

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT KAJIADO**  
**ELCLR E014 OF 2025**

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS  
OF CERTIORARI AND PROHIBITION;

IN THE MATTER OF: ARTICLES 23(F), 47, 48, 50(1) AND 159(2) OF THE  
CONSTITUTION OF KENYA, 2010;

IN THE MATTER OF: SECTION 1A, 1B AND 3A OF THE CIVIL  
PROCEDURE ACT, CAP 21 OF THE LAWS OF KENYA;

IN THE MATTER OF: SECTION 7(1) (C) OF THE MAGISTRATES COURT  
ACT, 2015; AND

IN THE MATTER OF: SECTION 73 AND 78 OF THE LAND  
REGISTRATION ACT, 2012.

BETWEEN

REPUBLIC.....APPLICANT

-AND-

THE PRINCIPAL MAGISTRATE,

KAJIADO MAGISTRATE LAW COURT.....1<sup>ST</sup> RESPONDENT

PHILIP SIRONKA OLE LEMITEI.....2<sup>ND</sup>  
RESPONDENT

THE DISTRICT LAND REGISTRAR

KAJIADO LANDS REGISTRY.....3<sup>RD</sup>  
RESPONDENT

DEPUTY COUNTY COMMISSIONER

ISINYA SUB-COUNTY.....4<sup>TH</sup> RESPONDENT

-AND-

PETER M DAMA MEELI.....1<sup>ST</sup> EX-PARTE APPLICANT

PAUL SAOLI OLE NCHAKE.....2<sup>ND</sup> EX-PARTE APPLICANT

JASON OLE MOOKE TONOU.....3<sup>RD</sup> EX-PARTE APPLICANT

### RULING

*(In Respect of the 2<sup>nd</sup> Respondent's Preliminary Objection dated 8<sup>th</sup> October, 2025)*

#### Introduction

1. On 1 April 2025, the Ex Parte Applicants filed a Chamber Summons application of even date seeking leave to apply for an order of judicial review by way of prohibition to restrain the implementation of the 1st Respondent's order and decision issued on 14 March 2025 in *Kajiado Miscellaneous Application No. E014 of 2025: Philip Sironka Ole Lemitei -vs- The District Land Registrar, Kajiado Lands Registry & Deputy County Commissioner, Isinya Sub-County* by the 3rd Respondent. Additionally, the Ex Parte Applicants sought that the leave, if granted, do operate as a stay of implementation of the said decision. The Chamber Summons application was accompanied by a Statutory Statement, Verifying Affidavit, and annexures in support thereof.

2. Upon considering the application ex parte on 8 April 2025, the Court granted leave to the Applicants to apply for the judicial review orders sought. The leave granted was to operate as a stay barring the implementation or further implementation of the 1st Respondent's decision by the 3rd Respondent.
3. When the matter came up for directions on 10 July 2025, the Ex Parte Applicants sought leave to amend their Notice of Motion dated 5 May 2025. Leave was subsequently granted, and the Court ordered that the Ex Parte Applicants serve all parties within fourteen (14) days. The Amended Notice of Motion dated 17 July 2025 was accompanied by an Amended Statutory Statement and Verifying Affidavit.
4. The 2nd Respondent responded to the Motion by raising a Preliminary Objection dated 8 October 2025 on the grounds that, the application:
  - a. Is accompanied by a Verifying Affidavit and Statutory Statement, and not a Supporting Affidavit, thereby highly prejudicing the Respondents in making their respective responses.
  - b. Offends Rule 11 of the Fair Administrative Action Rules, 2024; Order 51 Rule 4; and Order 53 Rules 3 and 4 of the Civil Procedure Rules, as

the application is not supported by a Supporting Affidavit and therefore lacks a factual basis. Further, it is legally untenable for the Ex Parte Applicants to annex documents to a Statutory Statement.

- c. Is defective, suffers from procedural irregularity, is incurably defective and fatally incompetent for want of a Supporting Affidavit, and ought to be struck out.

### **Court's Directions**

5. The court directed that the Preliminary Objection by the 2<sup>nd</sup> Respondent be canvassed by way of written submissions. The directive was complied with by learned counsel for the 2nd Respondent and the Ex Parte Applicants, whose respective submissions dated 19th November 2025 and 5th December 2025 were duly filed and form part of the record of the court.

### **2nd Respondent's Submissions**

6. The 2nd Respondent in his submissions, sought dismissal of the Ex Parte Applicants' Amended Notice of Motion dated 17 July 2025 with costs, arguing that it is founded on an amended Statutory Statement and a Verifying Affidavit and does not contain a Supporting Affidavit.

7. Reference was made to Order 53 Rules 1 and 3 of the Civil Procedure Rules to demonstrate that judicial review proceedings consist of two stages: the leave stage, and the substantive stage. It was further argued that the application is not supported by affidavits and that the annexures have not been properly sealed.
8. Reliance was placed on Order 51 Rule 4 of the Civil Procedure Rules and various authorities, including *Kamau Muhia v Agricultural Finance Corporation (2016) KEHC 1546 (KLR)* and *Skair Associate's Architects v The Evangelical Lutheran Church of Kenya*, Milimani Law Courts Commercial & Admiralty Division Civil Case No. 342 of 2014, to argue that the application must be struck out with costs as it is not buttressed by a Supporting Affidavit and the annexures have not been properly sealed.
9. It was further contended that, since the application contains contested facts, it ought to have been accompanied by a Supporting Affidavit encompassing the averments relied upon to prove the facts upon which the case rests.
10. The 2nd Respondent submitted that the application cannot be cured by Article 159 of the Constitution, as it is wrongly drafted and lacks key ingredients that go to the core of the suit. Reliance was also placed on

Order 51 Rule 4 of the Civil Procedure Rules and several judicial authorities, including University of Nairobi v George Mabele ELRC Appeal No. 22 of 2020 (2021) eKLR; Stephen Mbugua Wanjiru v Kiambu County Government (Environment & Land Petition E007 of 2024) {2024} KEELC 6419 (KLR) (30 September 2024) (Ruling); Benson Kamanda & 4 Others v Bisembe Farmers' Co-operative Society Ltd; Church Commissioners of Kenya v Lemurian & 28 Others (Environment and Land Case 209 of 2014) {2025} KEELC 6636 (KLR) (2 October 2025) (Ruling); and Kenindia Assurance Company Limited v John Brown Shilenje (2020) KEHC 161 (KLR).

11. Considering that the Ex Parte Applicants allege fraudulent dealings in respect of the suit property, it was submitted that such evidence can only be substantiated through a Supporting Affidavit with properly marked and sealed annexures.

#### **Ex Parte Applicants' Submissions**

12. The Ex Parte Applicants submitted that the Preliminary Objection is not sustainable and ought to be dismissed, as it is not founded on points of law but instead challenges the procedural nature of judicial review processes.

13. In support of this argument, reliance was placed on *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited (1969) EA 696* and *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 Others (2015) eKLR* to demonstrate what constitutes a proper preliminary objection.

14. It was submitted that under Kenyan law, there are two distinct ways of commencing judicial review proceedings: under Order 53 of the Civil Procedure Rules and under the Fair Administrative Action Rules. Under Order 53, the procedure involves the leave stage and the substantive stage, each with specific express requirements.

15. At the leave stage, a Statutory Statement containing the relief sought, the grounds relied upon, and the description of the Applicant, together with a Verifying Affidavit containing the evidence and facts relied upon, are the only documents required pursuant to Order 53 Rule 1(2). Once leave is granted, the Applicant is required to file a substantive Notice of Motion accompanied by the Statutory Statement and Verifying Affidavit filed at the leave stage.

16. The Ex Parte Applicants maintained that they duly complied with Order 53 by seeking leave through a Chamber Summons accompanied by a Statutory Statement and Verifying Affidavit. Upon being granted leave, they filed the substantive Notice of Motion in accordance with the Court's directive.
17. They argued that the 2nd Respondent's attempt to import the general requirements of *Order 51 Rule 4* relating to ordinary motions into judicial review proceedings is untenable and inappropriate, as it undermines the distinct structure of *Order 53 of the Civil Procedure Rules*.
18. Reliance was placed on *Republic v Land Disputes Court Central Division & Another Ex Parte Nzioka (2006) 1 EA 321; Republic v Technology (Judicial Review E002 of 2021) {2022} KEHC 494 (KLR) (12 May 2022) (Judgment);* and *Masara & Another v County Government of Nairobi (Environment and Land Judicial Review Case E004 of 2022) {2023} KEELC 288 (KLR) (26 January 2023) (Ruling).*
19. It was further submitted that Rule 11 of the Fair Administrative Action Rules cannot apply retroactively to processes commenced under Order 53 of the Civil Procedure Rules. Under the Fair Administrative Action Rules, judicial

review proceedings are commenced through an originating motion accompanied by a Supporting Affidavit, as leave is not required.

20. Accordingly, the 2nd Respondent cannot conflate two parallel procedural regimes initiated under different statutory frameworks in order to invalidate a lawful process through a Preliminary Objection.
21. The Ex Parte Applicants also submitted that the authorities cited by the 2nd Respondent do not relate to judicial review processes but to ordinary motions, petitions, and general affidavit practice, and therefore cannot override the express provisions of Order 53.
22. They maintained that Verifying Affidavits may contain relevant annexures, as they constitute the evidentiary foundation of judicial review proceedings. Further reliance was placed on *Republic v Technology* (supra) to argue that once leave is granted in judicial review proceedings, it can only be challenged through an application to set aside leave and not by way of a Preliminary Objection.
23. The Court was urged to award the costs of the objection to the Ex Parte Applicants.

### Issue for Determination

24. Having carefully analysed the Preliminary Objection and the competing submissions by counsel for the Ex Parte Applicants and the 2nd Respondent, the sole issue for determination is whether the Preliminary Objection is merited and meets the legal threshold.

### Determination

25. The celebrated case of Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited (1969) EA 696 defined what constitutes a Preliminary Objection as follows:

*“...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... 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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does*

*nothing but unnecessarily increase costs and, on occasion, confuse the issue, and this improper practice should stop.”*

26. Additionally, the purpose of a preliminary objection, was defined by the Supreme Court in *Independent Electoral & Boundaries Commission v Cheperenger & 2 Others* [2015] KESC 2 (KLR), in the following words:

*“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to a preliminary objection as a sword for winning a case otherwise destined to be resolved judicially, and on the merits.”*

27. Similarly, in *Oraro v Mbaja* [2005] KEHC 3182 (KLR), J. B. Ojwang stated that:

*“A ‘preliminary objection’, correctly understood, is 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 processes of evidence. Any assertion which claims to be a preliminary objection, yet bears 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.”*

28. The 2nd Respondent’s objection to the Ex Parte Applicants’ Amended Notice of Motion is premised on the ground that it is defective for not being accompanied by a Supporting Affidavit and that the annexures were not properly sealed, contrary to Order 51 Rule 4 of the Civil Procedure Rules. It is contended that a Supporting Affidavit and properly sealed annexures are crucial, particularly since the matter concerns alleged fraudulent dealings in respect of the suit property.
29. In response, the Ex Parte Applicants have dismissed these allegations, maintaining that the Preliminary Objection does not meet the legal threshold, as it is grounded on procedural issues rather than pure points of law. They rely on Order 53 of the Civil Procedure Rules and maintain that

the judicial review application was properly instituted in full compliance with the law. Unlike ordinary motions under Order 51, a substantive Notice of Motion in judicial review proceedings need not be accompanied by a Supporting Affidavit. They further contend that the 2nd Respondent is improperly conflating two distinct legal regimes.

30. Under *Order 53 of the Civil Procedure Rules*, a party seeking to institute judicial review proceedings must first seek leave ex parte through a Chamber Summons. Rule 1(2) requires that the Summons be accompanied by:

- a. A statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought; and*
- b. Affidavits verifying the facts relied upon.*

31. Upon the grant of leave, the Applicant is required to file a Notice of Motion and serve the parties. Order 53 Rule 4(1) provides that:

*“Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand, and no grounds shall, subject as hereafter in this rule provided, be*

*relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.”*

32. I have carefully scrutinised the pleadings filed by the Ex Parte Applicants and find that they fully comply with the procedural requirements set out in Order 53 of the Civil Procedure Rules. It would therefore be unjust to deny the Ex Parte Applicants the opportunity to have their dispute determined on the merits on the basis of alleged procedural defects, and particularly where the Constitution guarantees the right to a fair hearing under Article 50(1).

33. Accordingly, I hereby disallow the 2nd Respondent’s Preliminary Objection dated 8 October 2025, as it is unmerited. The costs of the objection shall be in the cause.

34. It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 19<sup>th</sup> Day of February 2026.

**M.D. MWANGI**  
**JUDGE**

**In the virtual presence of:**

Mr. Kipkirui for the 2<sup>nd</sup> Respondent

N/A by the Ex Parte Applicants and the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents

Court Assistant: Mpoye

M.D. MWANGI  
JUDGE

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