



**Laly v Magnet Ventures Limited (Environment and Land Case
682 of 2014) [2026] KEELC 459 (KLR) (30 January 2026) (Ruling)**

Neutral citation: [2026] KEELC 459 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 682 OF 2014
TW MURIGI, J
JANUARY 30, 2026**

BETWEEN

SUKHDEV SINGH LALY PLAINTIFF

AND

MAGNET VENTURES LIMITED DEFENDANT

RULING

1. The Defendant/Applicant filed a Notice of Motion dated 28th October 2024 seeking the following orders:-
 - a) That this Honourable court be pleased to vary, review and/or set aside the judgment of Justice Mogeni delivered on 23rd May 2022, declaring that the Defendant trespassed on the Plaintiffs' property and awarding the Plaintiff general damages of Kshs 5,000,000/= with interest and costs of the suit.
 - b) That this Honourable court do order the Plaintiff to pay to the Defendant the sums paid in satisfaction of the said judgment, its decree, and subsequent orders with interest from the date of payment.
 - i) Kshs 432,872/= being the taxed party and party costs paid on 16th May 2023.
 - ii) Kshs 66,500 being further court fees paid on 5th October 2023.
 - iii) Kshs 705,492/= being interest on the general damages awarded on 6th November 2023.
 - c) That this court do order the Plaintiff to pay to the Defendant the sum of Kshs 1,200,000/= paid to the Plaintiff on 8th July 2024 as licensing fees based on the said judgment with interest from the date of the judgment.



- d) That this Honourable court do grant any other or further orders as it may deem fit in the interest of justice.
- e) That the costs of the application be provided for.
2. The application is based on the grounds appearing on its face together with the supporting affidavit of the Applicant, sworn on even date.
3. In response, the Plaintiff filed a Notice of Preliminary Objection dated 11th March 2025, raising the following grounds:
 - i. The application dated 28th October 2024 is an abuse of the court process.
 - ii. The application offends the provisions of Section 80 of the *Civil Procedure Act* and Order 45, Rule 1 of the Civil Procedure Rules, because the Applicant has filed a Notice of Appeal dated 24th May 2022.
 - iii. That the Applicant relinquished its right to file an application for review when it filed the Notice of Appeal dated 24th May 2022.
4. The Preliminary Objection was canvassed by way of written submissions.

The Plaintiff/Respondent's Submissions

5. The Plaintiff filed its submissions dated 28th May 2025.
6. On behalf of the Plaintiff, Counsel outlined the following issues for the Court's determination:
 - a) Whether the preliminary objection is merited;
 - b) Whether a Notice of Appeal is enough proof for preferring an Appeal;
 - c) Whether this court has jurisdiction to entertain the application for review;
 - d) Who should bear the costs?
7. Regarding the first issue, Counsel submitted that the preliminary objection raises a pure point of law, citing Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, which prohibit a party from pursuing both an appeal and a review of the same judgment, as doing so would constitute an abuse of the court's process. Based on the foregoing, Counsel submitted that the court lacks jurisdiction to entertain the application. To support this point, reliance was placed on the cases of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 and *Serephen Nyasani Menge v Rispah Omase*.
8. Regarding the second issue, Counsel submitted that filing a Notice of Appeal is sufficient to render a review application incompetent. To support this argument, Counsel relied on the cases of *Otieno Ragot & Company Advocates v National Bank of Kenya Limited* (2020) eKLR and *Sheila Kabole Mabwa & 47 others v Wamalwa Kijana & 2 others* (1987) KLR 557. Counsel also relied on Rule 2(2) of the Court of Appeal Rules, which provides that an appeal includes an intended appeal. Counsel contended that the Defendant's Notice of Appeal clearly demonstrates an intention to appeal and therefore bars any review.
9. Regarding the third issue, Counsel submitted that this court lacks jurisdiction to entertain the application and urged the court to dismiss it with costs to the Plaintiff.



The Defendant/Applicant's Submissions

10. The Defendant filed its submissions dated 5th June 2025.
11. On behalf of the Defendant, Counsel outlined the following issues for the court's determination:
 - i. Whether the preliminary objection raises pure points of law as established in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696*
 - ii. Whether the filing of a Notice of Appeal bars an application for review under section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules; and
 - iii. Whether the Defendant's Application for review constitutes an abuse of the court process.
12. Regarding the first issue, Counsel submitted that determining whether an appeal has been filed would require checking whether a record of appeal has been filed and evaluating the evidence supporting it, which falls outside the scope of a preliminary objection.
13. Regarding the second issue, Counsel submitted that filing a Notice of Appeal merely serves as notice of the Defendant's intention to Appeal, not the Appeal itself. To support this point, Counsel cited cases from the Mombasa Court of Appeal, including Civil Application No. Nai 258 of 1997, *Noradhi Kenya Ltd v Loria Michele*, and *Yani Haryanto vs E.D & F Man (sugar) Limited*, Civil Appeal No. 122 of 1992.
14. Regarding the third issue, Counsel submitted that the application is neither vexatious nor intended to harass the opposing party but rather seeks to review the judgment based on the discovery of new and important evidence.
15. In conclusion, Counsel submitted that the preliminary objection fails to meet the legal threshold because it raises factual issues and should be dismissed.

Analysis and Determination

16. Having considered the Preliminary Objection and the rival submissions, the only issue for determination is whether the Preliminary Objection is merited.
17. The law on preliminary objections is well settled. A preliminary objection must be based on a pure point of law. In *Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors Ltd (1969) EA 696*, Law JA stated as follows:

“So far as I'm 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

18. Further on, Sir Charles Newbold JA stated;

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a 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 has 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 nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

19. In *Oraro Vs Mbaja* (2005) eKLR Ojwang J (as he then was) described it as follows;

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and, in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

20. For a preliminary objection to be valid, it must be based on a point of law and on facts that are not in dispute. It should not be proved by facts or evidence, nor should it address disputed facts.

21. The Plaintiff contends that the review application is incompetent as the Applicant has already filed a Notice of Appeal against the same judgment.

22. The issue for determination is whether filing a Notice of Appeal bars the Applicant from seeking review of the same judgment.

23. In *Yani Haryanto v E.D & F Man (Sugar) Ltd* (1993) eKLR, the Court of Appeal held that a review is not available once an appeal has been filed.

24. However, subsequent decisions have clarified that an appeal is deemed to have been filed upon the filing of a substantive appeal and not merely upon the filing of a Notice of Appeal.

25. In *Kisya Investments Ltd v Kenya Finance Corporation Ltd* (2005) eKLR, the court held that a notice of appeal is merely an expression of the intention to appeal and does not, in itself, constitute an appeal.

26. Similarly, in *Paul Mwaniki Gachanja v. Attorney General & another* (2015) eKLR, the court held that filing a Notice of Appeal does not bar a party from seeking review, because a Notice of Appeal is not an appeal properly so called.

27. In the matter at hand, the Respondent relies solely on the existence of a Notice of Appeal. No evidence has been presented to the court showing that a substantive appeal has been filed.

28. Determining whether an appeal exists is a factual matter that requires an inquiry into the facts and evidence, thereby taking the matter outside the scope of a preliminary objection as envisaged in the *Mukisa Biscuits case*(supra).

29. Based on the foregoing, I find the preliminary objection without merit and hereby dismiss it with costs.

RULING DELIVERED DATED AND SIGNED VIA MICROSOFT TEAMS THIS 30TH DAY OF JANUARY,2026

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T. MURIGI

JUDGE

In the presence of:-

Ms Biro holding brief for Ms Mburu for the Defendant.

