

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KIBERA
MISC. CIVIL APPLICATION NO. E007 OF 2025

ERIC GATHOGO
MUTONGA.....APPLICANT

VERSUS

PLANATE MANAGEMENT GROUP AFRICA
LIMITED.....RESPONDENT

RULING.

1. This matter is before the Court by way of an application seeking review of the ruling delivered on 12th November 2025 by Hon. P.W Mbulikah (Principal Magistrate) in Dagoretti MCCC No. E030 of 2025, **Eric Gathogo Mutonga v Planate Management Group Africa Limited**. The applicant seeks that the subordinate court file be called for, the impugned ruling be reviewed and set aside, and the suit be reinstated for hearing and determination on the merits before a competent court. Costs are also sought.
2. The application is premised on the contention that the trial court improperly upheld a preliminary objection and dismissed the suit without due regard to settled principles of law. It is argued that the court ventured into factual inquiry, contrary to the nature of a preliminary objection, which ought to be confined to pure points of law arising on the pleadings. The applicant further contends that the ruling denied him access to justice by compelling recourse to alternative dispute resolution, thereby precluding him from ventilating his claim through litigation.
3. The application is supported by the applicant's affidavit dated 18th December 2025, wherein he reiterates that the preliminary

objection was improperly upheld and that his case was neither heard nor determined on its merits.

4. In response, the respondent raised a preliminary objection dated 2nd February 2026, contending that the application is incurably defective for offending Order 45 Rule 1 of the Civil Procedure Rules. It is argued that the applicant has not satisfied the statutory grounds for review, namely discovery of new and important evidence, error apparent on the face of the record, or other sufficient reason. Further, it is contended that review lies only before the court which issued the impugned order, and that the present application is an improper attempt to invoke appellate jurisdiction through review.
5. The parties canvassed both the application and the preliminary objection by way of written submissions. The respondent maintained that the objection raises pure points of law, while the applicant contended that the issues raised entail factual interrogation and are therefore not amenable to determination by way of a preliminary objection.
6. The applicable constitutional framework is found in **Articles 2(1)** and **2(4)** of the Constitution, which affirm the supremacy of the Constitution, and **Articles 165(6)** and **(7)**, which vest in this Court supervisory jurisdiction over subordinate courts. Under this jurisdiction, the Court may call for the record of proceedings and make such orders or give such directions as may be necessary to ensure the fair administration of justice.
7. It is not in dispute that the applicant's suit before the subordinate court was dismissed at a preliminary stage and was not heard on its merits. The gravamen of the applicant's complaint is directed

at the propriety and correctness of the ruling upholding the preliminary objection.

8. The respondent's preliminary objection challenges the competence of the present application on the basis that it offends **Order 45 Rule 1** of the Civil Procedure Rules and that the applicant has invoked the wrong procedure. It is further contended that the application amounts to an appeal in disguise and that this Court lacks jurisdiction to entertain it.

9. **Order 45 Rule 1** of the Civil procedure Rules provides as follows on the requirements for an application for review:-

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 appeals 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. The principles governing preliminary objections are well settled. A preliminary objection must raise a pure point of law, argued on the assumption that all facts pleaded are correct, and must not require the Court to ascertain facts or exercise discretion. Where the objection invites the Court to interrogate factual matters or evaluate evidence, it ceases to be a true preliminary objection.
11. In the present case, the respondent's objection raises issues as to jurisdiction and the competence of the application, which are, in principle, matters of law. However, to the extent that it invites the Court to interrogate the factual basis of the applicant's claim and the circumstances surrounding the impugned ruling, it strays beyond the proper scope of a preliminary objection.
12. On the question of jurisdiction, it is correct that review under **section 80** of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules lies before the court which issued the impugned order. However, the applicant

has invoked the supervisory jurisdiction of this Court under **Article 165(6) and (7)** of the Constitution. That jurisdiction is distinct from, and not limited by, the statutory regime governing review.

13. Supervisory jurisdiction empowers this Court to examine the record of subordinate courts to ensure legality, propriety and regularity of proceedings. It is not an appeal, nor is it confined to the strict grounds set out under **Order 45**. Where a party demonstrates that a subordinate court acted outside its mandate, misapplied the law, or occasioned a miscarriage of justice, this Court is entitled to intervene.
14. In the circumstances, the applicant's invocation of this Court's supervisory jurisdiction cannot be said to be incompetent merely on account of non-compliance with **Order 45**. The preliminary objection, to that extent, is without merit.
15. Accordingly, the respondent's preliminary objection dated 2nd February 2026 is hereby dismissed. The application shall proceed for determination on its merits. Costs to follow the outcome of the application.
- Orders accordingly.

Ruling dated and delivered virtually this 22nd day of April 2026.

**D. KAVEDZA
JUDGE**

In the Presence of:
Parties Absent
Karimi Court Assistant.