



**Njuho v Keboi & 23 others (Environment & Land Case  
71 of 2018) [2025] KEELC 3001 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 3001 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 71 OF 2018**

**AA OMOLLO, J  
MARCH 27, 2025**

**BETWEEN**

**SAMUEL NDIBA NJUHO ..... PLAINTIFF**

**AND**

**JUSTUS KISEMER KEBOI ..... 1<sup>ST</sup> DEFENDANT**

**DANIEL K. LEPATEI & 22 OTHERS & 22 OTHERS & 22  
OTHERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The 10<sup>th</sup> Defendant/Applicant filed notice of motion dated November 21<sup>st</sup> 2024 supported by an affidavit sworn by Joan Odongo on the same date seeking for the following orders;
  1. Spent
  2. That this Court be pleased to review the conditional orders of the court delivered on 21<sup>st</sup> June 2021 allowing the 10<sup>th</sup> Defendant/Applicant's application to be struck out.
  3. That this Honourable Court be please to set aside or vary the condition requiring the deposit of the title.
  4. That this Honourable Court be pleased to strike out the 10<sup>th</sup> Defendant/Applicant from the suit unconditionally.
  5. That this honourable Court be pleased to issue any other orders it may deem fit and just.
  6. That the costs of and incidental to this application be provided for.
2. The motion was premised on the grounds that on 7<sup>th</sup> May 2021, the 10<sup>th</sup> Defendant/Applicant filed an application seeking inter alia that his name (the 10<sup>th</sup> Defendant) be struck out as a party in the suit.



On 21<sup>st</sup> June 2021, this court issued the said order on the condition that it deposits the title to the suit property in court.

3. That the Title to the suit property had been issued to the 9<sup>th</sup> Defendant, Patrick Irungu Mburu on 5<sup>th</sup> May, 2021, before the orders were issued thus the condition of depositing the said Title in Court cannot be fulfilled as the 10<sup>th</sup> Defendant/Applicant no longer has possession or control over it. The Applicant explained that the failure to disclose the issuance of the title to the 9<sup>th</sup> Defendant, prior to the court's orders was due to an inadvertent mistake and breakdown in information between the Bank's then representative, Elissa Otemba, and the counsel previously on record for the 10<sup>th</sup> Defendant/Applicant, Ms. Stephanie Kioko.
4. The applicant deposes that whereas this information was shared with Ms. Kioko, she left the firm without effecting the instructions to review the conditional order which had been overtaken by events as at the time it was made. Further, it came to their attention that the application for review had not been made on 11<sup>th</sup> November 2024 when the 10<sup>th</sup> Defendant/Applicant's legal officer followed up to inquire about the status of the matter. Thus, these make sufficient reasons for this court to review the impugned orders to protect the interests of all parties.
5. The Plaintiff opposed the application vide his replying affidavit sworn on 19<sup>th</sup> December 2024. He deposes that on September 28<sup>th</sup> 2018 he sued the 9<sup>th</sup> Defendant, Patrick Irungu Mburu, together with the 10<sup>th</sup> Defendant the Co-operative Bank of Kenya Limited on the basis that the 9<sup>th</sup> Defendant had fraudulently acquired his plot LR No. Kajiado/Kisaju/13225 and the 10<sup>th</sup> Defendant had fraudulently charged the same for Kshs 4,000,000 without carrying out any due diligence and kept the title in its custody as a collateral.
6. The Plaintiff stated that on May 7<sup>th</sup> 2021, the 10<sup>th</sup> defendant formally applied to the court to be removed and or struck out as a party and in June 21<sup>st</sup> 2021, the court ordered that the 10<sup>th</sup> defendant deposit the title documents in court before being removed as a party. That the 10<sup>th</sup> defendant did not appeal the Order neither did it claim that it had any difficulties in depositing title for LR No. Kajiado/Kisaju/13225 in court or that it was not in its custody.
7. That since May 7<sup>th</sup> 2021, nearly 4 years, parties have appeared before court more than ten times and the 10<sup>th</sup> Defendant has not complied with the court Order. The Plaintiff stated that on 25<sup>th</sup> November 2024, after nearly 4 years, the 10<sup>th</sup> defendant now claims that the title in question was released to the 9<sup>th</sup> defendant before the Order was made and admits that it did not give this information to court on 21<sup>st</sup> June 2021.
8. That the 9<sup>th</sup> defendant did not enter appearance in the present suit and neither did he file a defence thus if the 10<sup>th</sup> defendant released the title to the 9<sup>th</sup> defendant, it must have been a deliberate move to defeat the ends of justice.

### **Submissions**

9. In support of its application, the 10<sup>th</sup> Defendant/Applicant filed submissions dated 24<sup>th</sup> January 2025 while in opposition, the Plaintiff filed submissions dated 6<sup>th</sup> February 2025. The 10<sup>th</sup> Defendant submitted that have met the grounds to warrant a review of the conditional order issued on 21<sup>st</sup> June 2021.
10. According to the Applicant, in submitting meeting the threshold of Order 45 of the Civil Procedure Rules, their grounds for a review is the new evidence that has been discovered, particularly that the title to the suit property was issued to the 9<sup>th</sup> Defendant before the court's order. That the Applicant is



unable to comply with the court's conditional order to deposit the title because it no longer holds the title, and the 9<sup>th</sup> Defendant, now in possession of the title, is a party to the suit.

11. The 10<sup>th</sup> Defendant also argued that there is no direct claim against them, as their interest was related to a commercial charge that has since been discharged. The Applicant submitted further that a litigant should not suffer due to the mistakes or omissions of their legal representative, as held in several sets like *Salat v Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR and *Philip Keipto Chemwolo & Another v Augustine Kubende* (1986)eKLR.
12. It acknowledges that the oversight regarding the title's issuance was caused by the previous Counsel's failure to inform the court. That the Counsel unexpectedly left the firm, leading to a disruption in case handling and the said inaction was an unintended oversight.
13. They submitted that the delay in filing the review is excusable, citing the departure of Counsel, the passing of the 1<sup>st</sup> Defendant, and the overall minimal progress of the case over the past two years. In support of this argument, the Applicant relied on the case of *Mwangi S. Kimenyi v Attorney General & Another* [2014] eKLR, in submitting that the delay should be seen as reasonable given the exceptional circumstances and does not cause unjust disadvantage or prejudice to the other parties.
14. The Plaintiff on the other hand submits that the 10<sup>th</sup> defendant applied to be discharged from the present suit and that it held the title to the suit property charged to it to secure a loan advanced to the 9<sup>th</sup> Defendant and which land is claimed by the plaintiff. The Plaintiff poses the question thus, "how can the 10<sup>th</sup> Defendant apply to review an order they have been granted when they failed to fulfill the conditions upon which the said order was predicated?"
15. The Plaintiff submitted that the 10<sup>th</sup> Defendant has not produced any evidence to back up its allegations stating that it has not produced an official search to demonstrate when the property was discharged nor has it shown that it registered the inhibition as ordered by the court. That the 10<sup>th</sup> defendant has not attempted to redeem itself, knowing it discharged the title and from 2018 knew it had been sued because of the said title alongside the 9<sup>th</sup> defendant but upon discharge gave it to the 9<sup>th</sup> Defendant and has failed to register the inhibition.

### **Analysis and Determination:**

16. This application seeks to review the orders issued by this court on June 21<sup>st</sup> 2021 to the 10<sup>th</sup> Defendant after they sought to be struck out of the suit. The impugned orders granted read as follows;
  - (i) Discharge the charge registered against Title No. Kajiado/Kisaju/13225.
  - (ii) Register an inhibition against Title No. Kajiado/Kisaju/13225 to prevent any other or further dealings with the property.
  - (iii) Discharge of the charge and inhibition to be registered simultaneously.
  - (iv) Upon discharge of the charge the 10<sup>th</sup> defendant to hand over the title to the Deputy Registrar of the High Court for safe custody pending the hearing and determination of the present suit.
17. Under Section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the Civil Procedure Rules, the court may review its decision, inter alia: - on account of some 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.



18. The Applicant states that at the time when the order was made, they did not have the subject title deed in their possession because they had discharged the suit property and released the suit title to the 9<sup>th</sup> Defendant. That the failure to disclose the issuance of the said title to the 9<sup>th</sup> Defendant, prior to the court's orders was due to inadvertent mistake and breakdown in communication between the Bank's then representative, Elissa Otemba, and their previous counsel previously, Ms. Stephanie Kioko who they aver left the firm without effecting the instructions to review the conditional order.

19. As to whether there was discovery of new evidence, courts have exercised caution to prevent a party against whom a decision has been entered from procuring new evidence so as to strengthen or change the complexion of the case. In the case of Turbo Highway Eldoret Limited –vs- Synergy Industrial Credit Limited [2016]eKLR Sewe J. cited the case of Rose Kaiza –vs- Angelo Mpanjuiza [2009]eKLR, where the Court of Appeal considered an application for review on the ground of new evidence and held that:-

“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 ground of a 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 any new and important matter which was not within the knowledge of the party when the decree was made.”

20. The new evidence ought to have been not within the knowledge of the party and could not have been accessed when the order was being made. In this case, the 10<sup>th</sup> Defendant alleges to have issued the title to the suit property to the 9<sup>th</sup> Defendant on 5<sup>th</sup> May 2021. The information that the Applicant was not in possession of the suit title and which is now referred to as new evidence was within its (Applicant's) possession even before the filing of the application dated 5<sup>th</sup> May 2021. This is discernible from the document produced as annex JO-3 which is dated 19<sup>th</sup> April 2021. The document (annex JO-3) is a request for release of the “discharge” under the paragraph of title.

21. The 10<sup>th</sup> Defendant/Applicant is heaping blame on its previous counsels yet cases belong to parties. Why was this information not disclosed in the grounds in support of the motion whose orders are sought to be reviewed? Besides, the Applicant has not annexed any records from the Lands registry to confirm when the discharge of charge was registered. Worse still, the applicant does not explain to the court what prohibited it from complying with the second limb of the order that directed them to register an inhibition to prevent further dealings on the title to the suit land.

22. It is true that parties should not be made to shoulder the consequences of the negligence of their advocates. The same way the Plaintiff should not be the one to bear the inadvertence of advocates of opposing counsel. In the case of Duale Mary Ann Gurre –Vs – Amina Mohamed Mahamood & Another [2014] eKLR, where Hon. Justice Mutungi held as follows: -

“An advocate is the agent of the party who instructs him and such instructing client as the principal continues to have the obligation and the duty to ensure that the agent is executing the instructions given. In the case of litigation, the suit belongs to the client and the client



has an obligation to do follow up with his Advocate to ensure the Advocate is carrying out the instructions as given. The litigation does not belong to the Advocate but to the client. If the Advocate commits a negligent act the client has an independent cause of action against the Advocate.”

23. The present application dated 21<sup>st</sup> November 2024 was made almost 3 years after the order sought to be reviewed were issued on 21<sup>st</sup> June 2021. The explanation for the inordinate delay that there was a breakdown in communication and the lawyer leaving the law firm in my opinion was not sufficient. In applying the doctrines of equity of; equity aids the vigilant not the indolent and he who wants equity must do equity, I am unable to find in favour of the Applicant.
24. First because registering an inhibition by way of a court order did not require the Applicants to be in possession of the suit title. Thus, it failed to do the right thing (do equity). In addition, the indolence in bringing the application has put the Plaintiff to a disadvantage and therefore granting the orders sought is equivalent to letting the Applicant eat its cake and keep it.
25. The application is dismissed for want of merit with costs to the Plaintiff.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF MARCH, 2025**

**A. OMOLLO**

**JUDGE**

