



**Sese (Suing as the Administrator of the Estate of the Late Shali Sese)
v Karezi & 8 others (Environment and Land Constitutional Petition
32 of 2020) [2023] KEELC 17427 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17427 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 32 OF 2020
LL NAIKUNI, J
APRIL 25, 2023**

BETWEEN

**MOHAMED SHALLY SESE (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF THE LATE SHALI SESE) PETITIONER**

AND

**EDWARD MZEE KAREZI 1ST RESPONDENT
FULSON COMPANY LIMITED 2ND RESPONDENT
KILIFI BEACH PROPERTIES LIMITED 3RD RESPONDENT
CHIERA WAITHAKA 4TH RESPONDENT
STANBIC BANK(K) LIMITED (SUCCESSOR IN TITLE OF CFC STANBIC
BANK) 5TH RESPONDENT
MINISTRY OF LANDS AND HOUSING 6TH RESPONDENT
THE ATTORNEY GENERAL 7TH RESPONDENT
EMMANUEL KAZUNGU 8TH RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 9TH RESPONDENT**

RULING

I. Introduction

1. What is before the Honorable Court is a Notice of Motion application dated March 11, 2023 by Mohamed Shally Sese the Petitioner/Applicant herein. It was brought by the dint of Sections 1A, 1B, 3A and 80 of the [Civil Procedure Act](#) Cap 21, Orders 45 Rule 1 and Order 51 of the [Civil Procedure](#)



Rules 2010 and Article 159 of the Constitution of Kenya. The Notice of Motion application seeks to be granted the following orders:-

- a. Spend.
- b. That this Honorable Court be pleased to review its orders contained in its Judgment delivered by the Honorable Court Justice L.L. Naikuni on January 16, 2022 by affirming that the payment of Sum. Of Kenya Shillings one Hundred and Seventy Five Million (Kshs 175,000,000/=) together with accessed interest as compensation to the Petitioner for the loss of his suit land is payable by the 1st, 6th and 7th Respondents jointly and severally.
- c. That the costs of this application be in the cause.

II. The Petitioner's case

2. The Notice of Motion application is on the grounds, the testimonial facts and the 13 paragraphed Supporting Affidavit of Mohamed Shally Sese sworn and dated March 11, 2023 together with one annexure marked as "MSS - 1" annexed thereto.
3. The Deponent is the Petitioner herein. He averred as follows that:-
 - a. Judgment in the suit herein was delivered by the Honorable Court on February 16, 2022 where after a Decree was issued on March 9, 2023 marked as "MSS - 1" – for a sum of a sum of Kenya Shillings One Hundred and Seventy Five Million (Kshs 175,000,000,/=) as compensation for the loss of his land payable by the 1st, 6th and 7th Respondents.
 - b. The Decree never specified that the said amount was payable by the said Respondents jointly and severally. The said omission was a minor inadvertent by Honorable Court which was rectifiable.
 - c. Further liability was never apportioned to and among the Respondents.
 - d. In the course of the follow-up of the settlement with the relevant Government Departments has quite clearly emerged that the reason for the delay in effecting payment was due to the fact that this Honorable Court did not expressly indicate that liability of the 1st, 6th and 7th Respondents was joint and severally yet according to the facts and evidence adduced in the case before court the actions of the said three Respondents were not capable of apportionment of liability but the loss incurred as set out in the Judgment was a result of the joint and several acts of the said three Respondents.
 - e. There will be need to clarify this position to avoid causing any doubts and may cause frustrations to the Petitioner keeping him away from enjoying the fruits of the Judgment which was in his favour.
4. The Application was not opposed by any of the Respondents. There is only one issue for consideration whether the Notice of Motion application dated March 11, 2023 has merit and should be considered for review of the Judgment granted.

III. Analysis and Determination

5. I have had an opportunity to critically assess and considered the application filed by the Petitioner/ Applicant and the brief submission by the Learned Counsel for the Petitioner/ Applicant, Mr. Gikandi



Advocate. The Honorable Court has been called to consider a singular issue of whether the application seeking for the review of its Judgment delivered on January 16, 2022 has any merit from the face of it.

6. The principles governing review of Judgment are found in Section 80 *Civil Procedure Act* Cap 21 and Order 45(1) and (2) of the *Civil Procedure Rules, 2010* and an appeal has been preferred. Therefore, this Honorable Court finds it significant to critically examine the provisions for review, setting aside and/or varying Court orders. These are found mainly under the provisions of law already stated herein. A clear reading of these provisions indicates that Section 80 is on the power to do so while Order 45 sets out the rules on doing it.

Section 80 provides:- 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 Court which passed the decree or made the Order and the Court may make such order thereto.

Order 45 (1). States as follows:- Any person considering 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, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the 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 review of Judgment to the Court which passed the decree or made the order without unreasonable delay”.

7. From the stated provisions, it is quite clear that they are discretionary in nature. Thus, the unfettered discretion must be exercised judiciously, not capriciously and reasonably. To qualify for being granted the orders for review, varying and/or setting aside a Court order under the above provisions to be fulfilled, the following ingredients, jurisdiction and scope are required.

- a. There should be a person who considers himself aggrieved by a Decree or order;
- b. The Decree or Order from which an appeal is allowed but from which no appeal has been preferred;
- c. A decree or order from which no appeal is allowed by this Act;
- d. There is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made; or
- e. 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.
- f. The review is by the Court which passed the decree or made the order without unreasonable delay.

8. The power of review is available only when there is an error apparent on the face of the record. Indeed, this Court emphasizes that a review is not an appeal. The review must be confined to error apparent on



the face of the record and re – appraisal of the entire evidence or how the Judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is permissible.

Discussing the scope of the review, the Supreme Court of India in the case of “*Ajit Kumar Rath v State of Orisa*, 9 Supreme Court Cases 596 at Page 608. had this to say:-

“The power can be exercised on application of a person on the discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier; that is to say the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason”means a reason sufficiently analogous to those specified in the rule...”

9. In the case of “*Nyamongo & Nyamongo v Kogo*” [2001] EA 170 discussing what constitutes an error on the face of the record, the Court rendered itself as follows:-

“An error apparent on the face of the record cannot be defined or exhaustively, there being an element of definitiveness inherent in its very nature and it must be determined judicially on 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 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 is certainly no ground for review though it may be one for appeal.....”

10. From the instant case by the Petitioner/Applicant, there are clear ingredients stated not that there was apparent error and mistake on the case of record by this Honorable Court when it granted and/ or delivered Judgment on February 16, 2022 and Decree on March 9, 2023 for a sum of Kenya Shillings One Hundred and Seventy-Five Million (Kshs 175,000,000/=) compensation for the loss of the Petitioner’s land. It is instructive to note and admit herein that, indeed the Honorable Court inadvertently failed and/or was not able in clear and plain terms specify that the said amount was payable by the said 1st, 6th and 7th Respondents jointly and severally as required by law. Ideally, the liability is meant to be apportioned jointly and severally among these Respondents in accordance to the facts and evidence adduced in this case and so is the loss. This error on the face of the Judgement delivered by this Court on January 16, 2022 should be corrected and set the records straight to avoid any ambiguity. Justice must not only be done but seen to be done. By all means, this will now clarify the position. For avoidance of doubt, and seen to be causing any further confusion and frustration to the Petitioner/Applicant. He must sit down and relax to enjoy the fruits of his labour emanating from the Judgement which was entered in his favour on January 16, 2022 thereof. There should be no further delay in the matter.

VI. Conclusion & disposition

10. For these reasons, therefore I do proceed to hereby direct/order as follows: -



- a. That the Notice of Motion application dated March 11, 2023 by the Petitioner/Applicant be and is hereby allowed as prayed being meritorious.
- b. That the costs for the application to be awarded to the Petitioner/Applicant.
- c. That this now marks the finalization of the case. The file is closed.

It Is so Ordered Accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 25TH DAY OF APRIL 2023.

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HON. JUSTICE L. L. NAIKUNI (JUDGE)
ENVIROMNENT AND LAND COURT AT
MOMBASA

In the Presence of:

- a. **M/s. Yumna Court Assistant.**
- b. **M/s. Kiptum Advocate holding brief for Mr. Gikandi Advocate for the Petitioner/Applicant.**
- c. **Mr. Wafula Advocate for the 2nd, 3rd Respondent.**
- d. **M/s. Gulenywa Jonathan Advocate for 9th, 10th and 11th Respondents.**

