

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ELC NO. 49 OF 2021

SALIMU MWALIMU SHEE

PLAINTIFF

-VERSUS-

MACHARIA KAMAU.....1ST

DEFENDANT

MARTIN MOGWANJA.....2ND

DEFENDANT

PAULINE MOGWANJA.....

DEFENDANT

RULING

1. The subject of this ruling is the Notice of Motion application dated 10/06/2025 and 15/07/2025 filed by the plaintiff.

Application dated 10/6/2025

2. The application dated 10/6/2025 seeks the following orders; -

- 1) THAT this application be certified as urgent and the same be heard ex-parte in the first instance and issue a mention date for direction before Justice A.E Dena in Siaya court through online before 25th June 2025.

- 2) THAT the Honorable court issue stay of ruling slotted for 27th June 2025 pending hearing and determination of the subject application.
- 3) THAT the Honorable court grants leave and admits the further affidavit sworn by the plaintiff dated 10th June 2025 and be adopted as part of the plaintiff's evidence in response to the defendant application for review dated 7th October 2024 is invalid in law for lack of compliance of order 9 rule 9 and 10 and also the orders of this court by Justice A.E Dena dated 7th October 2024
- 4) THAT the Honorable court review or set aside and order dated 9th October 2024 of Justice A.E Dena for compliance with order 9 rule 9 and 10 of the civil procedure rules 2010
- 5) THAT on (sic) order of staying the order and direction dated 9th October 2024 and 20th December 2024 and all consequential order issue after 9th October 2024 be issued pending hearing and determination of the plaintiff application
- 6) THAT the Honorable court issue another ruling date after hearing and determination of this application
- 7) THAT costs of the application be awarded.

3. The above application was filed under Certificate of Urgency where my brother Naikuni J issued directions on its disposal staying the delivery of the ruling on the defendant's

application dated 10/7/2024 and set down the application dated 10/5/2025 for hearing on 30/9/2025 at Kwale.

4. Unaware of the stay orders, the ruling having been scheduled for the said 27th June 2025, I deferred it to 30/6/2025. This precipitated the second application dated 15/07/2025

Application dated 15/07/2025

5. The application dated 15/07/2025 sought the following orders; -

- 1) THAT the application be certified as urgent and be heard ex parte on a priority basis in the first instance and issue a mention date for direction before Justice A. E. Dena in Siaya ELC Court through online before 30th July 2025.

- 2) THAT the Honorable court issue stay of ruling slotted for 30th July 2025 pending hearing and determination of the Notice of Motion dated 10th June 2025 for hearing on 30th September 2025.

- 3) THAT the Honorable court on its own motion do correct its own clerical or arithmetical mistakes in order or errors arising therein from any accidental slip or omission and to read as follows;

There be a stay of ruling slotted for 30th July 2025 pending the hearing and determination of the Notice of

Motion dated 10th July 2025 being heard on 30th September 2025.

4) Costs of this application.

6. The above application is premised on the grounds on its face and the supporting affidavit of Salim Mwalimu Shee the plaintiff. The deponent rehashed the directions issued during the proceedings of 20/6/2025 presided by Naikuni J fixing the application dated 10/6/2025 for hearing on 30/09/2025 and staying the delivery of the ruling on the Notice of Motion application dated 7/10/2024.

7. The applicant also recalled subsequent directions by the court presided by myself on 27/06/2025 extending interim orders herein and fixing the ruling date for the application dated 7/10/2024 on 30/07/2025. It stated that this disregarded the directions issued on 20/6/2025 and at the same time a clerical or arithmetical mistake which may at any time be corrected by the court on its own motion or by application of any party. It is deponed that since parties were informed that the ruling would be delivered through the judiciary court system the plaintiff did not appear before court on 27/6/2025 and in view of the orders deferring the delivery of the ruling. Further that no notice issued to the firm appearing for the plaintiff. The deponent reiterated that therefore the instant application ought to be heard as per the directions of 20/6/2025 and the ruling delivered.

8. The applicant also restates the grounds of the application involving the rationale and definition for staying a judgement/ruling and caselaw.
9. It is further stated that the provisions of the Civil Procedure gives power to the court to correct clerical/arithmetical mistakes in the order dated 27/6/2025. That the slip rule recognizes that the court also blunders. That under section 100 of the Civil Procedure amendments may be made for purpose of determining the real question or issue raised by or depending on the proceedings. The deponent also discloses that the respondents have filed a response to the application dated 10/6/2025 scheduled for hearing on the 30/09/2025. The orders issued on 20/6/2025 and 27/6/2025 are annexed.
10. The applicant further urges the court to take judicial notice that the firm of Njuguna Kahari & Khai Advocates not being properly on record and any document including the application for review dated 7/10/2024 are all invalid in law. That failure to adapt the affidavit dated 10/6/2025 and delivering the ruling without considering it will be an injustice to the plaintiff in law.
11. It is clear that the orders sought in the above application are largely spent for the reasons that they sought to correct the record and stop the delivery of the ruling on the application dated 10/7/2024 on the said 30/7/2025. The orders staying the delivery of the ruling on the defendants

application were vacated on 30/9/2025 and the file was directed to me for further directions. I will therefore not belabor on it since the substantive orders lie in the application dated 10/6/2025 and some of the arguments overlap. This is also evident in the directions issued by this court on 23/10/2025 where parties were to proceed with the application dated 10/06/2025.

12. Back to the application dated 10/6/2025 which contains the substantive orders sought. The application was premised on the following verbatim grounds; -

- 1) THAT under the constitution (protection of rights and fundamental freedoms) practice and procedure rules rule 21(2) states that a party who wishes to file further information at any stage of the proceedings may do so with leave of the court.
- 2) THAT rule 20 of the protection of the rights and fundamental freedoms practice and procedures rules allows for filing of affidavits proceedings by way of written submissions or oral evidence as the court may direct 3.
- 3) THAT the honorable court directed that it will issue direction which was sent through email from Kwale High Court ELC registry on 20th December 2024 at 8:01 am which stated attached are the directions of the Honorable Judge on the same day of hearing of the Notice of Motion application dated 7th October 2024.

- 4) THAT during hearing on 20th December 2024 our advocate was away for the High Court direction sent on 20th December 2024 and only came across the direction after the hearing of the subject application dated 7th October 2024
- 5) THAT my advocates Mr. Benedict Odhiambo Oloo and Mr. Onduso were not around on 20th December 2024 as their office was closed on 15th December 2024 for Christmas holidays
- 6) THAT the advocates dealing with the subject file was not aware that the supplementary affidavit dated 9th November 2024 was expunged for want of leave and being unprocedural on 11th December 2024 which was not within our advocates knowledge
- 7) THAT the advocates dealing with the subject file was not aware that the supplementary affidavit dated 9th November 2024 was expunged for want of leave and being unprocedural on 11th December 2024 which was not within our advocates knowledge
- 8) THAT on 1st October 2024 the firm of Njuguna Kahari & Kiai advocates purport to come on record without compliance of order 9 rule 9 and 10 by filing a Notice of change of advocate dated 30th September 2024 which is invalid in law via receipt number A0176949
- 9) THAT on 7th October 2024 the Honorable court order the firm of Njuguna Kahari & Kiai Advocates who purport to file Notice of Motion dated 7th October for review to first compliance of order 9 rule 9 and 10

before hearing the subject Notice of Motion dated 7th October 2024 that order was never reviewed or appealed.

10) THAT the big question in law that did the firm of Njuguna Kahari & Kiai Advocates invoke order 9 rule 9 as by directed by the court

11) THAT no application was ever filed in compliance with order 9 rule 10 including the subject application dated 7th October 2024 no prayer for leave to come on record by the defendant's advocate.

12) THAT on 8th October 2024 the firm of Njuguna, Kahari & Kiai Advocate purported to backdate the letter dated 25th September 2024 to the deputy registrar environment and land court Milimani land court Nairobi instead of Kwale law court and requested the Deputy Registrar of Nairobi to record a consent in the following terms and the subject letter not copied to the firm of Benedict Odhiambo Oloo and Company advocates in the following purported terms: That leave be and is hereby granted to the firm of Njuguna Kahari & Kiai Advocates to come on record for the defendant herein after judgment in place of J.M W Law LLP Advocates.

13) THAT the subject consent letter dated 25th December 2020 was never adopted by the court till today.

- 14) THAT on 8th October 2024 the firm of Njuguna Kahari & Kiai Advocates wrote to the Deputy registrar environment and land court Kwale letter dated 7th October 2024 stating reference to the above matter and the court directions issued on 7th October 2024 by Honorable A.E Dena Judge on the application dated 7th October 2024 under the certificate of urgency.
- 15) THAT the firm purported to state that they have indeed complied with the order 9 rule 9 with the filed following documents: a. A consent letter dated 25th September 2024 between the firm of JMW Law LLP outgoing advocates and ourselves b. A notice of change of advocates dated 30th September 2024. We therefore request that the documents be availed to the Honorable court A.E Dena Judge for directions on our application under certificate of urgency dated 7th October 2024, notice the letter is not copied to the firm of Benedict Oloo & Company advocates.
- 16) THAT before the Honorable court no pending application under order 9 rule 10 to comply with the subject court directions and order dated 7th October 2024 and the letter dated 7th October 2024 in law being an administrative procedure cannot purport to be an application under order 9 rule 10 as per the law.

17) THAT the Notice of Motion dated 7th October 2024 for review has no legal foundation in law due to non-compliance with order 9 rule 9 and 10.

18) THAT the orders and direction dated 9th October 2024 by Justice A.E Dena did not grant leave to the firm of Njuguna Kahari & Kiai Advocates as per order a direction as per direction 1,2,3,4,5,6 and 7

19) THAT that the firm of Njuguna Kahari & Kiai advocates through email of njungunakaharikiai@gmail.com sent to the email of benedictolo0387@gmail.com two emails one on 2nd October 2024 and the other on 9th October 2024 2nd October 2024 email Attached is the Notice of change of advocates for your perusal and record 9th October 2024 email Kindly find attached herein the following documents for service upon yourselves under order 5 rule 22B of the Civil Procedure (Amendment Rules 2020) 1. Defendant/Applicants Motion dated 7th October 2024 to be heard inter parties on 20th November 2024

2nd October 2024 email.

Attached is the Notice of change of advocates for your perusal and record

9th October 2024 email

Kindly find attached herein the following documents for service upon yourselves under order 5 rule 22B of the Civil Procedure (Amendment Rules 2020)

1. Defendant/Applicants Motion dated 7th October 2024 to be heard inter parties on 20th November 2024

2. Court directions issued on 9th October 2024 3. Consent dated 25th September 2024 under order 9 rule 9 of the Civil procedure rules 2010

20) THAT it is clear the from the above statement no application under order 9 rule 10 was ever filed by the firm of Njuguna Kahari & Kiai advocates but purported to move the Honorable court through letters

21) THAT the Honorable Court informed the plaintiff on 20th December 2024 they expunged their supplementary affidavit dated 9th December 2024 and leaving written submissions dated 5th December 2024 after hearing on 20th December 2024 through court email that leading the plaintiff did not have a fair hearing under article 50 of the constitution 2010 and that the error on the face of the record should be corrected and the defendants application for review dated 7th November 2024 have no lawful foundation and should be dismissed with costs to the a plaintiff

22) THAT there is an error in law that the directions issued by Justice A.E Dena dated 9th October 2024 were founded on a wrong principal of law and should be reviewed as per the current Notice of Motion for review dated 7th October 2024 has been brought unprocedural in law.

23) THAT the case of Daniel Torotich Arap Moi and another vs Mwangi Stephen Murithi & another (2014) eKLR where the court held that: "Submission cannot take the place of evidence. The respondent has failed to prove his claim by evidence what appeared in submissions could not come to his aid submissions are generally parties "marketing language"

24) THAT In Kenyan legal practice, there is a clear distinction between administrative actions (including letters or notifications issued by a court registry or judicial officer acting in an administrative capacity) and judicial proceedings (such as formal applications filed, considered, and determined by the court). This ground is expounded by dictums from several succession cause and including case of speaker of the National Assembly v Karume (Civil Application 92 of 1992) [1992] KECA 42 (KLR) (29 May 1992) (Ruling) and LWK vs CMN Matrimonial Cause E011 of 2024) [2024] KEHC 14551 (KLR) (11 November 2024) (Ruling).

25) THAT in the interest of justice the notice of motion application for review dated 7th October 2024 which has been filed before complying with order 9 rule 9 and 10 be dismissed with costs to the plaintiff.

13. The application is stated to based on the grounds in the annexed affidavits of Salim Mwalimu Shee. The affidavit annexed to the application is titled 'Further Affidavit' and is sworn on 10/6/2025.

- 14.** In the above affidavit the applicant rehashes grounds set out above and I will not repeat them. Additionally it is deponed inter alia the Honorable court granted the orders and directions dated 7th October 2024 the defendants were to file a formal application by invoking order 9 rule 9 of the Civil Procedure Act and failure to which, the whole processes become unprocedural in law and a nullity and the documents filed on 7th October 2024 should all be struck out as per Notice of Preliminary Objection and Notice of Grounds of Objection filed by the plaintiff due to lack of locus standi.
- 15.** The court is also referred to the decisions in the cases of Hare Mkaha v Pwani Tau7akal Mini Coach & another [2014] eKLR; Alice Wambui Nganga v John Ngu.re Kahoro [2021] eKLR on order 9 rule 9 and 10, Lalji Bhimji Shangani Builders & Contractors vs City Counsel of Nairobi [2012] eKLR on failure to follow rules of procedure.
- 16.** It submitted that this Honourable Court lacks jurisdiction to grant prayer 3 of the Notice of Motion Application dated 7th October 2024 and in this regard the court is referred to Civil Appeal 10 of 1970 Somani's vs Shirinhanu (No2) 1971 E.A and Lakhumshi Bros Ltd vs R. Raju & Sons.

Defendants Response

17. In response to the application dated 10/6/2025 the defendant did not file a replying affidavit but filed grounds of opposition dated 1/07/2025 as follows;-

- 1) THAT the entire motion is misconceived, scandalous, frivolous, vexatious, mala fides and an abuse of this Court's process aimed at wasting judicial time and resources and at the expense of the Respondents contrary to the Overriding Objectives under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21.
- 2) THAT the entire motion is incompetent and lacks merit as it does not meet the requisite threshold for review as enshrined under Order 45 Rule 1 of the Civil Procedure Rules, 2010.
- 3) THAT the present motion is incompetent as it offends the mandatory provisions of Order 51 Rule 4 of the Civil Procedure Rules, 2010. The motion is grounded on evidence, but there is no affidavit to support the motion.
- 4) THAT the Applicant's prayer to have the Applicant's further Affidavit sworn on 10th June 2025 admitted as part of the Applicant's evidence in response to the motion dated 7th October 2024 is mala fides as filing of pleadings/responses to the Respondent's motion dated 7th October 2024 closed on 18th December 2024 pursuant to the Court's directions of 11th December 2024.
- 5) THAT the said prayer has been sought with the intention to deceive this Court and is a disguised appeal against the order of 11th December 2024, which expunged an almost identical Supplementary

affidavit by the Applicant for non-compliance with Court orders.

- 6) THAT the prayers as sought in the present motion are ambiguous and convoluted and incapable of being granted.
- 7) THAT the order of 9th October 2024 by Lady Justice A. E. Dena, which the Applicant seeks to review and stay, is incapable of being reviewed and/or stayed as it has already been performed by the parties.
- 8) THAT there are no orders of 20th December 2024 as referred to in the Applicant's instant motion capable of being stayed.
- 9) THAT the issue of whether the firm of Njuguna, Kahari & Kiai Advocates is properly on record is already an issue for determination before this Lady Justice A.E. Dena upon her determination of the Respondents' motion for review dated 7th October 2025. The Applicants, in response to the Respondents' motion dated 7th October 2024, filed a Notice of Preliminary Objection dated 15th November 2024 and Grounds of Opposition of even date to that effect. This issue is therefore sub judice.
- 10) THAT the Applicant's present motion is premature as the Court is yet to make a determination on the Respondent's Motion for review dated 7th October 2024.
- 11) The Applicant reserves the right of Appeal upon this Court rendering its ruling on the said motion.

That given the special circumstances of this case, there is an inordinate delay in filing the present motion for review as the Applicant became aware of the Order it seeks to review on 9th October 2024, but only filed the present motion after eight months, on 20th June 2025 at the eleventh hour before the ruling scheduled for 27th June 2025 could be delivered.

12) The court is invited to dismiss the Plaintiffs/Applicants' Notice of Motion dated 10th June 2025 with costs.

18. There is a preliminary objection by the defendants dated 1/7/2025 and the relevant grounds to the application dated 10/6/2025 are as follows;-

1) THAT the plaintiffs motion dated 10th June 2025 offends section 6 of the Civil Procedure Act Cap 21 as the issues raised therein were submitted on by the parties and are pending determination before Lady Justice A.E. Dena

2) THAT the order of 9th October 2024 by Lady Justice A. E. Dena which the applicant seeks to review and stay (sic) is incapable of being reviewed and or stayed as it has been performed by the parties.

3) THAT there are no orders of 20th December 2024 as referred to in the applicants instant motion capable of being stayed.

SUBMISSIONS

19. The application was canvassed by way of written submissions. Both parties complied and were also accorded opportunity for oral highlighting on 31/10/2025.

Applicants Submissions

20. The applicants Submissions are dated 29/09/2025. Highlighting the background and facts of the matter leading to the present application among others, the applicant identified five issues for determination summarized as hereunder-

Whether the defendants new advocates the firm of Njunguna, Kahari & Kiai Advocates Notice of Motion application dated 7th October 2024 for review after Judgement without first complying with order 9 rule 9 & 10 is incompetent, fatally defective.

21. It is submitted that the application for review was filed without compliance to the provisions of order 9 rule 9 and 10 and the effect of such non-compliance the application is incompetent and fatally defective since the rule was mandatory. It is emphasized that a letter is not a judicial process. Reliance was placed on a number of authorities including **Lalji Bhimji Sanghani Builders & Contractors v City Council of Nairobi [2012] eKLR; James Ndonyo v M/s Mclarens Young International [2015] eKLR, S.K. Tarwadi v Veronica Muehlmann [2019] eKLR, John Langat v Kipkemoi Terer & 2**

Others [2013] eKLR and Monica Moraa vs. Kenindia Assurance Co. Ltd [2012] Eklr.

Whether the plaintiff having heard the supplementary affidavit dated 9th December Expunged from the record can apply for leave to file a further affidavit to support his written submissions dated 5th December 2024 before the pending ruling

22. Rehashing prayer No. 3 of the application dated 10/6/2025 for grant of leave and admission of the further affidavit sworn by the plaintiff on 10th June 2025 and be adopted as part of the plaintiff evidence in response to the defendant application for review dated 7th October 2024, it is submitted the orders can be allowed if no injustice is caused to the other party and if the other party can be compensated for in costs. That the honorable court expunging supplementary affidavit dated 9th December 2024 left the supplementary written submission dated 5th December 2024 without evidence to support the submissions since submission are not evidence. This exposed plaintiff exposed lack of fair hearing under article 50 of the Constitution 2010. Reliance is placed on the **case of Belinda Murai 9 others v Amos Wainaina 1979KECA25(KLR); Araka v Chief Magistrates' Court at Keroka & another; Nyasani & 4 others (Interested Parties) (Judicial Review E008 of 2024) [2025] KEHC 8649 (KLR) (19 June 2025) (Ruling)**

Whether the defendants can apply in an application for stay of execution order under oxygen rule and article 159 of the constitution 2010 while there are statute lay down procedure in law

23..Noting that the defendants filed the Notice of Motion dated 7th October 2024 to stay of execution order under 1A, 1B, 3& 3A the oxygen rule section of the Civil Procedure Rule 2010, it is submitted that they ought to have invoked order 42 rule 6 that consequently the defendant are enjoying stay of execution of Judgment without a proper application before the High court. The court is referred to the case of **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others [2013] eKLR** (Supreme Court) stating Article 159 is not a panacea for all procedural deficiencies and not meant to whitewash every mistake made by a litigant. That parties must comply with rules of procedure unless the breach is minor and does not prejudice the other side. Other authorities cited are **Speaker of the National Assembly v Karume [1992] eKLR**, **Mumo Matemu v Trusted Society of Human Rights Alliance [2014] eKLR** (Court of Appeal); **Lalji Bhimji Sanghani Builders v City Council of Nairobi [2012] eKLR**

Whether the plaintiff has demonstrated error apparent on the face of record or sufficient reason

24. It is submitted the there was an error apparent on the face of record with order 9 rule 9 as the learned judge erred in

law as he was not an advocate for the defendant to advice failure to comply with the Civil Procedure Rules 2010. That the process purportedly used to comply with order 9 rule 9 was administrative through letter and not judicial process that bring an error on the face of the record. That the application was to be served on the plaintiff before further directions.

25. It is asserted a decree or order could be reviewed for any sufficient reason. Sufficient reason could only be deduced from the facts and circumstances of a particular case before the court. Reference is made to the case of **Ngororo v Ndutha & another (1994) KLR 402** where the court of appeal held that any person though not a party to the suit whose direct interest was affected by a judgment was entitled to apply for a review. An applicant had to place convincing evidence before a court for the court to be satisfied that there was sufficient reason to review the decision.
26. In relation to costs it is submitted that the same follow the event and it is for compensating the successful party for the trouble taken in prosecuting defending the case. The court is urged to grant costs to the applicant.

Respondents Submissions

27. The defendants' submissions are dated 7/10/2025 and identify four issues for determination summarized as follows; -

Whether or not this Honourable Court has Jurisdiction to entertain the present Motion

28. Referring to the provisions of Order 45 Rule 6 of the Civil Procedure Rules which is stated to bar subsequent applications in a review motion it is submitted that the Court having already dealt with the issue is therefore functus officio and ought not to deal with a matter that it has already dealt with and rendered a decision.

29. The only way the Plaintiff/Applicant can challenge the Order of 9th October, 2024 is by appealing against it which he has not. That having participated in the final submissions on 21st December, 2024, such leeway remains closed. Reliance is placed in the case *Jacqueline Mach Damon & Mawe Mbili Limited v Hugh George Cholmondeley Fifth Baron, Jonathan Swewart, Philip Coulson, Nicholas Cummings, Micheal David Stanford Tuck & Delamere Estates Limited* (Environment & Land Case 29 of 2019) [2022] KEELC 1346 (KLR) (24 February 2022) (Ruling)

Whether the firm of Njuguna, Kahari and Kiai Advocates is properly on record

30. It is submitted that this issue was raised in the Notice of Preliminary Objection and Grounds of Opposition dated 15th November, 2024. The issue was canvassed vide the Defendants'/Respondents' supplementary submissions dated 25th November, 2024 which are reiterated. It is contended the issue is therefore sub judice.

31. It is submitted the Plaintiff/Applicant has grossly misinterpreted Order 9 Rule 9 since it means either an application or a consent is required for an Advocate to come on record post judgment. Not both. That the consent of the outgoing advocates and Njuguna, Kahari and Kiai Advocates in on record and not disputed.

Whether the Plaintiff's/Applicant's Affidavit sworn on 10th June 2025 is capable of being admitted as evidence

32. It is submitted that the Plaintiff/Applicant had initially attempted to file a similar supplementary affidavit dated 9th November, 2024 which was expunged from the Court's records on 11th December, 2024 for non-compliance. That the present motion raises no new issue and is a disguised appeal against the order of the Court of 11th December, 2024.

33. It is emphasized that there must be an end to litigation. However, the Plaintiff's/Applicant's efforts to file this Motion 8 months after the response to the motion of 7th October, 2024 have closed is scandalous, frivolous

vexatious and an abuse of this court's process, and defeats the very ends of justice that they purport to be seeking herein. That it must be dismissed in its entirety. The case of **Raila Odinga & others v IEBC & 3 Others Supreme Court of Kenya Presidential Petitions Nos 3, 4, 5/2013 [2013] eKLR** is relied upon to buttress this point.

Whether the Plaintiff's/Applicant's has met the threshold to warrant stay of the Ruling pending the hearing and determination of this Motion

34. It is contended that the present Motion has not met the threshold to warrant stay of the Ruling pending the hearing and determination of this Motion for reasons there is an inordinate delay in filing the present Motion since it was filed 8 months after the Order of 9th October, 2024 was issued and 6 months after the hearing of the Motion dated 7th October, 2024. The Plaintiff/Applicant has not demonstrated and/or provided any plausible explanation for the delay. The present Motion is an afterthought since this Honourable Court had already scheduled the Ruling for 24th April, 2025 before it was deferred to 27th June, 2025 and no Motion was filed by the Plaintiff/Applicant herein staying the Ruling of 24th April, 2025.

35. It is urged that equity does not aid the indolent. Staying the Ruling will only amount to a delay of justice. That the defendants have anxiously waited for 1 year for the

delivery of the ruling and to put the suffering of the Defendants/Respondents to rest, we urge that this Honourable Court declines to grant stay of the Ruling and proceeds to deliver the Ruling on the Motion dated 7th October, 2024.

36. It is further submitted that no other Court of concurrent jurisdiction has the power to hear and/or determine the present Motion save for this Honourable Court. The court is urged to find the prayers sought incapable of being granted and the Plaintiff's/Applicant's Motion dated 10th June, 2025 be dismissed in its entirety with costs to the Defendants.

Applicants' Supplementary submissions

37. The applicant filed supplementary submissions dated 29th October 2025 with leave of the court. The submissions were to respond to new issues of law raised by the defendant submissions on their preliminary objection. The submissions largely rehash the same arguments.

ANALYSIS AND DETERMINATION

38. Having considered all the foregoing the main issue for determination is whether the application has merits. In reaching a determination on this question I will be addressing following issues; -

1) Whether the firm of Njuguna, Kahari & Kiai Advocates is properly on record is already an issue for determination before this Honourable Court.

2) Whether the plaintiff has demonstrated error apparent on the face of record or sufficient reason

3) Whether the supplementary affidavit dated 9th December 2024 should be replaced with the further affidavit dated 10/6/2025.

4) Costs

39. It has been stated that the application offends Section 6 of the Civil Procedure Act as the issues raised were submitted on by the parties and are pending determination. I note that section 6 of the Act is on stay of suit and prohibits a court to proceed with the trial of any suit or proceeding in which the matter in issue is substantially in issue in previous suit or proceeding. That the issue of whether the firm of Njuguna, Kahari & Kiai Advocates is properly on record is already an issue for determination before this Honourable Court.

40. The court will not belabor this point. The issue of whether the firm of Njuguna, Kahari & Kiai advocates was raised in the plaintiffs response to the application dated 7/10/2024. This is reflected on the Notice of Grounds of opposition dated 15th November 2024 as the first ground. The same issue was also raised as the first ground in the preliminary objection dated 15/11/2024. This was also identified as the first issue for determination in the

applicants' submissions dated 15/11/2024. I therefore see the applicant re-opening the arguments and beefing them up under the current application.

41. Based on the foregoing these courts hands are tied and all the grounds and arguments touching on compliance to the provisions of Order 9 Rule 9 & 10 being issues pending determination under the defendants application dated 7/10/2024 ought to be left to the said application. The same should in my view await their determination under the pending ruling.

42. The other ground raised by the defendant is premised on the provisions of Order 45 Rule 6 of the Civil Procedure Rules. It is contended that the same bar subsequent applications in a review motion such as the present application. I will reproduce the said provisions; -

Bar of subsequent applications (Order 45, rule 6)

'No application to review an order made on an application for review of a decree or order passed or made on a review shall be entertained.'

This ground arises from the prayer sought by the applicant to review the order dated 9th October, 2024 which order was granted during the pendency of a Motion for review dated 7th October, 2024. It is submitted that the Court having already dealt with the issue is therefore functus

officio and ought not to deal with a matter that it has already dealt with and rendered a decision.

43. I have keenly considered the provisions of Order 45 rule 6 and I respectfully disagree with the interpretation mooted by the defendant. In my considered view the decision envisaged under these provisions is the final determination on the substantive application for review. This in my view was the import of the ruling in the case of **Jacqueline Mach Damon & Mawe Mbili Limited (supra)** cited by the defendants where the court pointed thus *'In the present application the applicant under prayer (3) prays that the court reviews its order of 1st October 2020. The applicant thus is asking the court to review what it declined to review in the earlier application.'* Clearly in the present case the ruling on the application dated 7/10/2024 has not yet been delivered by this court.

Whether the plaintiff has demonstrated error apparent on the face of the record or sufficient reason

44. I will first highlight the law on review.

45. The right to apply for review is provided under the provisions of Section 80 of the Civil Procedure Act read together with Order 45 of the Civil Procedure Rules.

46. 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.

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

“1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

48. I have reviewed the reasons advanced by the applicant in support for his proposition for review of the court directions dated 9th October 2024. I'm inclined to agree that the only avenue left for the applicant was to appeal against the said orders. I say so for the reason that the said grounds do not meet the threshold for review and specifically error apparent on the face of the record. The same in my view are grounds for appeal as it is indicated I erred on process, that I ought not to have advised a party and the application ought to have been served first. The court cannot sit on appeal on its own impugned process. See **Republic Vs Medical Practitioners Board & Others exparte Geoffrey Muiruri King'ang'a (2021) KEHC 298 (KLR)**
49. An issue has been raised by the applicant on whether the defendants can apply in an application for stay of execution order under oxygen rule and article 159 of the constitution 2010 while there are statute lay down procedure in law. Clearly the applicant is aggrieved with the orders and the correct forum for this grievance is an appeal.
50. Further is the need for an application for review to be filed within a reasonable time. The said directions sought to be reviewed are dated 9/10/2024. The application to review the same was filed on 10/06/2025 a period of not less than 7 months. The reasons given have already been

highlighted and cannot stand for explanation for delay. The courts finds this delay unreasonable.

Whether the supplementary affidavit dated 9th December 2024 should be replaced with the further affidavit dated 10/6/2025

51. One of the reasons the current application was brought was for the court to admit the further affidavit sworn by the plaintiff dated 10/6/2025 and for it to be adopted as part of the plaintiff response to the defendants application dated 7/10/2024. This would be in lieu of the plaintiffs supplementary affidavit dated 9th December 2024 that was expunged from the record by court.
52. The court has noted that the further affidavit dated 10/6/2025 appears to be the same affidavit which seems to be the affidavit 'supporting the present application'. The depositions therein are therefore raised in support of the application herein yet it is the further affidavit being sought to be admitted to serve in place of the pleading that was expunged. Ordinarily the Further affidavit would be an annexure in the affidavit supporting the application. It is an affidavit that awaits to be admitted for purposes of the application dated 10/7/2024. I will steer off the suggestion that the applicant meant to confuse the court but I must point out this is disturbing if not mischievous. Additionally, it could also mean that the

present application has been filed without a supporting affidavit which is a foundational pleading.

53. The above notwithstanding, the applicant states that his advocate was not aware that the supplementary affidavit dated 9th December 2024 was expunged as the firm of advocates was closed for Christmas holidays by 15/12/2024. I had no evidence in this regard from the firm or an affidavit under oath by the counsel himself. Moreover, the directions were issued in the CTS on 2024 - 12-11 which is well before the said 15/12/2024.
54. I find no sufficient justification to admit the proposed Further affidavit for purposes of the application dated 10/7/2024 and which has since been argued.
55. I think I have said enough to demonstrate the application dated 10/6/2025 lacks merit. It is hereby dismissed with costs.

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

ORIGINAL