REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCLC NO. E053 OF 2025

MOSES EPOLOTO.....1ST PLAINTIFF/RESPONDENT

PETER HONGO.....2ND PLAINTIFF/RESPONDENT

DAVID NDIEMA.....3RD PLAINTIFF/RESPONDENT

GEORGE MUSAMALI.....4TH PLAINTIFF/RESPONDENT

(SUING ON BEHALF OF THE MEMBERS OF KENYA POLICE SACCO)

VERSUS

RUARAKA HOUSING ESTATE LIMITED .....1ST DEFENDANT/APPLICANT

UTUMISHI INVESTMENT LIMITED .....2ND DEFENDANT

KENYA NATIONAL POLICE DT SACCO.....3RD DEFENDANT

RULING

1. Before this court for determination is the notice of motion dated 17th July, 2025 filed by the 1st defendant/applicant and it is expressed to be brought under **Sections 1A, 1B** and **80** of the **Civil Procedure Act** and **Order 45 Rule 1** of the **Civil Procedure Rules** seeking the following orders:

a. This honourable court be pleased to review and set aside and/or vary the ruling delivered on 10th July, 2025 by honourable Justice C.G. Mbogo in respect of

the preliminary objection dated 21st February, 2025.

b. The costs of this application be provided for.

2. The application is supported by the affidavit of Albert Waweru Miare, the director of the 1st defendant/applicant which was sworn on even date. The 1st defendant/applicant deposed that the preliminary objection was filed by the 2nd defendant and the court repeatedly referred to the objection as having been filed by the 1st defendant/applicant which is incorrect and amounts to an error on the face of the record.

3. The 1st defendant/applicant further deposed that the court did not consider the written submissions filed by the 2nd defendant in support of the preliminary objection despite the same having a material bearing on the outcome of the ruling. It was deposed that failure to consider these particulars may have prejudiced the fair determination of the issues raised before the court and resulted in findings not supported by full appreciation of the parties' position. Further, that this constitutes clear grounds for review under **Order 45 Rule 1** of the **Civil Procedure Rules** being an error apparent on the face of the record.

4. The application was opposed by the replying affidavit of the 4th plaintiff/respondent sworn on 21st November, 2025. He deposed that the preliminary objection dated 21st February, 2025 indicates that it was drawn by Teddy & Company Advocates for the 1st defendant, and that the court simply referred to what the document stated. Further, he deposed that the 2nd defendant has not disputed the authenticity, content or appearance of the objection nor have they explained why the same shows the 1st defendant as the party who filed the same.

5. The 4th plaintiff/respondent deposed that the 2nd defendant cannot now blame the court for their own failure, and that if any confusion existed, the same emanated from the 2nd defendant's own pleadings. Further, that the 2nd defendant's act of remaining silent cannot now be weaponized as a ground for review, as this court sufficiently addressed the issue raised in the objection.

6. In conclusion, it was deposed that the alleged sufficient reasons and errors apparent on the face of record do not satisfy the strict requirements under **Order 45 Rule 1** of the **Civil Procedure Rules**.

7. The application was canvassed through written submissions. The 1st defendant/applicant filed its written submissions dated 14th

January, 2026. By the time of writing this ruling, the plaintiffs/ respondents had not filed their written submissions. Be that as it may, I have considered the application, the reply thereof and the written submissions filed. The issue for determination is *whether there is error apparent on the face of the record to enable review of the ruling delivered on 10th July, 2025.*

8. **Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules** provides as follows:-

> ***"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."***

9. **Order 45, Rule 1** of the **Civil Procedure Rules** provides 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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"

10. From the above provisions, it is clear that while **Section 80 of the Civil Procedure Act** grants the court the power to make orders for review, **Order 45** sets out the jurisdiction and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.

11. In the case of **National Bank of Kenya Ltd v Njau [1997] KECA 71 (KLR)**, the Court of Appeal held as follows:-

> ***"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."***

12. In the case of **Muyodi versus Industrial and Commercial Development Corporation & Another (2006) 1 EA 243**, it was held:-

> ***".... in Nyamogo & Nyamogo -v- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is 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 long drawn process of reasoning or 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 or wrong view is certainly no ground for a review although it may be for an appeal ...”***

13. The 1st defendant/applicant in this case argued that there are errors apparent on the face of the ruling delivered by this court on 10th July, 2025 to the extent that the court repeatedly referred to the preliminary objection as having been filed by the 1st defendant, yet the same was filed by the 2nd defendant. Secondly, the 1st defendant/applicant argued that the court failed to consider the written submissions filed by the 2nd defendant which in its view prejudiced the fair determination of the matter.

14. From the record, the notice of preliminary objection dated 21st February, 2025 is filed by the firm of Teddy & Company Advocates and it reads that the objection is filed by the advocates for the 1st defendant. On the face of it, the error emanates from the pleading itself and the court is not to blame. This error if it is to be corrected, would it alter the final determination of the court? I

think not. The court determined the objection based on the averments contained in the plaint dated 13th February, 2025.

15. Secondly, the court acknowledges that indeed the submissions filed by the 2nd defendant were inadvertently not considered. However, and as I disagree with the 1st defendant/applicant, the said submissions if considered even at this stage would not alter the final determination of the ruling. As I stated in the ruling and I quote ***"In this case, the plaintiffs pleaded "That on or around the year 1982, the 3rd defendant (Kenya Police Savings and Credit Cooperative Society) through its management decided to start a development project for its members." I believe the wording in this paragraph is what the 1st defendant contends to be the period when the cause of action arose. A plain reading of the plaint does not expressly state when the cause of action arose, but seeks to give a narration of the events leading to the filing of the suit from 1982 to date. Equally, the plaintiffs submitted that there are fraudulent transactions which they discovered in the year 2024 when they began investigations. <u>If say for example this statement was true, it would mean that the court would be required to comb through evidence to establish these facts which is not permitted within</u>***

***the dictates of the principles of a preliminary objection*.”** with emphasis

16. This court’s position in dealing with disputed facts in determining a preliminary objection remains unchanged especially where it is called upon to peruse documents to determine when the cause of action arose. Having said that, what I find appalling is that the party who should have sought review seems satisfied with this ruling. I say so for the reason that the 2nd defendant has not filed any response to support this application and neither has it filed the application seeking review.

17. In my view, the instant application is brought by a party who seems displeased with the decision of this court and if at all it was genuine, the same application should have been filed by the 2nd defendant unless it can be shown that the advocates acting for the 1st defendant/applicant have instructions to act for the 2nd defendant.

18. From the above, I find no merit in the notice of motion dated 17th July, 2025 and it is hereby dismissed. I make no orders as to costs. It is so ordered.

DATED, SIGNED & DELIVERED VIRTUALLY
THIS 24TH DAY OF FEBRUARY, 2026.

HON. MBOGO C.G.
JUDGE
24/02/2026.

In the presence of:
Ms. Benson Arunga - Court assistant
Mr. Duncan Muge for the 1st Defendant/Applicant
Mr. Teddy Ochieng for the 2nd Defendant /Respondent
No appearance for the Plaintiff/Respondent