



REPUBLIC OF KENYA



El Kithiri (Administrator of the Estate of Faraj Abeid) v Timimi (Environment & Land Case E130 of 2022) [2025] KEELC 4192 (KLR) (29 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4192 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E130 OF 2022**

YM ANGIMA, J

MAY 29, 2025

BETWEEN

HAMDAN FARAJ ABED EL KITHIRI (ADMINISTRATOR OF THE ESTATE OF FARAJ ABEID) PLAINTIFF

AND

YUSUF KARAMA TIMIMI DEFENDANT

RULING

1. By a notice of motion dated 03.10.2024 filed pursuant to Order 45 rule 1 and Order 51 of the Civil Procedure Rules (the Rules) Sections 1A, 1B and 3A of the *Civil Procedure Act* (Cap 21) Articles 159 and 165 (3) of *the Constitution* the defendant sought leave of court to change advocates and a review of the decree passed on 24.04.2024.
2. The defendant contended that there was a good reason to review the decree because the plaintiff had failed to disclose during the trial that the suit property, that is, Msa Block/XVI/1113/MN had already been sub-divided hence it was non-existent. For that reason, he contended that there was an error apparent on the face of the record which required a review. The application was supported by an affidavit sworn by the defendant on 03.10.2024.
3. The plaintiff filed a notice of preliminary objection dated 04.03.2025 and a replying affidavit sworn on even date in opposition to the application. The gist of the response was that the defendant had already moved to the Court of Appeal to challenge the impugned decree vide Mombasa Civil Application No. E066 of 2024 where the parties had already filed their respective submissions to an application for leave to file a notice of appeal and record of appeal out of time. The plaintiff also filed a supplementary affidavit sworn on 07.03.2025 exhibiting copies of the documents filed before the Court of Appeal.



4. When the application was listed for directions it was directed that the same shall be canvassed through written submissions. The record shows that the defendant filed written submissions dated 05.03.2025 whereas the plaintiff's submissions were dated 17.04.2025.
5. Order 45 Rule 1 of the Rules upon which the defendant's application is based stipulates as follows;
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.
6. There is no doubt from the material on record that the defendant has sought to challenge, before the Court of Appeal, the decree sought to be reviewed in the instant application. It would appear that the defendant has chosen to gamble with the judicial process by casting his net as wide as possible in the hope that if he misses to catch one fish here he may possibly catch it before the higher court. What the defendant has done is a clear violation of Order 45 Rule 1 pursuant to which he moved the court.
7. On the basis of Order 45 Rule 1 of the Rules and the authorities cited by the plaintiff's advocate some of which was decided by this court sitting at Embu, the court finds that the defendant's application for review is incompetent and untenable. The defendant was bound to make an election on which route to pursue. He could not legitimately engage in both the review and the appeal mechanism simultaneously.
8. The upshot of the foregoing is that the court finds the defendant's application for review to be incompetent and bad in law. As a consequence, the notice of motion dated 03.10.2024 is hereby struck out with costs to the plaintiff.

It so ordered.

Orders accordingly.

conclusions

RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 29TH DAY OF MAY, 2025.

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Y. M. ANGIMA

JUDGE

In the presence of:

Gillian - Court assistant

Mr. Oddiaga for the plaintiff

Mr. Mangale for the defendant

