctrine of ultra vires under Art. 50 of *the Constitution* dealing with fair trial rights. That is the very reason that judicial review should also be distinguished with the review jurisdiction provided in section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules. Whereas the expression of the doctrine of Judicial Review represents one of the principal checks and balances developed by



the Constitution to guard against abuse of power, having that remedy underpinned by the separation of powers. This is not the case with the review jurisdiction in which a session judge is empowered to revisit a decision made on the merits on any of the grounds stipulated in Order 45 Rule 1 of the civil Procedure Rules. It is generally accepted that the position on review jurisdiction under Section 80 and Order 45 Rule 1, the first point of call is for the decision maker to be asked to relook at the decision and if it falls within the scope of Order 45 Rule 1, he or she will be at liberty to take the necessary step in order to meet the ends of justice of the matter thus the High court will not the forum of conveniens to review the decision of the Deputy Registrar and other attendant orders which flow from that decision. In this case, procedurally if the applicant was substantially aggrieved with the decision of the deputy registrar, the approach to the High Court is by way of an appeal. This jurisdictional issues are properly understood from the factual matrix of this case. This court is being asked to quash the decision of the Deputy Registrar and no evidence has been presented that she acted illegally, irregularly and reasonably or with impropriety in arriving at the impugned decision on the merits. There is no evidence that her decision infringed the principles of natural justice or that the same was given in excess of jurisdiction not conferred by statute.

25. In the end, upon careful analysis of the Deputy Registrar's determination, it becomes apparent that the applicant's claim of prior execution against the tractor was thoroughly considered and rejected based on two critical factors: first, the applicant's own contradictory testimony regarding the disposition of the tractor; and second, the existence of prior court orders that specifically prohibited attachment of the vehicle in question. Furthermore, the applicant has failed to demonstrate why, with reasonable diligence, the evidence now being adduced could not have been presented during the original proceedings. The alleged concealment of material evidence by the decree holders remains unsubstantiated by documentary proof that would justify the extraordinary remedy of review.
26. In my view, the issues raised by the applicant qualify for an appeal rather than a review. Order 49 Rule 7(2) of the Civil Procedure Rules, 2010 explicitly provides that when a party is aggrieved by a decision of the Deputy Registrar made under the special powers conferred by the Rules, the appropriate recourse is to appeal to a Judge in chambers. The applicant, dissatisfied with the Deputy Registrar's determination, has incorrectly pursued the path of review instead of following the prescribed appellate procedure. This procedural misstep is significant and constitutes an improper forum for addressing the applicant's grievances. The clear legislative intent behind Order 49 Rule 7(2) was to establish a specific mechanism for challenging such decisions, which the applicant has failed to utilize.
27. Having thoroughly examined the competing arguments and documentary evidence, this Court finds that the applicant has failed to establish sufficient grounds for review. The application lacks merit, as it neither demonstrates an error apparent on the face of the record nor presents new and important evidence that could not have been discovered with reasonable diligence. The inconsistencies in the applicant's own testimony regarding the tractor further undermine the application's foundation.
28. For those reasons, the application fails for want of merit and each party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH DAY OF MARCH 2025.

.....

R. NYAKUNDI
JUDGE

