REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELCA CASE NO. E017 OF 2025

JACKTON OMONDI ODONGO::::::::::::::1st APPLELLANT/APPLICANT

EVERLINE MORAA OMONDI::::::::::::::::::2ndAPPELLANT/APPLICANT

VERSUS

SUPERIOR HOMES (KENYA) PLC::::::::::::::::::::::::::::::RESPONDENT

RULING

The application is dated 19th December 2025 and is brought under Article 50 & Article 159 of the constitution of Kenya, 2010, Sections 1A,1B,3A,65, 80 &99 of the Civil Procedure Act Cap 21 Laws of Kenya; Order 42 Rule 6, order 45 Rule 1, order 51 Rule 1 of the Civil Procedure Rules, 2010 seeking the following orders;

1. That this application be certified as urgent. The same be heard ex-parte and service of the same be dispensed with at the first instance, owing to its urgency.
2. That pending inter-parties hearing and determination of this application, this Honorable court be pleased to stay execution of its ruling delivered on 17th December 2025.

3. That pending inter-parties hearing and determination of this application, this Honorable court be pleased to stay execution of the judgement delivered on 21st February 2025, before Hon Derrick K. Kuto, senior principal Magistrate Mavoko Chief Magistrates' Court MCELC No. E120 of 2022: Jackton Omondi Odongo &Everline Moraa Omondi versus Superior Homes Kenya PLC.
4. That this Honorable Court be pleased to review and vary its ruling delivered on 17th December 2025, finding the Respondents Preliminary Objection merited and striking out all the pleadings and applications filed by the Firm of Achola Odhiambo and Company Advocates and vacating all subsequent orders issued.
5. That this Honorable Court be pleased to hear and determine the Appellant/Application's Notice of Motion Applications dated 17th March 2025 and 19th March 2025 on merit.
6. That the costs of this application be in the cause.

It is based on the annexed affidavit of Michael Odhiambo and on grounds that in the ruling delivered on 17th December 2025, the Honorable court held that the respondent's preliminary objection dated 7th April 2025 was merited and struck out all the pleadings and applications filed by the firm of Achola Odhiambo and Company Advocates and equally vacated all subsequent orders of Stay of

Execution issued therein, which findings was erroneous. That in reaching impugned ruling, the Honorable Court failed to take cognizance of the proceedings of 17th July 2025. Marking the Notice of preliminary Objection dated 7th April 2025 as having been dispensed with by virtue of the respondents' Advocates on record acknowledging the existence of a consent granting the firm of Achola Odhiambo & Company Advocates authority to act for the Appellants/Applicants post Judgement, in the place of their former advocates, which is evident on the face of the record. That the court further ignored the glaring factual disposition and admission that Respondent's advocates Notice of Preliminary objection dated 7th April 2025 was withdrawn in court on 17th July 2025 by the Respondents counsel which position the respondent had rightfully submitted, conceded and upheld in paragraph 2 of their written submissions dated 11th December 2025. That further the Honorable Court erroneously failed to appreciate the undisputed fact that the Respondent had already conceded that the firm of Achola Odhiambo & company Advocates was properly on record and had as such withdrawn their Notice of Appeal. That the court, by striking out all the Appellants/Applicants pleadings equally struck out the Appellants/Applicants Memorandum of Appeal and as such the Honorable Court failed to appreciate despite rightfully noting that the appeal constituted a fresh suit that counsel did not require leave or consent to come on

record and as such the Memorandum of Appeal ought not to have been dismissed, which holding was erroneous.

That the Honorable Court in the impugned ruling of 17th December 2025 in which it struck out the entire Appellants/Applicants Memorandum of Appeal and any other pleadings filed therein, erroneously granted orders that had not been sought in the Notice of Preliminary Objection dated 7th April 2025 since the Notice of Preliminary Objection only sought to strike out the Notice of Motion Applications dated 17th March 2025 and 19th March 2025. That the court in delivering a ruling on the Respondent's Notice of Preliminary Objection, went back on its own directions of 17th July 2025, marking the same as having been dispensed with. That the court equally ignored the glaring fact on the face of record, that the both parties had conspicuously failed to submit on the Notice of Preliminary Objection in their respective written Submissions on record and erroneously delivered a ruling on an already dispensed with the Notice of Preliminary Objection on a date that it had reserved for delivery of ruling on the Appellants Notice of motion Application dated 17th March 2025 and 19th March 2025 and for issuing directions on the matter. That owing to the error on the record the court erroneously vacated the obtaining stay of execution Orders in favor of the Appellants/Applicants prematurely thereby condemning them unheard and curtailing their constitutional right of appeal and fair hearing.

That the said misapprehension constitutes an error apparent on the face of the record and has occasioned a miscarriage of justice.

That it is just and expedient in the circumstances that this Honorable Court reviews its ruling delivered on 17th December 2025 to correct the said error and grant the order sought. That this application is paramount as the Appellants/Applicants are reasonably apprehensive that the Respondent shall move in haste to execute the judgment of the subordinate Court thus rendering the Appellants/Applicants homeless and their appeal moot given that the subject of the suit is a house they bought from the Respondent and in which they reside.

This court has carefully considered the application and submissions therein. The Respondent submitted that the remedy of review is not available for the Applicant. In the case of Mwihoko Housing Company Limited vs Equity Building Society (2007) 2 KLR 171 is relevant. It was held, that;

"A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an

incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of Rose Kaiza Vs Angelo Mpanju Kaiza 2009, the Court was categorical that;

"An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made…"

Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section 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.

(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."

The aforesaid rule is based on section 80 of the Civil Procedure Act, Cap. 21 Laws of Kenya which states 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."

Under Section 80 of the Civil Procedure Act, the court has unfettered discretion to make such orders as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously. In Court of Appeal, Civil Appeal No. 211 of 1996, National Bank of Kenya vs Ndungu Njau, the Court of Appeal held that;

"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 evidence and should not require an elaborate argument to be established. It will not be 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 proceed on an incorrect expansion of the law".

From the above provisions of the law, authorities cited and facts of this case the applicant submitted that the preliminary objection had been dispensed with as they had already filed a consent to act dated 15th March 2025. I have perused the court record and find that the consent was filed after the application hence at the time of coming on record the Applicants counsel did not have leave of the court.

Be that as it may, Section 1A of the Civil Procedure Act provides for the overriding objective of the Civil Procedure Act and the rules made thereunder and provides as follows:

> *"1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.*
>
> *(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).*
>
> *(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.*

Section 1B of the same Act, on the other hand provides for the duty of court and states:

> *(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims —*

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

Furthermore, I have perused the Respondents submissions dated 11th December 2025 which states the preliminary objection was dispensed with after the filing of the consent. In the circumstances I find that the application is merited and I grant the following orders;

1. That this Court reviews and varies its ruling delivered on 17th December 2025, finding the Respondents Preliminary Objection merited and striking out all the pleadings and applications filed by the Firm of Achola Odhiambo and Company Advocates and vacating all subsequent orders issued.
2. That the status quo be maintained pending hearing and determination of the Appellant/Application's Notice of Motion Applications dated 17th March 2025 and 19th March 2025 on merit.
3. That the costs of this application be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 24TH DAY OF FEBRUARY 2026.

N.A. MATHEKA

JUDGE