Shee v Kamau & 2 others (Environment and Land Case 49 of 2021)
[2025] KEELC 7915 (KLR) (11 November 2025) (Ruling)

Neutral citation: [2025] KEELC 7915 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ENVIRONMENT AND LAND CASE 49 OF 2021

AE DENA, J

NOVEMBER 11, 2025

BETWEEN

SALIMU MWALIMU SHEE ..... PLAINTIFF

AND

MACHARIA KAMAU ..... 1ST DEFENDANT

MARTIN MOGWANJA ..... 2ND DEFENDANT

PAULINE MOGWANJA ..... 3RD DEFENDANT

RULING

1. This ruling is the subject of the Notice of Motion application dated 7th October 2024 filed by the Defendants and the Preliminary Objection filed in response thereto dated 1st November 2024.

The Notice of Motion

2. The applicants seeks the following orders; -

    1. SPENT

    2. That upon hearing ex-parte, an interim order of stay of execution of the Judgement, Decree and all consequential orders made on 20th September 2024 be issued pending hearing and determination of the Defendants' Applicants' motion for review.

    3. That upon hearing inter-partes, the Judgement, Decree and all consequential orders issued by this Honourable Court on 20th September 2024 be reviewed, vacated, and set aside and the same be substituted with an order decree dismissing the entire suit with costs to the Defendants Applicants.

4. That to protect, preserve and maintain the dignity of this Honourable Court, one Salim Mwalimu Shee, the Plaintiff Respondent herein and Halima Amir Boi be cited for perjury under Section 108(1) as read together with Section 110 of the Penal Code Cap 63 Laws of Kenya, for deliberately giving false evidence on oath.

5. That the costs of this motion in any event be borne by the Plaintiff Respondent.

3. The application was premised on the grounds on its face. It was supported by the depositions in the affidavit sworn by Macharia Kamau the 1st Defendant with authority of the 2nd and 3rd Defendants Applicants.

4. The deponent avers that by a Judgement and decree of this court adverse orders were issued against the Defendants to demolish the structures on Kwale Galu Kinondo 720 the suit property within ninety (90) days and for the Land Registrar Kwale to expunge all documents indicating that the suit property was transferred to the Defendants Applicants herein and reconstruct all the records to reflect the Plaintiff Respondent as the legal registered owner of the suit property.

5. That stay of execution of the said judgement was not granted particularly on cancellation of the Defendants Applicants' title to the suit property. There is apprehension the plaintiff was is likely to dispose the same to unsuspecting third parties thus rendering the success of this motion a pyrrhic victory.

6. The applicants aver they stand to suffer substantial and irreparable loss and damage in the strenuous and herculean task of demolishing the permanent structures erected on the suit property as ordered unless the status quo prevailing is maintained before the expiry of the ninety (90) days granted to the Defendants Applicants to demolish the said structures on the suit property pending the determination of this application.

7. The applicants assert they are the bonafide proprietors of the suit property with an indefeasible title against the Plaintiff having been issued with a title to the same on 19th February 2001. (a copy of the Certificate of Title was annexed hereto and Marked MK-3)

8. That they have been in actual possession and occupation of the suit property from sometime in the year 2001 (over 23 years) when they acquired the suit property and will thus be seriously prejudiced should the Land Registrar cancel the applicants instruments of title as ordered before the instant motion for review is heard and determined.

9. It is deponed that the Plaintiff Respondent has never been in possession of the suit property and therefore does not stand to suffer any loss and or damage. That no prejudice will therefore be suffered by the Plaintiff if stay of execution is granted. To the contrary, the applicants stand to suffer irreparably should the decree be executed which will put the suit property out of this Court's jurisdiction as there is a real danger that it may be sold to third parties.

10. The deponent adds that he has had a long career of over 24 years with several United Nations Organizations, including as UNICEF Representative and UNDP UN Resident Coordinator and as plenipotentiary Ambassador for Kenya to the United Nations both in Nairobi and UN Headquarters in New York. That he served as principal Secretary to the Ministry of Foreign Affairs for five years until the year 2022 and was currently the Ambassador and Special Envoy of the East Africa Community Facilitator on DRC as well as the Group President and Managing Director of the Trade Development Bank Group.

11. According the deponent the said positions were and still are extremely engaging hence the need to engage the assistance of third parties in the purchase and transfer of the suit property as well as prosecution of the trial before this Court. That it is evident from the proceedings and the judgement of this Court that he was not directly involved either in the purchase of the suit property nor the prosecution of this matter as he has always believed that the defendants including himself held a good and untarnished title to the suit property and therefore entrusted the purchase of the suit property and the prosecution of this matter to their mutual trusted Advocate.

12. That moreover having been in possession for over 23 years the Judgement came to him as a shock since the Plaintiff (PW1) who in conjunction with his mother, one Halima Amir Boi (PW2) have been found to be liars and fraudsters in their claim of ownership of Galu Kinondo 677 (the mother parcel) by various courts of law.

13. That being aggrieved by the judgement he sought a second opinion from the firm of Njuguna, Kahari and Kiai Advocates. That in a rather surprising and fortunate turn of events it turned out that the said law firm had acted in a similar brief to wit ELC Case No. 237 of 2004 - Mombasa: Star Fish Cottages Ltd versus Halima Amir Boi & 3 others which involved PW2 in the instant case and whose subject was Kwale Galu Kinondo 720, a subdivision of Galu Kinondo 677.

14. Additionally upon further enquiry and consultation, he also discovered new and important matter and or evidence which were neither within the knowledge of the applicants nor their legal team at the time of trial and which matters were not brought to the attention of the Court as follows; -

15. That on 7th November 2019 Hon Justice Sila Munyao sitting in Mombasa delivered a judgement in ELC case No. 237 of 2004 where, from the evidence led therein, found that Galu Kinondo 677 was properly subdivided giving rise to plots no. 718-724 and the same sold to 3rd parties by the registered proprietors one of whom was Amir Ali Boi, the Plaintiff's grandfather. (Annexed and Marked MK-4 is a copy of the Judgement in ELC case No. 237 of 2004- Mombasa: Star Fish Cottages ltd v Halima Amir Boi & 3 Others [2019] eKLR attesting to the same).

16. That the brief history of the suit property was that, the original parcel to wit Galu Kinondo 677 had a dispute between Amir Boi, the Plaintiff's grandfather on the one hand and two other proprietors on the other hand, on who the land ought to have been adjudicated to and registered as first proprietor upon adjudication. That the said dispute was heard through the land adjudication dispute mechanism under the *akn ke act 1968 35 Land Adjudication Act* (Cap 284) Laws of Kenya. A decision was rendered therein by the Minister in the year 1976 who ordered that the above-named three persons be jointly registered as owners of Plot 677.

17. That the order of the Minister was implemented and the three registered as proprietors of the original title, Plot 677. The three would later subdivide Plot 677 into plots numbers 718 to 724, with plot 720 being the suit property in this matter. The said subdivisions were then sold to third parties by the three joint proprietors.

18. It is deponed that Sila Munyao J. in ELC No. 237 of 2004 found the said Amir Ali Boi was no doubt a "barefaced liar" who attempted to backtrack on the sale of the subdivisions of Plot numbers 718-724 by claiming that his co-proprietors had sold the said subdivisions without his knowledge and consent. He thus filed Mombasa HCCC Miscellaneous Application No. 131 of 1991 in which he obtained an order of mandamus issued on 22nd October 1991 by Justice Wambilyangah, compelling the Minister, the Director of Land Adjudication and the District Land Registrar Kwale to register the said subplots solely in his name. (Annexed and Marked MK-5 is a copy of the Court Order attesting to the same).

19. It is averred that , the registered proprietors of the subplots to whom they had been sold became aware of the order of Wambilyangah J. and filed an application to set the same aside. That they were successful and Wambilyanga J. set aside his own orders vide a ruling of 23rd November 1992. In setting aside the order issued on 22nd October 1991, Wambilyangah J. found that Amir Boi had misrepresented to Court the true facts of the case and found that Amir Boi together with his co-proprietors had properly sold the subplots and had thus obtained the said order on the basis of misrepresentation and false allegations. The Court ordered that the persons previously registered as proprietors of the subplots be re-registered. The proprietor of Plot 720, the suit property herein, was one Joseph Gilbert Kibe. (Annexed and Marked MK-6 (a & b) is a copy of the ruling dated 23rd November 1992 & Copy of Court Order issued on 26th November 1992, respectively, attesting to the same).

20. On information of counsel on record it is indicated that that prior to the above and, on 27th November 1985, the said Amir Ali Boi had proceeded to make a report at Diani Police Station claiming that his Coproprietors had sold the subplots without his knowledge and consent but upon investigations, it was found that that information was false and Amir Boi was charged in Kwale District Magistrates Court, Criminal Case No. 1580 of 1986 with the offence of giving false information to a person employed in the public service. Amir was found guilty of the said offence and convicted on 29th March 1989. He never appealed his conviction.

21. It is deponed that Amir Boi filed an appeal against the ruling of Wambilyangah J. of 23rd November 1992 to wit Civil Appeal No. 82 of 1993-Mombasa: Amir Ali Boi v Director of Land Adjudication & another, but the appeal was eventually struck out on 20th January 1995. (Annexed and Marked MK-7 is a copy of the Court Order dated 20th January 1995 attesting to the same). He sought leave to file another appeal through Civil Application No. NAI 168 of 1995, but the same was dismissed on 28th July 1995 as lacking in merit. (Annexed and Marked MK-8 is a copy of the ruling dated 28th July 1995 attesting to the same).

22. The deponent adds that as at 28th July 1995 when Amir's last attempt to revive his claim to the subplots was dismissed, the subplots had been re-registered to the various proprietors and the same gazetted vide Gazette Notice No. 5386 of 2nd September 1994. One of the re-registered proprietors was one Joseph Gilbert Kibe. (Annexed and Marked MK-9 is a copy of the Gazette Notice of 2nd September 1994 attesting to the same). That Joseph Gilbert Kibe's title to the suit property was affirmed and or confirmed in Mombasa High Court Civil Case No. 966 of 1981: Mbaruk Mohamed & Another v The Honourable Attorney General & 8 others. (Annexed and Marked MK-10 is a copy of Judgement dated 30th October 1987 attesting to the same).

23. The deponent contends that Halima Amir Boi, PW2 in this matter was a witness in the aforementioned case to wit ELC case No 237 of 2004 before Hon. Sila Munyao J. and thus all the foregoing facts were well within her knowledge but which she fraudulently and deliberately withheld from this Honourable Court in order to mislead this Court into arriving at a particular outcome in a bid to defeat justice.

24. That , the Plaintiff herein being a son to Halima Amir Boi cannot be found to be without blemish as regards to knowing about the history of the suit property, the said Halima Amir Boi and her sons are vexatious litigants who have constantly and stubbornly filed multiple suits over the same subject matter in a conspiracy to defeat justice. (Annexed and Marked MK-11 (a, b, c & d) are copies of the List of Witnesses dated 14th November 2012 in ELC No. 237 of 2004; vis-à-vis the List of Witnesses dated 31st July 2017 & 17th February 2021; and copy of Ruling dated 16th January 2018 in ELC No. 71 of 2013 – Mombasa: Halima Amir Boi v Obadiah Otieno Wesong & 2 Others attesting to the same).

25. The deponent reiterates that from the decided cases above and Gazette Notice No. 5386 of 1994, it is evident that one Joseph Gilbert Kibe properly and legally acquired the suit property to wit Kwale Galu Kinondo 720 and thus passed good title to myself and the 2nd and 3rd Defendants Applicants.

26. It is contended that this Honourable Court therefore lacked jurisdiction to hear and determine this suit. That neither the 2nd and 3rd Defendants Applicants nor deponent could have reasonably obtained the above-decided cases and Gazette Notice even with due diligence as they are, notably old cases (most unreported) and documents that could not reasonably be in the custody of anyone known either to the deponent or the 2nd and 3rd Defendants Applicants

27. The deponent asserts it is clear beyond peradventure that this Honourable Court was duped into arriving at the decision of 20th September 2024 where it upheld (sic) a title which was previously cancelled by a court of horizontal jurisdiction and confirmed by the Court of Appeal.

28. That it is a matter of pure coincidence and good fortune that the deponent sought a second opinion from his current Advocates on record who had fortunately acted in ELC 237 of 2004 before Sila Munyao J. over the same subject matter and therefore had access to the new material evidence, which are in fact public documents.

29. That it is however evident and clear beyond peradventure that the Plaintiff and Halima Amir Boi have been aware of the above facts but concealed the same in order to manipulate a favourable outcome from this Honourable Court.

30. The deponent contends with benefit of counsels advise that Halima Amir Boi never appealed the Judgement of Sila Munyao J. in ELC case No. 237 of 2004 rendered on 7th November 2019. It is disclosed that the Notice of Appeal filed on 23rd September 2024 has since been withdrawn in favor of the application for review.

31. It is averred that the entire Judgement was pegged on the fact that the Order of mandamus of Wambilyangah J. issued on 22nd October 1991 was neither set aside nor appealed against. It is now apparent that the said order was in fact set aside by this Honourable Court (Wambilyangah J.) and the same confirmed by the Court of Appeal.

32. That the Title in favour of Amir Boi which this Court upheld was not in existence at the time of the trial as it had been cancelled by a Court of competent jurisdiction and a Gazette Notice issued to that effect. There was therefore no valid title that this Court could confer to the Plaintiff vide its orders of 20th September 2024.

33. That the cancellation of the title in favour of Amir Boi was not contested by neither the Plaintiff herein nor Halima Amir Boi. In fact, the said cancellation was affirmed by this Honourable Court and the Court of Appeal in the various decisions

34. That, therefore, and from the very outset, this Honourable Court had no jurisdiction to hear and determine this matter as the same was tantamount to sitting on appeal on an issue that had not only been determined by a Court of horizontal jurisdiction but also confirmed by the Court of Appeal.

35. That the title confirmed by this Honourable Court in favour of the Plaintiff had been cancelled almost 30 years earlier and this Court had no jurisdiction to confer proprietary rights to the Plaintiff where none existed.

36.That there was no prayer in the Plaint for cancellation of the title and therefore the order issued on 20th September 2024 to that effect is an error apparent on the face of the record.

37. That the Judgement of this Honourable Court was therefore obtained through fraudulent and deliberate misrepresentation, concealment of facts, irregularly and through an elaborate corrupt scheme thus occasioning a serious miscarriage of justice to the Defendants Applicants herein.

38. It is urged that this Honourable Court has the inherent powers to review, vary and or set aside its Judgement and decree where it is demonstrated and or proved by the Applicants that the Judgement was obtained by fraud or deceit, or that the court was misled into giving its Judgement and or manipulated to render a certain outcome with the aim of defeating justice through abuse of court process.

39. That it is clear from the chronology of events hereinabove, that this Honourable Court was not made aware of other cases decided touching on this title by this Court and the Court of Appeal and therefore there is sufficient cause to set aside the Judgement in order to maintain the dignity of this Honourable Court and to affirm the time-honoured doctrine of stare decisis.

40. That from the foregoing facts, there is an error apparent on the face of the record and there has been discovery of new and important matter and or evidence which were not within the deponents knowledge at the time of trial and there is therefore sufficient and justifiable reasons for this Court to review and set aside and or vacate the Judgement of 20th September 2024. The court is also invited to substitute it with a decree dismissing the entire suit with costs to the Defendants Applicants.

Response to the application

41. The plaintiff in rebuttal filed a Notice of Preliminary objection dated 1 11 2024 on the following grounds

    1. That the firm of Njuguna Kahari & Khai Advocates filed the Notice of Motion without leave and compliance of Order 9 rule 9 of the *akn ke act 1924 3 Civil Procedure Act* this lacking locus standi.

    2. That the court lacks jurisdiction to grant any orders sought in the Notice of motion herein in view of the filed Notice of Appeal dated 23 09 2024

    3. That the defendants having invoked their right to appeal have no right in the application seeking review.

    4. That the court granted a stay of judgement for 90 days pending appeal on 20 9 2024 and could not purport to grant prayer Number 2 of the Notice of Motion which sought for an exparte stay of execution for the judgement and decree. The court had become functus officio after delivering judgement.

    5. That the Notice of Motion application is bad in law, misconceived and an abuse of the court process.

42. The plaintiff also filed a replying affidavit sworn by Salimu Mwalimu Shee on 15 11 2024. It is reiterated that the application predated the Notice of change of advocates filed on 30 10 24 contrary to order 9 rule 9 and all documents filed lack locus standi.

43. It is deponed that the Court of Appeal has held in the case of Rose Kalza Vs Angelo Mpanju Kalza that not every new fact will cause the interference of judgement or decree.

44. That a notice of appeal having been filed there is a pending appeal , review is only available to a party who though aggrieved by a decision has the right to appeal but is not appealing or has no right of

appeal. A party cannot exercise both right of appeal and review as was held by the Court of Appeal in Orero Vs. Seko (1984)eKLR.

45. Rehashing the prayers in the Notice of Motion the court is asked to take judicial notice of the fact that Halima Amir Boi is deceased and the offence of perjury cannot be sustained. That the court lacks jurisdiction to grant prayer 3. That it cannot seat on appeal on its own decision. The court is referred to the case of Samani Vs.Shirinhanu (no.2) 1979 EA and Lakhamshi Bros.Ltd Vs R. Raju & Sons. It is urged that to allow the application would be to open the case on grounds thought after judgement and there would be no finality to litigation.

46. The deponent refers to the ruling dated 22 7 2020 in the present proceedings where an application for injunction was granted restraining the defendants from selling, construction among other actions. That there were two titles on the same suit property. The court upheld the plaintiffs title after a full hearing where the plaintiffs and defendants testified. That the defendants failed to demonstrate the root of their title by failing to call the said Gilbert Kibe as their witness.

47. The deponent avers that he sought to introduce new parties and explain an entry made in 1976 in favor of Gilbert Kibe under Kwale Galu Kinondo 720. That vide list of documents dated 23 10 2020 the defendants filed a green card for plot Kwale Galu Kinondo 720 which has entries reflecting the court decisions and therefore this was in the knowledge on counsel for the defendants. That the plaintiffs sought joinder of Mr. Kibe, land registrar to come and explain the entries. The defendants opposed the application to re-open the proceedings. This court dismissed the plaintiffs application. That the same cannot be reopened in through review.

48. It is stated the new evidence was before the court on 23 02 22 and 16 5 22. Reference is made to plaintiff further list of documents dated 7 2 2021 where the issues of the plots 718- 723 registered in the names of 7 persons who are listed including Gilbert Kibe. The relevant entries of the green cards touching on the orders mentioned in Misc 131 of 1991 are enumerated. That Halima Boi was a witness who was cross examined by counsel for the defendants who failed to exhaust all the exhbits in cross examination. That it was not for the plaintiff to produce evidence to back up the defendant's case.

49. It is averred that none of the parties in the present suit were parties in various cases highlighted in the application. That the gazette notice 5386 of 1994 did not cancel the title for plot 720 but 718 and 724 and has never been amended todate. That the certificate of title remains a valid certificate capable of transmission to Amir Ali Boi in 1992.

50. It is further stated a sale agreement is not evidence of title, there was no transfer produced by the defendants during the hearing in their favor. That the mention of the several cases is time barred by limitation being decisions which are now over 12 years old.

51. That the Notice of motion application cannot stand as an application for contempt for want of leave and the invitation to cite the plaintiff and Halima Boi cannot stand for want of an application for contempt as was held in the case of James Mulinge Vs. Freight wings Limited & 3 others (2016)eKLR.

52. It is reiterated that the 1st defendant was bound by the actions of its counsel who conducted the hearing , failed to produce relevant proof to support the sale to him of the suit property and their title and when the land was only available to the Digo community.

Applicants further response

53. By a further Affidavit in response sworn by Macharia Kamau on 26 11 2024, it is stated that the defendants current advocates were appointed on 25 09 2024 after the judgement. A consent was entered with the immediate previous advocates on even date a copy is attached. The consent was filed

on 1 10 2024 which is verifiable in the CTS. That pursuant to the consent a notice of Change of Advocates dated 30 9 2024 was filed on 1 10 2024 a copy was annexed together with filing receipt. It is misleading to state the Notice of Change is dated 30 10 2024 and that the application was filed before the said Notice of change.

54. It is deponed that the defendants had preferred an appeal through the former advocate after the judgement but on advise of the new counsel the same was withdrawn vide a Notice of Withdrawal of Notice of Appeal dated 4 10 2024 lodged on 7 10 2024. A copy was attached. That consequently the provisions of Rule 83 of the Court of Appeal Rules took effect and at the time of filing the present application there was no Notice of Appeal on record. It is urged that the filing of a Notice of Appeal does not constitute an appeal under the provisions of rule 84 of the Court of Appeal rules 2022. That section 80 of the *akn ke act 1924 3 Civil Procedure Act* and 45 of the Civil Procedure Rules 2010 clothes this court with jurisdiction to review its own orders and or decree.

55. It is asserted that the plaintiff has not in its reply controverted the fact that the title held by Amiri Ali Boi the root origin of his title was cancelled vide a ruling of Wambilyangah J of 23 11 1992. The plaintiff cannot purport to derive his title from a title which was cancelled by a court of competent jurisdiction and which has never been reinstated or reviewed. Reiterating the contents of his supporting affidavit to the application it is pointed that the replying affidavit of the plaintiff neither denies and or disputes the depositions therein. Therefore, the applicants have proved that the judgement of this court was obtained through fraudulent misrepresentation of facts, concealment of material evidence and deceit.

SUBMISSIONS

56. The application and the preliminary objection were heard concurrently by way of written submissions. Parties were also given an opportunity to highlight orally on 20 12 2024. The applicant defendants filed submissions dated 15 11 2024 and supplementary submissions 25 11 2025. The plaintiff respondent filed submissions dated 15 11 2024. The plaintiffs supplementary submissions were expunged by the court for being filed without the leave of the court.

57. I have read the affidavits sworn in support of the application and those sworn in reply including the grounds of opposition and preliminary objection. I have also given due consideration to the submissions of the learned counsels appearing.

Analysis And Determination

The Preliminary Objection

58. The court will first consider the preliminary objection raised in view of the fact that since a preliminary objection properly raised is capable of resolving the application without the necessity of going into full determination of the same on merit.

59. The main issue that arise for determination is whether the firm of Njuguna Kahari & Kiai advocate is properly on record for the applicants.

60. The plaintiffs preliminary objection is grounded on the provisions of Order 9 Rule 9 of the *akn ke act 1924 3 Civil Procedure Act*, though I must state the said applicable provisions are in the Civil Procedure Rules 2010 and not the Act.

61. Order 9 Rule 9 of the Civil Procedure Rules, 2010 provides for change of Advocates to be effected by order of Court or consent of parties to wit:

> When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court —
>
> a. upon an application with notice to all the parties; or
>
> b. upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be"

62. In the present case Judgment had been rendered on 20th September 2024 where there was a determination of the Court and therefore the provision of Order 9 Rule 9 were applicable herein. It is not in dispute that the firm of Njuguna Kahari & Kiai advocate were coming on record for the defendants after the judgement.

63. It is submitted on behalf of the plaintiffs that on 7th October 2024 the firm of Njuguna Kahari & Kiai advocate purported to file the subject notice of motion without an application for leave under order 9 rule 9 to come on record after judgment having been delivered on 20th September 2024 in place of the firm JWM LLP.

64. When is leave required? From the above provisions the law requires leave to be sought where there is no consent involving both the incoming advocates and outgoing advocate. Did the advocates agree by way of consent in this regard? The applicants produced a copy of a consent entered into on 25 09 2024 ref. NKK 053 2024 addressed to the Deputy Registrar ELC Kwale Law Courts. The letter is signed by JWM Law LLP outgoing Advocates for the Defendants and Njuguna, Kahari & Kiai Advocates the incoming Advocates for the Defendants. The present application is dated 7 10 2024. The consent clearly shows it predates the filing of the application herein. in view of this then there was no need for leave of the court.

65. It has been submitted that Counsel for the applicants filed a consent between the outgoing Advocate and themselves which consent did not cure the status of the Application and clearly offended the express provisions of Order 9. The question that arises then is if the absence of a consent would be fatal to the present application? Or put differently whether subsequent compliance would mitigate or cure.

66. In Tobias M. Wafubwa v Ben Butali [2017] EKLR the Court of Appeal made the following observation concerning the application of Order 9 Rule 9 of the CPR 'there is no question that the objective of rule 9 is to not only serve as notification to the court in ongoing proceedings that there has been a change of counsel for the parties, but also to safeguard the interests of the outgoing counsel. In this case, Kituyi and Company Advocates having taken over representation of the respondent from Kweyu and Company Advocates, we see no prejudice that would be visited upon Mr. Sifuma's client, save to ensure the expeditious and just disposal of justice'

67. In Boniface Kiragu Waweru vs James K. Mulinge [2015] eKLR cited by the Court of Appeal in Tobias M Wafubwa above, the court stated thus 'where in addressing the issue of non-compliance with order 9 rule 9 this Court observed thus; "All in all we are not persuaded that non-compliance with Order 111 rule 9A of the Civil Procedure Rules was meant to make the following proceedings incompetent or a nullity, efficacious as the provision was meant to be. Indeed at all times, the set procedures ought to be followed or complied with. However, we find that non-compliance, in the present matter, did not go to the root of the proceedings. The non-compliance we may say, was procedural and not fundamental. It did not cause prejudice to the appellant at all..."

68. Applying the foregoing it is the finding of this court that the Notice of Motion application dated 7th October 2024 is properly before this court and the said firm of Njuguna Kahari & Kiai as well. The preliminary objection raised on the basis of noncompliance with the provisions of Order 9 rule 9 fails on this front. The court declines the invitation to strike out the applicants' pleadings.

69. The other objection raised is that the Honorable court lacks jurisdiction to grant any orders prayed for in the notice of motion application dated 7th October 2024 in view of the filed Notice of Appeal dated 23rd September 2024. The plaintiffs submit that the defendants cannot file an Appeal by dint of the Notice of Appeal dated 4 10 2024 and at the same time concurrently file an application for review in the High Court.

70. The applicants submit there is no pending appeal the Notice of Appeal having been withdrawn through a Notice of Withdrawal of Appeal duly filed under the provisions of rule 83 of the Court of Appeal Rules and served. The applicants desire to appeal dissipated after the said withdrawal. Moreover the application was filed after the said withdrawal. It is urged that there is no requirement for endorsement of the Notice by the registrar and if there was then this is an internal process outside the control of the applicant. The appeal was deemed withdrawn effective the day of filing.

71. The right to apply for review is provided for under the provisions of Section 80 of the *akn ke act 1924 3 Civil Procedure Act* read together with Order 45 of the Civil Procedure Rules.

Section 80 provides; -

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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

72. Order 45, rule 1 provides for Application for review of decree or order as follows;-

" 1.

(1) Any person considering himself aggrieved—

SUBPARA (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) .....

73. Arising from the above the options available to an aggrieved party is he may only file for review where he has a right of appeal but has not exercised it and or has chosen not to exercise it or where there is no right of appeal. In the present case a judgement was rendered and a right of appeal accrued and indeed the defendant proceeded to file Notice of Appeal.

74. The pertinent question in this limb of the preliminary objection is whether a Notice of Appeal is an appeal or when is it considered an appeal since as the name suggests it is a Notice of Appeal.

75. The Court of Appeal in Multi Choice (Kenya) Limited Vs. Wananchi Group (Kenya)Ltd & 2 Others (2020)eKLR faced with an Appeal from a ruling of Justice Mumbi Ngugi (as she then was) where two issues had emerged namely whether under Order 45, the filing of a notice of appeal to the court of appeal is or is not a bar to the filing of an application for review. The learned Judge, observed from her research that, there are several conflicting decisions on this point, both from the High Court but also from the Court of Appeal. The Superior court in the end chose to go with the authorities that state that a notice of appeal is not an appeal but is a means through which a party evinces an intention to appeal.

76. From the decision of the Court of Appeal in Multichoice (supra) I picked the following pertinent expositions touching the provisions of section 80 of the *akn ke act 1924 3 Civil Procedure Act* and Order 45;-

> 'Both provisions require no further elucidation as they are as clear as they can be; that a party will only be entitled to seek review, if he has not preferred an appeal or if there is no right of appeal. While the statement requires no explanation, the dispute is on the question of, when an appeal is "preferred"? Or put differently, is a notice of appeal an appeal?'

77. The Court of Appeal went further to state as follows; -

> 'It is the notice of appeal, evincing the aggrieved party's intention to challenge, in this Court the impugned decision, that gives jurisdiction to the courts to entertain applications under Rule 5(2)(b) and Order 42 rule 6(4),' respectively. For the purposes of the latter, an appeal to the Court of Appeal is "deemed to have been filed when under the Rules of that Court notice of appeal has been given". This is the only instance, as far as I am concerned, where the notice of appeal is treated as an appeal, yet strictly speaking, the two are distinct. It has been explained before that a notice of appeal will be treated as an appeal only for the very specific and limited purpose of enabling a party who has lost in the superior courts below to seek an order of stay of execution, or of proceedings, or an injunction before this Court.

78. But of more relevancy is the Court of Appeal also stated thus;-

> 'An appeal is preceded by lodgment of a notice of appeal. If appeal is not instituted within the appointed time above, the notice of appeal will, by the provisions of Rules 83 and 84 be deemed to have been withdrawn or struck out, as the case may be.
>
> To construe the provisions of Order 45 and to answer the question, whether a notice of appeal is an appeal, the court has to do so with reference to all the relevant provisions. This brings me to the crux of the first limb of this appeal, at which point it is apposite to state that as far my reading of the authorities in this field goes, there has never been any major inconsistencies in interpretation of Order 45, both by the High Court and this Court. Save

for the case of Kisya Investments Ltd, (supra), all the rest of the decisions cited to us by both sides are actually in agreement, as I will shortly illustrated by the review of sampled decisions, including those cited in the appeal; that the court has jurisdiction to entertain an application for review where only the notice of appeal has been lodged. Conversely, the court will not hear an application for review when an appeal has been instituted under Rule 82 of this Court's rules.'

79. The import of the foregoing discussion is that a notice of appeal is not an appeal for purposes of the present application and therefore there was no appeal and there is no appeal filed against the judgement of this court. I therefore do not find it relevant to delve into the discourse of sequency of events and whether a notice of withdrawal must be formally adopted by the court through the registrar. That for me it is but an administrative mechanism and provided that the provisions of the rules permit the withdrawal of a notice of appeal and in this instance it was withdrawn.

80. The upshot of the foregoing is that the preliminary objection must fail on all fronts.

81. Having settled the preliminary issues I will now address the substantive application on review.

Application For Review

82. The main issue for determination is whether the application meets the threshold for review and whether the orders sought should issue.

83. The application has been brought under the provisions of sections 1A, IB, 3 & 3A & 80 of the *akn ke act 1924 3 Civil Procedure Act*, Cap 21, Order 45 Rule 1, and Order 51 Rule 1 of the Civil Procedure Rules, 2010.

84. I have already set out the provisions of section 80 and order 45 elsewhere in this ruling I will not rehash them to avoid repetition.

85. The power to review is discretionary. However further guidance on the exercise of this discretion is provided under Order 45 which requires the following grounds should exist: -

    (a) Discovery of a new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

    (b) There was a mistake or error apparent on the face of the record; or

    (c) Any other sufficient reasons; and

    (d) The application must be made without unreasonable delay

86. My understanding of the above requirements is that they are disjunctive and any one of them if met should suffice for a court to review its decision. However before I delve into the analysis the courts have through judicial decisions offered further guidance on the exercise of the said discretion as follows

87. I will start with Lakhumshi Bros Ltd vs R. Raju & Sons referred by the plaintiffs which held that the court has no such jurisdiction which would in effect involve it sitting in Appeal on its own decision.

88. In the case of Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR. the court stated that a review is by no means an appeal in disguise whereby an alleged erroneous decision is reheard and corrected.

89. In Republic V Cabinet Secretary for Interior and Co-Ordination of National Government Exparte Abdullahi Said Salad [2019] eKLR the court stated thus; -

> '.... I emphasize that review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible".

90. From the foregoing it is clear that what the court exercising the discretion is also enjoined to consider is the pronouncement with regard to the issue in the impugned decision and ensure that it does not seat on an appeal of its own decision.

91. I will therefore based on the foregoing identify and eliminate the grounds that will qualify to be points of appeal.

1. It is urged that the court granted a stay of judgement for 90 days pending appeal on 20 9 2024 and could not purport to grant prayer Number 2 of the Notice of Motion which sought for an exparte stay of execution for the judgement and decree. That court had become functus officio after delivering judgement. This in my view is a ground of appeal the orders having been granted in the first instance.

2. The applicants contend that there was no prayer in the Plaint for cancellation of the title and therefore the order issued on 20th September 2024 to that effect is an error apparent on the face of the record. This ground as urged can only be entertained at appellate level. I say so because it has nothing to do with an error on the face of the record. The applicant is simply aggrieved by the courts decision to issue orders that were not asked for by the plaintiffs. Infact this point was addressed at paragraph 48 of the judgement where I agonized over the fact that there was no prayer for cancellation of title.

92. It is trite that the law donates the discretion to the court to review its own judgement or orders upon being moved by a party who is aggrieved by the same. Parameters to consider in the exercise of the discretion have already been set out. The applicants allege that there is undisputed new and important matter or evidence which after the exercise of due diligence, was not within the defendants knowledge or could not be produced by the defendants at the time when the decree was passed.

93. The above is to me the substantive ground for the present application for review though I note there are other grounds based on the provisions of Order 45 hereinabove.

94. It behooves the court to interrogate if the facts or evidence being introduced is a new matter and whether it was not within the defendants knowledge during the pendency of the proceedings. The other factor to consider is whether the information could not have been obtained even if the party applying could have tried before the judgement decree.

95. Regarding diligence deployed by the applicant it is clearly stated Mr. Macharia was not involved in the prosecution of this matter and entrusted it to his lawyers due to his busy schedule and nature of his employment that necessitated his deployment outside the country. For me this is not a convincing reason for failure to obtain evidence and I will not belabor the point.

96. But having stated the above would the information that has been discovered have been found had the requisite diligence and effort been deployed by the defendants. Most of the information discovered arises from litigation emanating from the origin of the suit property being its mother title Galu Kinondo 677 together with other subdivisions therefrom. The information given is stated to have

been discovered by the new counsel on record who coincidentally had been involved in litigation surrounding the suit property and or the subdivisions.

97. It is submitted on behalf of the applicants that the ruling of Wambilyangah J of 23 11 1992 which extinguished Amir Bois title is unreported. Further that the defendants were not parties to Misc Application No. 191 of 1991. It is suggested that as laymen and only transacting over the suit property in the year 2001 over 9 years after the said ruling was delivered it is not improbable and or illogical that they could not have obtained the said ruling and the gazette notice aforesaid even with due diligence. That at the time the buyers had no digital platforms.

98. I have gone through the information annexed to the supporting affidavit of the applicant. These are court judgements and rulings including orders extracted and arising from the said determinations. These are the judgement of Justice Sila Munyao in ELC No. 237 of 2004 Mombasa Starfish Cottages Ltd Vs Halima Amir Boi & 3 Others and I noted that the defendants in the present case were not parties. However PW2 was the 1st defendant in the matter. Further while it dealt specifically with plot 719 there are matters disclosed therein which are relevant to the history of the suit property herein sharing the same mother title. The other suit is Mombasa High Court Miscellenous Civil Application No. 131 of 1991 where the orders of Mandamus issued by Wambilyangah J were set aside on 23 11 92. The parties in this one were Amir Ali Boi Vs Director of Land adjudication. The defendants were not parties. There is Mombasa High Court Civil Case No. 966 of 1981 Mbaruk Mohamed & Ano Vs The Hon. Attorney General and 8 Others where still the defendants applicants were not parties. The other rulings were by the Court of Appeal where Amri Boi had sought to appeal against the decision of Wambilyangah J and where Kwach, Akiwumi and Tunoi Judges of Appeal struck out the appeal for incompetence and Gachuhi JA dismissed an application for extension of time to file appeal.

99. Based on the foregoing and having noted that the Defendants applicants were not parties I would agree that they may not have been expected to be aware of the proceedings to even set out to look for the same. I would give them the benefit of doubt.

100. But of utmost importance is whether the information discovered and placed before the court is new and important to the dispute.

101. The information is obtained from Mombasa HCCC Misc Application No.131 of 1991 where it is alleged Amir Ali Boi obtained orders of Mandamus before Justice Wambilyangah to have all the subdivisions registered in his name on the basis that the same were sold without his consent. One of the purchasers is Gilbert Kibe and who is the person the applicant allegedly bought the suit property from. It is further stated that the orders of mandamus were later set aside by Justice Wambilyangah on 23rd November 1992 at the instance of the proprietors of the subdivisions. It is stated the court then found that the said Amir Boi had misrepresented to the court the true facts and further the court order that the parcels be reverted to the previous purchasers one being Gilbert Kibe herein. The said Boi's appeal in civil appeal No.82 of 1993 was struck out on 20 01 1995 and yet another appeal through Civil Application No. Nai 168 of 1995 was also dismissed on 28 07 1995. It is stated by this date in 1995 the orders of Wambilyangah J were implemented through GN No. 5386 of 2nd September 1994 and Gilbert Gitau re-registered as lawful proprietor of plot 720. That the plaintiff title was nolonger in existence legally.

102. Additionally, it is contended that Gilbert Kibes title was also affirmed in Mombasa High Court Civil Case No. 966 of 1981 Mbaruk Mohamed & Ano Vs The Hon. Attorney General and 8 Others and Mombasa ELC case No. 237 of 2004 Star Fish Cottages Limited Vs. Halima Amir Boi & 3 Others (2019) eKLR

103. I have read all the court determinations and orders produced as annextures. The material comprises several orders of the court that were prima facie made subsequent to the orders made by Wambilyangah J which prima facie could be important. I'm being careful to reiterate prima facie because the same is yet to be fully tested. What is clear based on the circumstances of this case is that new evidence has been presented which in my view appears to be prima facie important. The Court did not have the benefit of the full information during the hearing.

104. The court is persuaded the information prima facie is important to the extent that it touches on the suit property and its history which history cannot be ignored.

105. Moreover it is submitted that at the time of the proceedings there was no title over the suit property allegedly held by the plaintiff which the court could breath life into as the same had been cancelled by a court of concurrent competent jurisdiction. It is submitted that these facts were deliberately withheld by the plaintiff.

106. The applicants urge that there is an error apparent on the face of the record. What is an error apparent on the face of the record?

107 . Mativo J (as he then was) in the case of Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR enumerated the subject of review at length quoting a number of court decisions including the case of Nyamogo & Nyamogo Vs Kogo referred to by the applicants thus;-

> '13. The starting point is that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review. [5]
>
> 14. In Nyamogo & Nyamogo v Kogo[6] discussing what constitutes an error on the face of the record, the court rendered itself as follows:- "An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the 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 a long drawn process of reasoning 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 apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal." 15. The Indian Supreme Court [7] made a pertinent observation that is it has to be kept in view that an error apparent on the face of record must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. 16. In Attorney General & O'rs v Boniface Byanyima, [8] the court citing Levi Outa v Uganda Transport Company, [9] held that the expression "mistake or

> error apparent on the face of record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment."
> 17. There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.'

108. The error referred to by the applicants is that by the time the judgement was being issued there was no title in the name of the plaintiffs because the title had been cancelled by a court of competent jurisdiction and that a court cannot sanitize a title. The error is being attributed to the court when the court did not have that record in the entire proceedings. The arguments advanced by the applicants cannot stand. It is not possible for a court to make an error in the absence of the full facts that are said to have made the error arise.

109. I make a finding that based on the facts and what has been enumerated above to constitute an error on the face of the record, the application does not meet this specific requirement and or threshold.

110. But is there any other basis upon which the court could consider the application. Indeed the court may set aside and or review its order for any other sufficient reason. The court was referred to the decision of the Supreme Court Case of Outa Vs. Okello & 3 Others (2017) KESC 25(KLR) where the court held that the Apex court could review its own judgement so as to meet the ends of justice in exceptional circumstances one being where the judgement, Ruling or order is obtained by fraud or deceit? For me I think while the principles may apply, I'm conscious that this is not the Supreme Court.

111. I think I have said enough to demonstrate why the application should succeed and also why the preliminary objection must fail on all fronts.

112. Therefore in view of the above findings and specifically that there is new evidence and or information which in my view is prima facie important but which the court did not have its benefit what then should the court do with this information.

113. The defendants have invited this court to vacate and set aside the judgement herein and the attendant decree and thereafter substitute with an order decree dismissing the entire suit with costs to the Defendants Applicants. I must respectfully disagree with this invitation. Firstly, a review is not an appeal and which has been stated elsewhere in this judgement. Dismissing the entire suit will amount to having decided the case summarily and issued another judgement without hearing the parties substantively on the new evidence. Even the alleged new evidence has to be tested and this is what a fair hearing would entail. The information cannot be tested fully at this stage judgement having been rendered. The only forum the said evidence can be tested is a hearing where it needs to be properly adduced and responded to.

114. Having seriously considered the above I found the best option that will uphold the course of justice would be set to aside the entire proceedings and the judgement herein.

115. Having set aside the judgement and proceedings this court would be functus officio and will not render itself on the invitation to cite the plaintiff and Halima Mwalimu Shee for perjury including fraud. In any event perjury is a criminal offence and I do not wish to enter an arena where I lack jurisdiction.

Final Orders And Disposition

116. The following orders issue to dispose of the Preliminary Objection

SUBPARA 1.

The preliminary objection dated 1st November 2024 is dismissed with no orders as to costs.

117. The following orders issue to dispose of the application

1. The Notice of Motion application dated 7th October 2024 is allowed in the following terms;-

    a. The Judgement, Decree and all consequential orders issued by this Honourable Court on 20th September 2024 be and are hereby reviewed.

    b. The entire proceedings and the judgement dated 20th September 2024 with the attendant decree and all consequential orders are set aside.

    c. An order be and is hereby made for a retrial of the entire suit.

    d. Costs of the application shall abide the outcome of the suit upon retrial.

It is so ordered

RULING DATED SIGNED AND DELIVERED THIS 11TH DAY OF NOVEMBER 2025

JUSTICE A.E. DENA

JUDGE

11 11 2025

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Onduso Holding the Brief of Mr. Oloo for the Plaintiff

Mr. Njuguna appearing alongside Ms. Muturi for Defendants

Court Assistant Asmaa Muftah