REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. E041 OF 2021

RHINE FORWARDERS LIMITED ……..

……..PLAINTIFF

VERSUS

JOSEPH WANJAU MWANGI ……1ST DEFENDANT

SHAR V. DHAYALAL ……2ND DEFENDANT

RULING

1. This is a ruling on the notice of motion dated 29/05/2025, filed by the plaintiff, which is said to have been brought under **Sections 1A, 1B, 3A** and **63 (e)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya,** and under **Orders 18 Rule 10, 45 Rule 1** and **51 Rule 1** of the **Civil Procedure Rules, 2010,** and all enabling provisions of the Law. The plaintiff prays for the following orders:

a. ***Spent.***
b. ***Spent.***
c. ***THAT the proceedings of 23/04/2025 and all subsequent orders and/or directions, including the filing of written submissions on the case following the trial of the same, be and are hereby re-opened, varied and/or reviewed.***
d. ***THAT this honourable court be pleased to order the defendants' case to be reopened and heard for purposes of cross-examination of DW-2, Deputy Land Registrar for Nairobi County, and DW-3, Land Registrar for Machakos County.***
e. ***THAT this honourable court be pleased to issue directions that the documents produced by DW-2 and DW-3 on the said date be served upon the plaintiff's advocates to facilitate cross-examination of DW-2 and DW-3.***
f. ***THAT this honourable court do issue any such orders and directions as it deems fit in the circumstances.***
g. ***THAT the defendants bear costs for the motion.***

2. The motion is based on the grounds listed on the face thereof and the supporting affidavit sworn by the plaintiff's counsel, **Ms. Jeretina Mayega,** on the instant date. In summary, she asserts that on 23/04/2025, this case proceeded for an *ex parte* defence hearing without the plaintiff or his advocates due to an inadvertent misdiarization of the hearing date.

3. They became aware of the proceedings and orders on 29/04/2025 when served with a mention notice regarding written submissions before judgment. The failure to attend on 23/04/2025 was unintentional; the date was mistakenly recorded as 23/05/2025. As a result, the matter proceeded *ex-parte.* The advocates, having reviewed the proceedings, now seek to cross-examine DW-2 and DW-3 on their oral testimonies and evidence from 23/04/2025, and request the court's indulgence.

4. The motion is contested by a replying affidavit from **Mr. Thuita Kiiru**, the defendants' counsel, dated 3/06/2025. He states that on 17/02/2025, both parties appeared before the court and agreed the matter would proceed to a hearing on 23/04/2025, a date set with the consent of advocates. The plaintiff and/or his advocate were absent from court on that date without prior notice or request for adjournment. No explanation was given for their absence. The plaintiff's counsel admits to receiving the mention notice on 29/04/2025, which outlined subsequent court directions. Despite knowing of the proceedings, the plaintiff delayed filing this motion until just days before the scheduled mention on 4/06/2025.

5. To counsel, this shows the motion is an afterthought, meant to delay proceedings and reintroduce already admitted evidence. The documents from DW2 and DW3, official records from the Ministry of Lands, were not new or private, but are part of the

public record and were presented by authorised officials. Allowing the case to be reopened would be an injustice, as the plaintiff has not explained the significant delay in seeking to reopen it. The plaintiff has not met the legal threshold for review, as they lack both new evidence and any error apparent on the record.

6. In accordance with the court's directive, the motion has been canvassed through written submissions received from **Ms. Nyachoti & Co. Advocates** for the plaintiff, dated 16/06/2025 and from **Ms. Thuita Kiiru & Co. Advocates** for the defendants, dated 3/07/2025. Consequently, after identifying and examining the issues for determination, this ruling shall, in its subsequent analysis and decision, consider the arguments contained in the rival submissions, and will also take into account applicable law and judicial precedents.

Issues for determination, Analysis and Determination.

7. Thus, having given careful thought to the motion, its grounds, affidavits and submissions, the distilled issues for determination that will adequately address the matters in controversy are: -

    a. Whether the DW2 and DW3 should be recalled.
    b. Whether the plaintiff has met the legal threshold to warrant the review of its orders of 23/04/2025.

These issues shall be handled in chronological order shortly.

a. <u>Whether DW2 and DW3 should be recalled.</u>

8. As submitted by the plaintiff, the pertinent legal provisions addressing this matter are found in **Section 146 (4)** of the **Evidence Act,** which authorises the court to recall a witness for additional examination-in-chief or further cross-examination. This provision is mirrored in our **Order 18, Rule 10** of the **Civil Procedure Rules (CPR),** which also grants the court the authority to pose questions to a witness.

9. In reopening a case, the court exercises judicious discretion rooted in law, evidence, and reason. The criteria to be applied in this discretionary exercise were comprehensively summarised by the persuasive decision of **Susan Wavinya Mutavi v Isaac Njoroge & another [2020] KEELC 8 (KLR),** as follows:

> ***"First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty-bound to ensure that the proposed re-opening of a part's case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on part of the applicant. Fourth, the***

applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible."

10. Having reviewed the grounds laid out in the motion and examined the record. This court has reviewed the reasons presented by the plaintiff's counsel regarding their failure to attend court on 23/04/2025 and the grounds for a recall. Following this, it is deemed that the explanation that counsel misdiarised the court hearing date is not tenable, given the existence of the e-filing system. In addition to orally issuing dates in court, the court's electronic system has implemented additional automated mechanisms to inform parties of hearing/mention dates. This position was well elaborated in the decision of **Maina v J.K. Horeria t/a Horeria & Company & another [2023] KEELC 16919 (KLR)** as follows:-

"It is worth noting that in this era of e-filing that was officially launched by the Judiciary on July 1, 2020 the e-filing court systems usually sends parties automated notifications either emails or Short Message Services (SMS) notifying parties

of upcoming court dates and any charges (sic) in the schedule. Parties have always been urged time without number to embrace the said technology. The proceedings that Counsel for the Defendant seeks to set aside were definitely post the launch/commencement of court's e-filing system."

11. When this matter came before this court on 4/06/2025, Ms Mayega informed the court that her law firm had registered a landline number rather than a mobile number in the CTS system. However, this is not the case, as after checking the CTS system, only an email address was registered. Counsel needs to update their details, as it is incumbent upon them to ensure that their credentials are up to date.

12. Nevertheless, the burden rested on Ms. Mayega to produce evidence of misdiarization to substantiate her claims by submitting a copy of the relevant diary, which she failed to do. Moreover, and in agreement with Mr. Thuita, although she was aware of the proceedings on 23/04/2025 at least one month prior to the filing of the current matter, the motion was only filed a few days before 4/06/2025, the date scheduled by the court for the purpose of reserving the matter for judgment, which this court considers an afterthought as she did not move the court immediately she became privy of the proceedings of 23/04/2025.

13. Additionally, the plaintiff wants to be allowed to reopen the defendants' case on the grounds that it did not cross-examine DW2 and DW3. In this court's considered view, and in concordance with Mr. Thuita, the reasons provided are indeed not the circumstances under which a trial court exercises the discretion to reopen a case in a civil trial. Furthermore, as established in the case of **Susan Wavinya Mutavi *(Supra),*** parties are required to present all their evidence and close their cases; consequently, the plaintiff possesses no entitlement to reopen the case for the purpose of rebutting the opposing party's evidence after the case has been closed and the defence has submitted their written submissions. Accordingly, this court finds that this prayer fails.

b. <u>Whether the plaintiff has met the legal threshold to warrant the review of its orders of 23/04/2025.</u>

14. With respect to this issue, the relevant provisions governing the review of court decisions are set out in **Section 80** of the **Civil Procedure Act** and **Order 45, Rule 1** of the **CPR**. **Section 80** states that;

> ***"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 judgment to the court which passed the decree or made the order, and the***

court may make such order thereon as it thinks fit."

15. Further, **Order 45, Rule 1(1),** of the **CPR** provides as follows:

*"**(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."

16. The salient conditions brought out in **Order 45 Rule 1 (1)** of the **CPR,** such as the discovery of new and important

matter, mistake, and sufficient cause, have to be proved by an applicant, and in dealing with such applications, the court has to exercise its judicious discretion. With regard to the prevailing jurisprudence, this court aligns itself with **paragraph 32** of the Supreme Court's decision in **Parliamentary Service Commission v. Wambora & 36 others [2018] KESC 74 (KLR),** in which it articulated the following non-exhaustive guiding principles for the consideration of applications for review of court decisions:

> ***"(i)A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court. (ii)Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;(iii)An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application. (iv)In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically. (v)During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review. (vi)The applicant has to satisfactorily demonstrate that the judge(s)***

misdirected themselves in exercise discretion and:(a)as a result a wrong decision was arrived at; or(b)it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice."

17. Accordingly, in the circumstances of this case, the plaintiff, albeit properly moving the court under **Order 45 Rule 1 (1)** of the **CPR** to seek a review of the proceedings and orders of 23/04/2025, has indicated that the basis of the motion involves a mistake. Accordingly, having earlier found that the mistake was not substantiated by the provision of a copy of the diary, this court finds that the prayer for review or variation of its orders of 23/04/2025 is unsustainable. This court finds that this relief fails.

18. For the above reasons and findings, and considering this is an interlocutory ruling, this court dismisses the application dated 29/05/2025 with costs being in the cause. In the end, the following disposal orders are hereby issued: -

a. The application dated 29/05/2025 is dismissed with costs being in the cause.

b. The plaintiff is to comply with the previous directions on written submissions on the substantive suit within 21 days hereof.

c. A mention date shall be given for purposes of issuing a judgment date.

Orders accordingly.

Delivered and Dated at Machakos this 3rd February, 2026.

HON. A. Y. KOROSS
JUDGE
03.02.2026

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms Kanja Court Assistant

Miss. Omwambia holding brief for Mr. Philip Nyacholi for Applicant

Miss. Orimba holding brief for Mr. Kiilu for Defendant