

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAJIADO
ELCLC E017 OF 2025

JOSHUA LESERE MAKAT, NTIYAYIO OLE MAITUMU,
TIMOTHY TONKEI TISIKE (Suing as the personal
representatives of the Estate of Pulei Markat Deceased)
PLAINTIFFS

VERSUS

MOKIRA OLOYIONTE1ST
DEFENDANT

LAND REGISTRAR, KAJIADO2ND
DEFENDANT

ATTORNEY GENERAL 3RD
DEFENDANT

RULING.

(In respect of the motion dated 2nd February 2026 brought under Order 45 rule 1 (a) & (b) of the Civil Procedure Rules & Section 80 of the Civil Procedure Act seeking review of the ruling delivered on 27th November 2025)

Background.

1. The motion under consideration is by the 1st Defendant/Applicant herein who seeks to review, set aside and or vary the ruling of this court delivered on 27th November 2025 in respect of his preliminary objection dated 15th May 2025. In the said ruling, the court citing the decision in **Oraro vs Mbaja (2005) 1KLR**, was emphatic that the matters raised in the preliminary objection by the 1st Defendant were at best canvassed by way of an ordinary application where the documents and pleadings sought to be relied on are presented as annexures to the supporting affidavit for consideration by the court in view of the limited scope of the jurisdiction on preliminary objections.
2. Rather than filing an application, the 1st Defendant has come back to court seeking to review the impugned ruling with a 2nd prayer that this court be pleased to call for the file Kajiado ELC No. 52 of 2020.
3. The application is premised on the seven (7) grounds on the face of it and the affidavit of MOKIRA OLOYIONTE. The Applicant asserts that he is aggrieved by the ruling of the court delivered on 27th November 2025 and therefore seeks

its review in accordance with the provisions of Order 45 rule 1 of the Civil Procedure Rules. The review sought according to the Applicant is necessary to enable the court determine the issues on a complete and proper record.

4. In the supporting affidavit, the Applicant restates the provisions of Order 45 rule 1 of the Civil Procedure Rules which allow for review upon the discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the Applicant or could not be produced by him at the time when the impugned decree or order was made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.
5. The deponent deposes that the Plaintiffs failed, neglected and or deliberately omitted to disclose the existence of the earlier suit Kajiado ELC No. 52 of 2020 to this court which omission amounted to material non-disclosure, mischief and abuse of the court process.
6. The deponent asserts that this court in dismissing the preliminary objection dated 15th March 2025, did not take

into account, consider or pronounce itself on the existence, status and legal effect of the earlier suit Kajiado ELC No. 52 of 2020. The Applicant opines that the ruling therefore contains a material lacuna in that it failed to interrogate and determine a fundamental and jurisdictional issue of sub judice rendering it incomplete, defective and legally untenable. This lacuna according to the Applicant constitute an error apparent on the face of the record and or sufficient reason within the meaning of section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules.

Response by the Plaintiff/Respondent.

7. The application by the 1st Defendant is strenuously opposed by the Plaintiffs/Respondents through the lengthy replying affidavit sworn by TIMOTHY TONKEI TISIKE on 23rd February 2026 on his own behalf and on behalf of his co-administrators.
8. The Respondents assert that the 1st Defendant's application is fatally defective, incompetent in law, frivolous and vexatious, devoid of any merit and amounts to an abuse of

the process of court and law. It is pointed out that the application was filed 77 days after the delivery of the impugned ruling. The delay according to the Plaintiffs is therefore inordinate and inexcusable and the Applicant has not sufficiently explained it. The Respondents term the application as a delaying tactic calculated to stall the determination of this suit on its merits.

9. The Respondents opine that the application is a backdoor appeal and an attempt to re-open issues that were conclusively determined by the court and is therefore a waste of precious judicial time and resources.

10. The Respondents further assert that the application does not meet the threshold for review. According to the Respondents there is no apparent error revealed in the impugned ruling nor one that is self-evident. The re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to an exercise of 'appellant jurisdiction' by this court of its own ruling which is impermissible in law.

11. In any event, the Respondents aver that the suit, Kajiado ELC 52 of 2020 was struck out on a technicality and is therefore neither active nor pending as alleged by the 1st Defendant.
12. Responding to the allegation of time bar, the Plaintiffs/Respondents argue that in a claim based on fraud, the period of limitation does not begin to run until the fraud is discovered.
13. On the ground of discovery of new and important evidence, the Respondents affirm that this was not one of the grounds in the preliminary objection that was the subject matter of the impugned ruling. They further assert that they hold a grant of letters administration ad litem issued on 13th August 2020 which allows them to represent the estate of the deceased.

Further affidavit by the 1st Defendant/Applicant.

14. In his further affidavit, the Applicant reiterates the averments in the application and the supporting affidavit.
15. Responding to the allegation that the application was filed 77 days after the delivery of the impugned ruling, the

Applicant asserts that under Order 50 rule 4 of the Civil Procedure Rules, the period between December 21st and January 13th (inclusive) is excluded from the computation of time for filing, amending or delivering pleadings and doing any other act. He argues that his application was filed 38 days after the pronouncement of the ruling, taking into consideration the above provision of the law.

16. The Applicant further relies on his age of 82 years as the other reason for the delay.

17. The Applicant restates that the Kajiado ELC 52 of 2020 is alive and has not been conclusively determined rendering the current suit sub judice; it offends the provisions of Section 6 of the Civil Procedure Act. The Applicant insists that the ruling of this court of 27th November 2025 did not include any finding in respect to the existence of the earlier suit, Kajiado ELC 52 of 2020.

Court's directions.

18. The directions of the court were that the 1st Defendant's application be canvassed by way of written

submissions which submissions have been considered in the writing of this ruling.

Issues for Submissions.

19. The sole issue for determination in this court's opinion is whether the 1st Defendant's application meets the threshold for review under section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules.

Determination.

20. Both sides are in agreement on the grounds for review. An Applicant seeking orders of review must demonstrate that;

a) There is discovery of new and important matter or evidence, which was not in his knowledge or could not be produced by him after exercise of due diligence; or

b) There is a mistake or error apparent on the face of the record or;

c) There is sufficient reason; and

d) The application for review must have been made without undue delay.

20. From my analysis of the application before court, the application is premised on the grounds of error apparent on the face of the record and the discovery of new and important matter or evidence which was not in the Applicant's knowledge or could not be produced by him after exercise of due diligence.

21. The nature of the error contemplated under Order 45 rule 1(b) of the Civil Procedure Rules is an error that is apparent on the face of the record and not one which has to be fished out and searched. The court in the case of **Republic vs Dentists Board & another (Misc. Civil application 59 & 63 of 2019) (Consolidated) {2021} KEHC 298 (KLR) (Judicial Review) (16 November 2021) (Ruling)** went into great depth to define an error apparent on the face of the record stating that;

***“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness 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 even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”

22. The Applicant’s claim is that this court did not take into consideration or pronounce itself on the existence, status and legal effect of Kajiado ELC 52 of 2020. The ruling therefore according to the Applicant contains material lacuna for failing to interrogate and determine the issue of sub judice, rendering it incomplete, defective and untenable.

23. At the risk of repeating myself, I need to reiterate the holding in the Mukisa Biscuits case as cited with approval in the case of **Oraro vs Mbaja (2005) IKLR**, where Ojwang J (as he then was) was categorical that;

“A preliminary objection correctly understood is now well defined as, and declared to be 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 process of evidence. Any assertion that claims to be a preliminary objection and yet it bears factual aspect of calling 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.”

24. This court was categorical in its ruling that issues of res judicata, duplicity of suits and suits having been spent will require probing of evidence. They are issues incapable of being handled as preliminary objections. The issue of sub judice raised by the Applicant in the preliminary objection

dated 15th May 2025 is incapable of being handled as a preliminary objection. The court was explicit that it is an issue that is best canvassed by way of an ordinary application where the documents and pleadings sought to be relied on are presented as annexures for the consideration of and probing by the court.

25. The court did not therefore determine the issue of sub judice for that reason; it was incapable of being considered in the form of a preliminary objection. The court was conscious and deliberate in its ruling. If the Applicant is dissatisfied with the court's interpretation of the scope of a preliminary objection, he can only appeal against the ruling of this court; review is not available to him. It is this court's finding that there is no error apparent on the face of the record to warrant a review.

26. The 2nd ground raised is that of discovery of a new and important matter or evidence. The alleged new and important matter or evidence is that the grant which the Plaintiffs rely on does not allow them to file suit on behalf of the estate of the deceased.

24. For starters, the point of the grant being insufficient was not part of the grounds in the preliminary objection of 15th May 2025. Secondly, the new and important evidence or matter contemplated under the law is that which was not within the Applicant's knowledge or could not be produced by him at the time the impugned order was made even after the exercise of due diligence. An application for review, has no window for the introduction of new grounds that had not been canvassed at the time of the impugned ruling.

27. A review cannot be claimed merely for a fresh hearing, arguments, or correction of an erroneous view taken earlier as held by the Supreme Court of India in the case of **Ajit Kumar Rath vs State of Orisa & others 9 Supreme Court cases 596.**

25. The court's finding is that the Applicant has not demonstrated the discovery of new and important matter or evidence which was not in in his knowledge or could not be produced by him after exercise of due diligence.

26. The final consideration is whether the application was filed without undue delay. The Applicant while denying that

his application was filed 77 days after the delivery of the impugned ruling admits that it was filed 38 days after, which in his opinion is not inordinate. He justifies the delay by his age explaining that he is unable to move as fast as he used to when he was younger.

27. In the case of **Moses Mwangi Kimani v Shammi Kanjirapparambil Thomas & 2 Others (2014) eKLR**,

Justice F. Gikonyo defined inordinate delay as follows: -

“There is no precise measure of what amounts to inordinate delay as that would differ from case to case depending on the circumstances and facts of each case; for instance, the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth.

Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. Caution is, however, advised for

courts not to take the word “inordinate” in its dictionary meaning, but to apply it in the sense of excessive as compared to normality.”

28. A period of 38 days is inordinate in the circumstances of this case and it has not been sufficiently explained. I do not find the Applicant’s explanation reasonable.

29. Consequently, and for the foregoing reasons, the court finds and holds that the application by the 1st Defendant is unmerited and does not meet the threshold for review. Further, there was inordinate delay in the filing of the application which delay has not been sufficiently explained.

30. The application dated 2nd February 2026 is hereby dismissed with costs to the Plaintiffs/Respondents.

It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 16th Day of April 2026.

M.D. MWANGI
JUDGE

In the presence of:

Mr. Kuria h/b for Mr. Taliti for the Plaintiffs/Respondents

Ms. Wambui h/b for Mr. Muturi for the 1st Defendant/Applicant

Mr. Miller Oyugi for the 2nd & 3rd Defendants

Court Assistant: Alex

M.D. MWANGI

JUDGE

ORIGINAL FILE COPY