

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(FAMILY DIVISION)

HCF MISC. APPL. NO E041 OF 2025

CORNELL SHISANYA

ESTHER SAYO TAKWA.....
APPLICANTS

VERSUS

KENYA PORTS AUTHORITY

AZIZA LEYA SHIUNDU
RESPONDENTS

RULING

1. The applicant filed an application dated 5th August 2025 seeking to stay proceedings in CMC Succession Cause No E034 of 2020 pending investigation of what she says were forgeries of the consent form. She also sought to have this court review, vary, and set aside the direction issued by the Hon. Lucy Khaendi Sindani on 31st July 2025 in the said matter.
2. In the grounds in support of the application, she stated that she had filed an application in the court below seeking to stay proceedings pending investigations by the Directorate of Criminal Investigations, which the magistrate declined to allow, and that she, instead, gave directions to the parties, which directions they were required to comply with. In her supporting affidavit, the grounds were reiterated.

3. The 1st respondent appointed the firm of Ochieng Eddie Vincent & Co. advocates. The said advocates filed a preliminary objection dated 22nd August 2025, vide which it was contended that the application offends section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules and should therefore be struck out with costs to the 1st respondent.
4. In the submissions dated 21st October 2025, the 1st respondent's counsel contended that the applicant ought to have filed the review application in the court that made the impugned decision, as this court lacks jurisdiction to hear and determine a review application of a matter pending before a different court. It was further contended that no appeal had been proffered against the impugned decision.
5. Mr Ochieng, learned counsel for the 1st respondent, relied on the case of **D J Lowe & Co Ltd v Banque Indo Suez, Nairobi Civil Application No 217 of 1998 [1998] eKLR** and **Turbo Highway Eldoret Ltd v Muniu (Civil Appeal E040 of 2021) [2022] KEHC 10197 (KLR)** in support of his contention that the that the conditions for grant of orders of stay of proceedings had not been met.
6. Counsel prayed for costs, "*to deter any further myriads of applications which waste the court's time*".
7. In the submissions dated 23rd September and 27th October 2025, it was urged that since the 1st respondent did not file grounds of opposition nor a replying affidavit, the notice of preliminary objection

holds no water. It was further urged that the preliminary objection was filed out of time and without leave.

8. What amounts to a preliminary objection is well settled. A preliminary objection is raised on the basis of pure points of law which arise from the pleadings and that do not require investigations of facts. In **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**, the Court of Appeal for Eastern Africa stated as follows regarding preliminary objections: -

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which, if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Writing separately in the said decision, Sir Charles Newbold, P, added that: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of

Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

9. The contention in this case is that the matter, out of which the impugned decision was made, was in the court below. Can this court review such a decision? I am of the view that it review is not the same thing as an appeal. Order 45 Rule 1 of the Civil Procedure Rule states that: -

**“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.”**

10. From the foregoing, it is clear that a review application is made in the court that made the decision. This court did not make the impugned decision. That being the case, it is my view that the instant

application was filed in the wrong court. If the applicants were aggrieved by the decision of the court below, they should have appealed against it. That being the case, the preliminary objection has merit. The same is allowed, with the consequence that the entire cause is struck out.

11. Each party will bear own costs.

12. Orders accordingly.

Dated and signed this 27th day of November 2025. Delivered virtually through **Microsoft TEAMS.**

Gregory Mutai
JUDGE

In the presence of:

Mr Ochieng for the 1st Respondent;

Ms Esther Sayo Takwa (pro se litigant); and

Arthur - Court Assistant.