

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**

**CONSTITUTION PETITION NO. E003 OF 2023**

**SHERIA NA HAKI HUMAN RIGHTS INSTITUTE ..... PETITIONER**

**VERSUS**

- 1. AHMED SIRAJ NOOR**
- 2. AISHA FATUMA MOHAMED**
- 3. NGOZI A.J**
- 4. THE REGISTRAR OF TITLES MOMBASA**
- 5. NATIONAL LAND COMMISSION**
- 6. THE HON. ATTORNEY GENERAL**
- 7. DIRECTOR LAND ADMINISTRATION**
- 8. CABINET SECRETARY MINISTRY OF LANDS & URBAN DEVELOPMENT**
- 9. COUNTY GOVERNMENT OF MOMBASA**
- 10. INSPECTOR GENERAL OF POLICE**
- 11. O.C.S BAMBURI POLICE STATION ..... RESPONDENTS**

**RULING**

1. By a Notice of Motion dated 30<sup>th</sup> July, 2025, Ahmed Siraj Noor (the 1<sup>st</sup> Respondent), prays for the following orders:
  - a) Spent;**
  - b) That this Honourable Court be pleased to exercise its discretionary powers to allow the review and setting aside of its orders given on 4<sup>th</sup> July, 2025 in particular review and set aside the orders**

**dismissing the 1<sup>st</sup> Respondent's Application dated 3<sup>rd</sup> October 2024;**

- c) That the Honourable Court do grant orders to review and set aside its findings/Ruling of 4<sup>th</sup> July 2025 in particular the one dismissing the 1<sup>st</sup> Respondent's application dated 3<sup>rd</sup> October 2024 with costs (and) instead do order that this matter is *Res Judicata* and the Petitioner's Petition be struck out with costs to the 1<sup>st</sup> Respondent; and**
- d) That costs be provided for.**

2. The application is supported by an Affidavit sworn by the 1<sup>st</sup> Respondent and is premised on the grounds inter alia:

- i. That under Paragraphs 19 and 20 of the Ruling, the Court wanted to see the previous case Judgment and Pleadings and if the parties were the same;**
- ii. That the Judgment in Mombasa ELC No. 11 of 2022 (OS) was produced as an exhibit and there was evidence that the parties were the same;**
- iii. That this Court in a Ruling issued on 20<sup>th</sup> May, 2024 had found that this matter was sub judice**

**hence and it was stayed pending the hearing of Mombasa ELC No. 11 of 2022 (OS);**

**iv. The prayers in the said Mombasa ELC No. E011 of 2022 (O.S) and in this Petition all relate to Plot No. MN/I/1885 and its subdivisions and the main parties in both matters are the same hence making this Petition *Res Judicata*;**

**v. That the Petitioners did not file any Appeal or application for review to the finding that the Petition was *sub judice*;**

**vi. That the interest of justice and fairness requires that orders given on 4<sup>th</sup> July 2025 be reviewed and set aside as sought herein; and**

**vii. That there is a mistake and error apparent on the face of the record in view of the Civil Procedure Act and Rules and the 1<sup>st</sup> Respondent has sufficient reason to seek review.**

3. The Petitioner – Sheria Na Haki Human Rights Institute, is opposed to the application. In a Replying Affidavit sworn on its behalf on 27<sup>th</sup> September 2025 by its Director Ekran Eto, the

Petitioner avers that the error so allegedly made by the Court in the impugned Ruling can only be cured by an appeal and not an application for review. The Petitioner further avers that there is no new evidence the Applicant can contend to be introducing through evidence which was already before the Court at the time the Ruling was made.

4. The Petitioner further avers that the instant application is a concealed move of forum shopping by the Applicant and a mere afterthought as the Applicant has already filed a letter requesting to be supplied with typed certified copies of proceedings, Ruling and the Order of the Court dated 4<sup>th</sup> July 2025.
5. I have carefully perused and considered both the application and the response thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties.
6. By his application before the Court the 1<sup>st</sup> Respondent urges the Court to review and/or set aside the orders issued herein on 4<sup>th</sup> July 2025 and to instead strike out the Petition herein on the basis that it is *res judicata*. It is the 1<sup>st</sup> Respondent's case

that there is a mistake and error apparent on the face of the record in the Ruling delivered on the said date.

7. The law on review is provided for under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules upon which the application is predicated.
8. Section 80 of the Civil Procedure Act provides 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.”**

9. On the other hand, Order 45 Rule 1 of the Civil Procedure Rules, 2010 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.”

10. Arising from the foregoing provisions it has been stated that Section 80 of the Civil Procedure Act gives the Court the power to review while Order 45 of the Civil Procedure Rules 2010, sets out the parameters within which the Court should act.

11. As the Court of Appeal held in the case of ***National Bank of Kenya Limited -vs- Ndung’u Njau (1997) eKLR:***

**“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-evident and should not require an elaborate argument to be established. It will not be a 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 proceeded on an incorrect expansion of the law.”**

12. In the matter herein the Applicant had by a Notice of Preliminary Objection dated 3<sup>rd</sup> October 2024 sought to have the Petition herein dismissed on the grounds (i) that it offends the doctrine of constitutional avoidance and (ii) that it was *res judicata* Mombasa ELC No. E011 of 2022 (OS). In its Ruling delivered on 4<sup>th</sup> July 2025, this Court found and determined that the Applicant herein had failed to demonstrate that the matter was *res judicata* as it was not clear how he had come to the conclusion that the Plaintiffs in the previous suit were the ones who had instructed the Petitioner in the instant Petition. The Court further found that the Applicant had failed

to establish that the parties in the two suits were the same and/or if they were litigating over the same subject matter to warrant this Petition to be rendered *res judicata*.

13. According to the Applicant, those matters were within the Court record as the judgment in the previous suit was produced as an exhibit and this Court constituted differently had stayed the hearing of this Petition having found that it was sub-judice. It was not clear to me why the Applicant assumed that since the matter had been declared as sub-judice, the same should have been subsequently declared as *res judicata*. What was clear to me was the fact that the Applicant was of the view that this court had proceeded on an incorrect expansion of the law.

14. Considering such a matter in ***Pancras T. Swai -vs- Kenya Breweries Limited (2014) eKLR***, the Court of Appeal held thus:

**“It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If**

**parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are functus officio and have no appellate jurisdiction.”**

15. It is trite that a review application must confine itself to the scope and ambit of Order 45 Rule 1 of the Civil Procedure Rules, lest it mutates into an appeal. A perusal of the application before me does not suggest that there is an apparent error on the face of the record. What the Applicant is saying in the instant application is that the Court misapprehended the law by failing to be guided by the decision of a concurrent Court in making an earlier decision herein.
16. As was held in ***Nyamogo & Nyamogo -vs- Kogo (2001) EA 170:***

**“An error apparent on the face of the record cannot be declared 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. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”**

17. In the premises herein, I was not persuaded that there was any merit in the Motion dated 30<sup>th</sup> July 2025. The same is misconceived and devoid of merit. It is hereby dismissed with costs to the Petitioner.

**Ruling dated, signed and delivered in open court and virtually at Mombasa this 23<sup>rd</sup> day of April, 2026.**

.....  
**J.O. OLOLA  
JUDGE**

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Mr. Egunza Advocate for the Petitioner
- c) Ms. Midega holding brief for Omwenga Advocate for the 1<sup>st</sup> Respondents
- d) Mr. Tajhbai Advocate for the 9<sup>th</sup> Respondent