REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT ISIOLO

ELC APPEAL NO. E020 OF 2025

LAWRENCE DANIEL KIRINYA…….APPELLANT

VERSUS

SAMUEL BUNDI THURANIRA…….….RESPONDENT/APPLICANT

RULING

1. Before me is the amended Notice of Motion Application dated **19th February 2026;** brought pursuant to the provisions of **Sections 1A , 1B, 3, 3A, 63[e] and 80 of the civil procedure Act, Chapter 21, Laws of Kenya; order 42 rule 6; and order 45 rule 1 of the civil procedure rules 2010 and all enabling provisions of the law**. The relief[s] sought are:-

    i. ***That the Judgment / Ruling delivered on 5th day of February 2026; in this matter be reviewed and/or set aside.***

    ii. ***That pending the hearing and determination of this application interpartes, the execution of decree issued in the judgment on 5th of February 2026 be stayed.***

    iii. ***That pending the hearing and determination of this application, the execution of decree issued in the judgment on 5th day of February 2026 be stayed.***

    iv. ***That the cost of this Application be provided for.***

2. The application is anchored on various grounds which have been enumerated in the body thereof. The grounds include: the Applicant filed written submissions; the submissions were dated 26th January 2026; the submissions were duly lodged and same were/ contained in the court tracking system.

3. Additionally, the Applicant has contended that despite having filed the written submissions, the court ignored and disregarded the submissions. Moreover, it has been posited that the submissions which were filed raised pertinent and salient issues. The submissions [if considered], would have enabled the court to arrive at and reach a contrary conclusion.

4. The application is supported by the affidavit sworn by Samuel Bundi Thuranira on 19th February 2026. The supporting affidavit has reiterated the grounds contained in the body of the application. In addition, the deponent has annexed a copy of the judgment of the court.

5. The Respondent has filed grounds of opposition dated 26th February 2026, in opposition to the application. The Respondent has posited that the Applicant herein was granted timeline within which to file and serve written submissions. The Applicant failed to file and serve written submissions within the set timelines. In addition, it has been posited that when the matter came up for mention on 2nd February 2026, the Applicant had neither filed nor served the written submissions. The court thereafter proceeded to and scheduled the matter for judgment.

6. Furthermore, it has been contended that the Applicant herein has neither met nor satisfied the requisite grounds for review. In any event, it has been contended that the Applicant herein is merely abusing the due process of the court.

7. The subject application came up for hearing on 4th March 2026, whereupon the advocates for the parties sought to canvass and dispose of the application by way of written submissions. To this end, the court proceeded to and issued directions. The directions were: The Applicant shall file and serve written submissions within three days from the date of the directions; and the Respondent shall file and serve written submissions within three days from the date of service by the applicant.

8. The Applicant filed written submissions dated 6th March 2026, and wherein the Applicant has adopted the grounds contained in the body of the amended application and reiterated the averments in the supporting affidavit. In addition, the Applicant has highlighted three [3] key issues. The issues highlighted by the Applicant are: The Applicant duly filed written submissions dated 26th January 2026; the submissions were not taken into account by the court; the Applicant has established and satisfied the grounds to warrant review of the judgment and the consequential decree of the court.

9. In particular, learned counsel for the Applicant has submitted that the Applicant has discovered new and important evidence, namely; that the court did not take into account the applicant's written submissions. In addition, learned counsel for the Applicant has also posited that the

Applicant has shown the existence of an error and mistake; which is apparent on the face of record.

10. Flowing from the foregoing, learned counsel for the Applicant has contended that the application beforehand is meritorious. In this regard, the court has been implored to allow the application; review the judgment; and thereafter re-write a judgment taking into account the submissions filed by the Applicant.

11. The Respondent filed written submissions dated 10th March 2026 and wherein same has highlighted and canvassed four [4] salient issues. The issues highlighted by the Respondent are: Whether the Applicant's amended Notice of Motion is properly on record; whether the Applicant complied with the directions issued by the court on 27th November 2025; whether the application dated 19th February 2026 has met the threshold under order 45 rule 1 of the civil procedure rules; and whether there would be any prejudice if the orders sought are granted.

12. Learned counsel for the Respondent has thereafter contended that the court issued directions on 27th November 2025 and wherein the parties were directed to file and exchange written submissions within the set timelines. In particular, it has been contended that when the subject appeal come up for mention on 2nd February 2026, the Applicant herein had neither filed nor served the written submissions.

13. To the extent that the Applicant had neither filed nor served written submissions, it has been submitted that the court was right in setting down the matter for judgment. In any event, it has been submitted that the Applicant could not purport to sneak in submissions to the court tracking system without serving the submissions on learned counsel for the respondent.

14. Additionally, it has been submitted that the Applicant herein has neither shown nor demonstrated any basis to warrant the review of the judgment and the consequential decree. In particular, it has been submitted that though the Applicant adverts to the discovery of new and important evidence, no such evidence has been substantiated. In this regard, it has been submitted that the limb of discovery of new and important evidence does not avail to the applicant.

15. Flowing from the foregoing, learned counsel for the Respondent has invited the court to find and hold that the subject application is not only premature and misconceived, but same is legally untenable. The court has been implored to dismiss the application; and to award costs to the respondent.

16. Having reviewed the amended application dated 19th February 2026; the supporting affidavit thereto; the grounds of opposition filed by the respondents; and upon consideration of the written submissions filed by/ on behalf of the parties, three [3] key issues crystalize for determination.

17. The issues are: whether the Applicant duly filed and served his submissions as pertains to the appeal or otherwise; whether the

application beforehand has met/ satisfied the threshold to warrant review or otherwise; what orders ought to issue or be granted.

18. Regarding the first issue, it is imperative to recall and reiterate that the subject appeal came up for directions on 27th November 2025. During the directions, the advocates for the parties agreed to canvass and dispose of the appeal by way of written submissions. Thereafter, the court proceeded to and issued directions as pertains to the hearing and disposal of the appeal.

19. The directions that were issued by the court were; the appeal shall be canvassed by way of written submissions; the appellant shall file and serve written submissions within 21 days from the date of the directions; the Respondent shall file written submissions within 21 days from the date of service; and the appellant shall be at liberty to file rejoinder submissions [if any] within seven days from the date of service by the respondents. In addition, the court fixed the appeal for mention on 2nd February 2026.

20. On 2nd February 2026, the appeal indeed came up for mention, whereupon learned counsel for the Appellant [now Respondent in the application] duly attended court and intimated to the court that same had duly filed and served written submissions dated 5th January 2026. On the other hand, learned counsel posited that the Applicant herein [Respondent in the appeal] had neither filed nor served written submissions. Thereafter, learned counsel invited the court to set down the matter for Judgment.

21. It is instructive to note that learned counsel for the Applicant did not attend court on the scheduled date. Moreover, learned counsel for the applicant had neither filed nor served written submissions as at the time when the matter was called out and directions given.

22. Never the less, having authenticated that no submissions had been filed and none were obtaining in the court tracking system; and coupled with the fact that no submissions had been served upon learned counsel for the appellant, the court proceeded to and scheduled the matter for Judgment. For good measure, the judgment was scheduled for delivery on 5th February 2026.

23. The foregoing observations reflect the status of the court record as at 2nd February 2026, when the matter was mentioned. However, learned counsel for the Applicant now contends that by the time the court issued directions, same had already filed his submissions. In particular, it is contended that the submissions were [sic] dated 26th January 2026.

24. Though learned counsel for the Applicant has contended that same duly filed his submissions, I beg to state that following the filing of the current application, I commissioned the court assistant to check the court tracking system and to ascertain the date and time when the applicant's submissions were filed [if at all].

25. It suffices to state that the court assistant logged into the court tracking system and established that the Applicant had filed submissions dated 26th January 2026. However, it transpired that the said submissions were filed

on 2nd February 2026 at 5.15pm. There is no gain saying that the written submissions were filed outside the prescribed timelines and more particularly, well after the court had given directions as pertains to the delivery of Judgment.

26. Two critical sub-issues do arise. Firstly, the submissions by the Applicant were being filed long after the court had given directions pertaining to the date of Judgment. Strictly speaking, the submissions were being smuggled into the court record, even though learned counsel knew that the timelines for the filing of the said submission[s], had long lapsed.

27. Moreover, it is important to highlight that even though learned counsel is aware of the time when the impugned submissions were filed, learned counsel has had the audacity to purport that the submissions were duly filed in line with the directions of the court. In addition, learned counsel for the Applicant was being a bit disingenuous by [sic] backdating the submissions to hoodwink an onlooker/ bystander that the submissions were filed on 26th January 2026.

28. I beg to state that certain conducts that are now being deployed by parties and their learned counsel, ought to be called out and shamed. An advocate cannot seek to circumvent clear directions of the court by distortion and manipulation. Such conducts do not sit/ portend well with the due process of the court. [**See sections 1A, and 1B of the Civil Procedure Act, Chapter 21, Laws of Kenya].**

29. The second sub-issue that does arise is the legal implication[s] attendant to submissions filed by a party, but which are not served upon the adverse party. To start with, there is no gainsaying that every court process must be served on the adverse party. In this regard, it behoved learned counsel for the Applicant to serve his submissions [if any] upon the applicant's advocate.

30. I have not heard learned counsel for the Applicant to contend that same indeed served the submissions upon learned counsel for the appellant. Quite clearly, learned counsel for the applicant, was seeking to litigate by ambush. Suffice it to state that the provisions of **Article 50(1) of the Constitution, 2010;** frown upon such conduct. In addition, it is not lost on me that the submissions by learned counsel for the Applicant and which were never served on learned counsel for the appellant were clearly intended to occasion an injustice to the appellant.

31. Be that as it may, I hasten to state that it was incumbent upon learned counsel for the Applicant to abide by the directions of the court. Where there was non-compliance for any reason, it behoved learned counsel to approach the court and seek extension of time. Learned counsel for the Applicant did not have to resort to the unorthodox; and un-lawyerly tactic[s] which was deployed herein.

32. *In a nutshell*, my answer to issue one is to the effect that learned counsel for the Applicant did not file and serve the written submissions in accordance with the directions of the court.

33. The submissions were not **duly** filed. Needless to say, the submissions were being smuggled in outside the directions of the court.

34. Turning to the second issue, it is important to underscore that any Applicant who seeks to partake of and benefit from the discretion of the court as pertains to review is obligated to satisfy certain known/ established grounds. The grounds are: Discovery of new and important evidence which could not have been availed at the time of the delivery of the Judgment/ ruling; an error or mistake apparent on the face of record; or sufficient cause.

35. It suffices to state that the Applicant must first and foremost implead the ground [if any] that he seeks to be canvassed before the court. The ground underpinning review must be disclosed/ captured in the body of the application. It is only after the particular ground has been pleaded/ captured in the body of the application that the Applicant can now move to substantiate and prove the ground, in accordance with the required Legal standard.

36. Nevertheless, it is apparent that the Applicant herein has neither impleaded nor disclosed the ground[s] upon which review is being sought. In the absence of the ground being deployed to anchor the application for review, there is no gain saying that the application for review is deficient, defective and legally untenable. [See the holding in the case of ***Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR - Civil Appeal 142 of 2012]***

37. Other than the failure to capture or disclose the particular heading under which review is sought, the Applicant has equally failed to substantiate any of the known grounds for review. Pertinently, review does not issue for the mere asking of a party. Such a party must prove/ demonstrate a clear basis to warrant review.

38. In respect of the instant matter, the Applicant has been oscillating been discovery of new and important evidence [and error and mistake apparent on the face of record. Suffice it to state that these arguments are only in the submissions. I beg to address the questions sequentially.

39. With regard to the aspect that touches on and concerns discovery of new and important evidence [if at all], I wish to state that there is no evidence that has been discovered. Moreover, there is a clear dichotomy between evidence and submissions. Notably, submissions relate to legal analysis and caselaw [if any] supporting a position taken by a party. [See the holding ***in Daniel Toroitich Arap Moi versus Mwangi Stephen Mureithi 2014 eklr; and Frank Logistics Limited v Golden Lion Real Estate Company & 6 others [2025] KECA 1471 (KLR)]***

40. However, it is common ground that a case can very well be heard and disposed of by a court of law with or without submissions. Suffice it to state that the failure to file submissions or non-consideration of the submissions by a party, does not amount to [sic] discovery of new and important evidence.

41. Regarding the second aspect, namely; error or mistake apparent on the face of record, I wish to point out that the error or mistake must firstly: be apparent on the face of record; stare the court on the face; be one that can prompt review of the judgment or the impugned ruling. Moreover, it is not lost on me that an error or mistake apparent on the face of record is distinct from '*mere error'*.

42. In ***Nyamogo & Nyamogo v Kogo (2001) EA 170*** the Court of Appeal elaborated on the distinction between an 'error apparent on the face of record'; and ' *mere error'*.

43. The Court stated thus:

> ***An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a 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 a long drawn process of reasoning 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 apparent on the face of the record even though another view was possible. <u>Mere error or wrong view is certainly no ground for review though it may be one for appeal.</u>***

44. Whereas an error or mistake apparent on the face of record may, subject to proof, warrant review, a *'mere error'* does not avail. Furthermore, it is not lost on me that the claimant seeking to vitiate a judgment/ ruling on the basis of error or mistake must go the extra mile to demonstrate how the error or mistake affects the Judgment.
45. It is not enough for an Applicant to merely throw on the face of the court an *omnibus* allegation known as error and mistake apparent, without substantiating the error; and showing how [sic] the error impacts on the Judgment/ ruling.

46. As pertains to the subject matter, learned counsel for the Applicant has anchored the application for review on the basis that the court did not consider [sic] the applicant's submissions. However, it has not been demonstrated how these submissions would affect the final outcome and the conclusion that were reached by the court. To my mind, learned counsel for the Applicant is merely trying his luck in an endeavour to cover up for his lapses and [sic] to have a second bite on the cherry.

47. Notwithstanding the foregoing, it is not lost on me that the jurisdiction of the 1st appellate court, while entertaining an appeal is circumscribed. Notably, the 1st appellate court is enjoined to review, re-evaluate, re-appraise and scrutinize the evidence that was tendered before the trial court and to arrive at an independent conclusion.
48. Nevertheless, the 1st appellate court is called upon to defer to the findings and conclusions of the trial court, unless good basis exists to warrant departure.[see ***Peters Versus Sunday Post limited [1958] EA 23; Ephantus Mwangi versus Dancun Mwangi Wmabugu [1984] Eklr and Jabane versus Olenja [1986] EKLR*** , respectively.

49. I beg to underscore that while crafting the judgment in respect of the appeal, I subjected of the entire record of the Lower Court to exhaustive scrutiny and evaluation. I thereafter arrived at various factual and legal conclusions. The conclusions were underpinned by the evidence that was tendered before the trial court.

50. Needless to say, that I have not seen or come across any submission by the Applicant which seeks to highlight an error or mistake pertaining to the manner in which the analysis and re-evaluation was taken. I have also not seen any error or mistake that would warrant review. I must warn myself that in our adversarial system, there are parties who may be keen to keep knocking at the door of justice under the mistaken pretext that a contrary position may [and I say may] avail; if they keep trying.

51. Before concluding on this issue, I wish to take cognisance of the holding in the case of **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR.** The court *[per Mativo J- as he then was*] stated thus:

> **30. The principles which can be culled out from the above noted authorities are:-**
>
> ***i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.***
>
> ***ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.***

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by

the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

31. Guided by the jurisprudence discussed above, it is my finding that the reasons cited by the Applicant do not quality to be any of the grounds prescribed in Order 45 Rule 1 of the Civil Procedure Rules.

32. In view of my above conclusions, I find that the grounds cited do not qualify to be grounds for review to bring the applicant's application within the ambit of the grounds specified in Order 45 Rule 1. It is my finding that this is not a proper case for the court to grant the review sought or even to exercise its discretion in favour of the applicant. Accordingly, the applicant's application dated 27th March 2019 is dismissed with no orders as costs.

52. Bearing in mind the apt and succinct discussion in the decision [*supra],* I come to the conclusion that the Applicant herein has not brough himself within the four corners of the provisions of **Order 45 rule 1 of the civil procedure rules, 2010**. Having failed to bring himself within the prescription of the said order, the request for review does not lie.

CONCLUSION

53. It is the Applicant who had sought review of the judgment and the consequential decree of the court. The Applicant was therefore enjoined to establish and substantiate the relevant heading underpinning the plea for review. The Applicant has failed to do so.

54. In the premises, my conclusion is to the effect that the application beforehand has been mounted in vacuum. In any event, it suffices to underscore that there is a distinction between an error and a mistake apparent on the face of record; and a *'mere error'*. The former may vitiate a Judgment or ruling whereas the latter is superficial.

FINAL ORDERS.

55. In the end, and as a result of the foregoing, the final orders of the court are:

i. ***The amended Notice of Motion Application dated 19th February 2026 be and is hereby dismissed.***

ii. ***Costs of the Application be and are hereby awarded to the Respondent [the Appellant in the main appeal].***

iii. ***The Cost[s] shall be agreed upon and in default be taxed in the conventional manner.***

56. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 23RD DAY OF MARCH, 2026

OGUTTU MBOYA, FCIArb;CPM[MTI-EA]

JUDGE

In the presence of:

Court Assistant Mukami

Mr. Mwirigi Mbaya for the Appellant/ Respondent

N/A for the Respondent/ Applicant.