



**Watamu Men Fridays Limited v Attorney General (Sued as an Agent of the Government of the Republic of Kenya Representing National Land Commission, Chief Land Registrar, Registrar of Titles, Mombasa, Director of Surveys & Any other Relevant Arm of the Government) & 3 others (Environment & Land Miscellaneous Case 29 of 2018) [2023] KEELC 19878 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19878 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND MISCELLANEOUS CASE 29 OF 2018  
EK MAKORI, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**WATAMU MEN FRIDAYS LIMITED ..... APPLICANT**

**AND**

**SWALEH A. ATHMAN ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL (SUED AS AN AGENT OF THE GOVERNMENT OF THE REPUBLIC OF KENYA REPRESENTING NATIONAL LAND COMMISSION, CHIEF LAND REGISTRAR, REGISTRAR OF TITLES, MOMBASA, DIRECTOR OF SURVEYS & ANY OTHER RELEVANT ARM OF THE GOVERNMENT) ..... 2<sup>ND</sup> RESPONDENT**

**ABDINASIR A. MOHAMED ..... 3<sup>RD</sup> RESPONDENT**

**ABDILAH A. NASIR ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. Plaintiff/Applicant's Notice of Motion Application dated 3<sup>rd</sup> February 2023 seeks that the order by Odeny J. made on 18<sup>th</sup> July 2022 dismissing the suit filed herein be reviewed, varied, or set aside and that the Judicial Review No 29 o 2002 (which was transferred from Mombasa and given ELC No 29 of 2018) together with all other consequential orders be reinstated. The application is supported by an affidavit sworn by the Applicant's Counsel.
2. The Application is opposed by the 1<sup>st</sup> Respondent who relied on the Grounds of Opposition dated 8<sup>th</sup> March 2023 and filed on the same date. The application was canvassed through written submissions.



3. The Applicant deponed in the supporting affidavit that this matter was held in abeyance following a ruling delivered on 8<sup>th</sup> July 2011 (Ojwang J. as he then was) suspending all matters related to the specific Judicial Review question.
4. The deponent further alleged that there was no service of the notice to show cause before the matter was dismissed and therefore not aware when the matter came up. In addition, the Applicant averred that the application has been made without unreasonable or undue delay.
5. The 1<sup>st</sup> Respondent opposed the application through Grounds of Opposition and stated as follows:
  - a. The application is devoid of merit since the suit being sought to be reinstated was dismissed pursuant to the provisions of Order 17 Rule 2(1) of the [Civil Procedure Rules](#).
  - b. The application is premised upon speculation, unfounded fears, and concealment of material facts and thus falls short of the basic criteria for grant of reliefs sought.
  - c. The Applicant has failed to furnish any proof of any application made or any step taken during the intervening one-year period before the dismissal of the suit.
  - d. That the application is a non-starter by dint of Order 45 Rule 1 the Applicant failed to adduce new and important matters or evidence for the court's consideration.
  - e. That the Applicant has failed to advance any proper or credible justification for its non-attendance or delay to prosecute the suit to warrant a grant of the orders sought herein.
6. The Applicant submitted that in 2002, this suit was filed seeking Judicial Review Orders of *Mandamus* directing the Chief Land Registrar to cancel the registration of Title number Kilifi/Jimba/1125 under the relevant provisions of the [Registered Land Act](#) (Repealed.) The suit was however held in abeyance following the Court's ruling that all Judicial Review matters be suspended awaiting the conclusion of all other pending matters related to the specific Judicial Review in question and relating to the Kilifi/Jimba 1125 title.
7. Thereafter there are in Court yet-to-be-concluded civil suits including ELC No 4 of 2019 and 104 of 2019 among others touching on the same suit property and there is no way this specific matter could proceed being a Judicial Review owing to the orders alluded to and for the said reasons, this suit has not proceeded as anticipated even though the Applicants and their advocates are live of its existence and the reasons for the dormancy is that the Applicants are waiting for the hearing of the other suits currently actively being prosecuted in court touching on the same parcel of land Kilifi /Jimba 1125 to be finalized as directed by Ojwang J. for a follow up on this specific matter
8. It is submitted that it came to the attention of the Applicant that a notice to show cause dated 20<sup>th</sup> June 2022 indicating that the matter would be mentioned for dismissal on 18<sup>th</sup> July 2022 was never served upon their advocates' offices until this position was brought to their attention by the client. It was the first time the Applicant saw that Notice when it was brought to their attention through their client's letter dated 25<sup>th</sup> July 2022 which was received on 26<sup>th</sup> July 2022 seeking to know the status of the same and/or what transpired in court on the 18<sup>th</sup> July 2022. The Applicant had discovered the non-appearance of either of the parties to show cause why the suit should not be dismissed, which led to its actual dismissal. The Applicant was not able to establish why the Notice was not sent to their offices. The said Notice to Show Cause why the suit should not be dismissed under Order 17 Rule 2 of the [Civil Procedure Rules](#) was not received in the advocates' offices.
9. It is the Applicant's submission that in the circumstances, the Orders made on 18<sup>th</sup> July 2022 were made without the parties having a chance to be heard. Had the Applicant known, it would have attended



Court and relayed all the information contained in paragraphs 3 to 11 of its supporting affidavit. It is submitted that this application has been made without unreasonable and/or undue delay on the Applicant's part and that this Court sets aside its Order unless this Court reviews and sets aside those orders, the Applicant will suffer great loss and prejudice as the quashing orders being sought will be rendered nugatory.

10. Further the principles which the law has developed to guide the exercise of discretion by the court in an application for reinstatement of a suit or dismissal of the suit for want of prosecution are:
  - a. Whether there has been an inordinate delay on the part of the Plaintiffs in prosecuting the case;
  - b. Whether the delay is intentional, contumelious and, therefore, inexcusable;
  - c. Whether the delay is an abuse of the court process;
  - d. Whether the delay gives rise to substantial risk to a fair trial or causes serious prejudice to the Defendant;
  - e. What prejudice will the dismissal occasion on the plaintiff?
  - f. Whether the plaintiff has offered a reasonable explanation for the delay;
  - g. Even if there has been a delay, what does the interest of justice dictate: the lenient exercise of discretion by the court?
  - h. Whether the mistake of the advocate should be visited on the Applicants.
  - i. Whether the Applicant has given a satisfactory explanation for non-attendance and/or prosecution.
11. It was averred that the Applicant has explained that COVID-19 happened to frustrate the prosecution of matters and that the Plaintiff/Applicant traveled abroad for his essential treatment and was in and out of the country from the year 2020/2021. Further, he has gone ahead to provide sufficient reasons that display the position in the supporting affidavit sworn by the Applicant dated 31<sup>st</sup> October 2022.
12. The Applicant submitted that on all facets the delay has been explained and does not amount to abuse of the court process. Article 50(1) of *the Constitution* of Kenya, 2010 provides for the right to a fair hearing, which is fundamental to the rule of law. Moreover, Article 159(2) (d) of *the Constitution* of Kenya, 2010 provides that the courts and tribunals shall be guided by the principles of administration of justice without undue regard to procedural technicalities. It is consequently in the interest of justice that this matter be heard and determined on its merits.
13. The Applicant cited the cases of *Savings & Loan Kenya Ltd v Onyancha Bwomote* [2014] eKLR and Uganda Court of Appeal case in *Wanendeya v Gaboi & another* [2002] 2 EA 662 to emphasize the issue of non-attendance to prosecute and reinstating applications that had earlier been dismissed for non-attendance, the courts in those cases were of the view that disputes ought to be determined on merits and that lapses ought not necessarily debar a litigants from pursuing their rights.
14. That in the case of *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR, the Defendants wanted a suit reinstated after a default judgment was entered under Order 9 Rule 5 and the former Chief Justice Apaloo, while still a judge of appeal, stated as follows regarding blunders and mistakes such as those involved in this application:

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard



on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of parties and not the purpose of imposing discipline.”

15. And in *Mbaki & Others v Macharia & another* [2005] 2 EA 206, on page 210, this Court stated as follows:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

16. The Applicant submitted that in assessing the prejudice caused to the Defendants by the delay, the court should also assess the likely prejudice the dismissal of the suit will occasion upon the plaintiff. The prejudice to the plaintiff will be ascertained by looking at a number of varying factors, which, among the major ones are -the nature of the case-e.g. public litigation, representative suit, etc., the importance of the claim or subject matter, the legal capacity of parties, rights of the parties in the suit and so on. that the cause of action, in this case, is quite substantial and raises serious issues which the court needs to quash an existing title alleged to have been subsumed several other plots hence the reason for the court to stay all the Judicial Review pending hearing and determination of all the pending suits first. The plaintiff's suit was filed following the violation of the plaintiff's rights to its property by the defendants and seeking judicial Review orders of Mandamus directing the Chief Land Registrar to cancel the registration of Title number Kilifi/Jimba/1125 under the relevant provisions of the *registered land act* ( Repealed) as the same had subsumed plots 696 Kilifi/Jimba. The plaintiff will suffer immensely if the orders sought are not granted; a fact that gives this case a different dimension and which makes it desirable that the suit is reinstated. These matters will be considered by the court if the case is heard on merit to avoid an injustice.
17. On whether the Defendant will be prejudiced if this matter is reinstated, the Applicant contended that the Defendants will not and has not been prejudiced at all. Further, for reinstatement of a suit to give rise to substantial risk to a fair trial or result in grave injustice to the Defendants, the Defendant must show he suffered some additional prejudice, which is substantial, and results in 1) impending fair trial; 2) aggravated costs; or 3) specific hardships to the Defendant. It must also be shown that the delay has worsened Defendant's position in the suit.
18. The 1<sup>st</sup> Respondent submitted that Section 80 of the *Civil Procedure Act*, Chapter 21 of Laws of Kenya, and Order 45 of the *Civil Procedure Rules* provide the jurisdiction and the scope of orders of review. Any party invoking the same must live within the four corners of the section and Rules respectively
19. The 1<sup>st</sup> Respondent opined that it can therefore be said that review is a creature of statute. An appraisal of the above provisions confirms that Section 80 of the *Civil Procedure Act* prescribes the power of review while Order 45 stipulates the rules.
20. The Applicant alleged that they recently as of 26<sup>th</sup> July 2022 were informed that the Court had dismissed the matter without being served with the Notice to Show Cause. The failure to serve according to them came across as new and important evidence which after the exercise of due diligence they could not attend because of the alleged non-service of the notice.
21. The 1<sup>st</sup> Respondent quoted the case of *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others* [2021] eKLR, where the Court expounded on what new and material facts entail to afford one the pedestal to seek review orders.



22. 1<sup>st</sup> Respondent averred that the Applicant is the one who filed the case and any notices are served to all parties. Therefore, the onus was on the Applicant to ensure that the matter was active in court by attending or filing any documents propagating the same.
23. 1<sup>st</sup> Respondent contended that from the exhibit marked “JCC-1,” the ruling by Ojwang J. was delivered in 2011 and the instant matter was filed in 2018. The matters that were affected by the said ruling are listed in the ruling, which does not mention the instant matter. In addition, the Applicant has in any case failed to demonstrate that it complied with orders of consolidation for it to participate in the hearing of the consolidated Judicial Review matters. Therefore, the Applicant failed to exercise due care and diligence and thus the Applicant has failed this test.
24. On delay, the 1<sup>st</sup> Respondent submitted that the provisions of the law, specifically Order 45 Rule 1 (b) of the *Civil Procedure Rules*, do not require the Respondents in an application for review to show what prejudice will be occasioned to them. That however the Applicant is required by the law to file his application for review and to show the court that he did so without unreasonable delay.
25. The Court of Appeal in *Afapack Enterprises Limited v Punita Jayant Acharya (Suing as the Administrator of the Estate of the late Suchila Anatrai Raval)* [2018] eKLR made the following observation while upholding a decision to dismiss an application for review that was brought 9 months after the decision was entered:
- “It is also an important requirement that the application for review should be made without unreasonable delay. Although the appellant attributed his predicament to mistake of his counsel, what militated, against the exercise of discretion by the Judge in the appellant’s favour was clearly the appellant’s own conduct. The Judge found that the appellant “has not been diligent enough in pursuing its rights;” and that the appellant was guilty of inordinate delay in making the application for review. In the words of the Judge: “An application for review ought to be made without unreasonable delay. Here the delay is spanning a period of nine months. Ordinarily, nine months delay in an application for review, if no reasonable explanation is offered is inordinate.”
26. The 1<sup>st</sup> Respondent concluded that the Applicant failed to furnish any reasons to the Court for the 8 months delay from 18<sup>th</sup> July 2022 when the dismissal orders were made to 3<sup>rd</sup> February 2023 when the application was filed contrary to the requirement of Order 45 Rule 1(b) of the *Civil Procedure Rules*, that requires applications for orders of review to be filed without unreasonable delay.
27. From the material placed before me the issues which commend for deliberations and decision is whether the order by Odeny J. made on 18<sup>th</sup> July 2022 dismissing the suit filed herein be reviewed, varied, or set aside and that the Judicial Review No 29 of 2002 (sic) (which was transferred from Mombasa and given ELC No 29 of 2018).
28. The Applicant's application is buttressed, significantly under Section 80 of the *Civil Procedure Act*, Order 17 Rule 2 (1) of the *Civil Procedure Rules*, and Order 45 Rules 1, 2, and 3 of the *Civil Procedure Rules*.
29. As correctly cited by counsel for the 1<sup>st</sup> Respondent, Section 80 of the *Civil Procedure Act*, Chapter 21 of Laws of Kenya, and Order 45 of the *Civil Procedure Rules* provide the jurisdiction and the scope of orders of review. 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.”

30. Order 45 Rule 1 of the [Civil Procedure Rules](#), 2010 provides as follows:

45(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 review of judgment to the court which passed the decree or made the order without unreasonable delay.”

31. The order sought to be reviewed emanated from the dismissal of the current suit under the powers conferred to it by dint of Order 17 Rule 2 (1) of the [Civil Procedure Rules](#):

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

The rationale of the court to exercise such powers is as explained by Mumbi J. in the case of [Invesco Assurance Company Limited v Oyange Barrack](#) [2018] eKLR:

There is no dispute, I believe, with respect to the law on dismissal of suits for want of prosecution. Whether to exercise the power of dismissal for want of prosecution under Order 17 is, however, a matter that is within the discretion of the court. In its decision in [Nilesh Premchand Mulji Shah & another t/a Ketan Emporium v M.D. Popat and others & another](#) [2016] eKLR, the court stated as follows:

“11. Nonetheless, Article 159 of [the Constitution](#) and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of [Ivita v Kyumba](#) [1984] KLR 441 espoused that:

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied



with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court."

15. In *Argan Wekesa Okumu v Dima College Limited & 2 others* [2015] eKLR the court considered the principles for dismissal of a suit for want of prosecution and stated as follows:-

"The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable, and that the Defendant is likely to be prejudiced by such delay. As such, the 3<sup>rd</sup> Defendant, in this case, must meet the burden of proof in seeking the dismissal of the Plaintiff's case for want of prosecution see the case of *Ivita v Kyumbu* (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same."

16. In *Naftali Opondo Onyango v National Bank of Kenya Ltd* [2005] eKLR, the court noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated as follows:-

"However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a Court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff."

... Now applying the principles enunciated in the authorities, I have found that, the delay of under one year in this case may be long but it is not inordinate."

32. The current suit was dismissed at the behest of the court itself as a mechanism to remove redundant cases from court. There is a tendency in this country for litigants to file suits in court and leave them at the "parking bay" unattended. The reason why the courts are moving and acting suo moto is for the courts to reckon with the real statistics and case backlog and determine the time, energy, and resources including even personnel required to clear case backlogs expeditiously and less expensively. It also aids in Case Management Strategies to achieve the expeditious disposal of cases to weed out the redundant ones and spend more time on the active ones. But more importantly as per the *Invesco* case (*supra*):

"Article 159 of *the Constitution* and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity"

33. The current suit was filed on 17<sup>th</sup> December 2018 and a hearing notice was served on the Attorney General for 21<sup>st</sup> February 2019, on that day the Applicants were absent and the trial court Olola J.



marked the suit “SOG” (Stood over Generally). Since the Applicant had taken no action the court at its own motion, issued notice to show cause through the Deputy Register of this court dated 20<sup>th</sup> June 2022 inviting all parties to attend court on 18<sup>th</sup> July 2022 to explain why the suit could not be dismissed for want of prosecution. The Notice as can be seen from the record was addressed to all the parties involved particularly all the counsels involved in the matter. The Deputy Registrar of this court was never called to be questioned whether there was proper service or not or how service was effected on the parties.

34. On 18<sup>th</sup> July 2022 nobody appeared before the Judge to show cause why dismissal could not be done. The suit was dismissed culminating in the application for reinstatement filed on 7<sup>th</sup> February 2023 for reasons as explained in the current application.
35. This now brings me to the next level of whether a review of the order for dismissal is sustainable.
36. The Applicant has given a long history of why the current matter ought to be reinstated. The most significant being that there were several matters filed in several courts involving land parcel number Kilifi/Jimba/1125. That in Mombasa Misc. No 108 of 2004 Ojwang J. (as he then was) stayed several matters pending consolidation and determination of those several matters and the question of Judicial Review orders be stayed which included allegedly affected this matter. The 1<sup>st</sup> Respondent thinks otherwise. The list of matters stayed did not affect this one. The decision by Ojwang J. was rendered in 2011 and could not touch the current suit filed in 2018. I have looked at the decision by Ojwang J. There were several Malindi High Court matters stayed, but not this one. How could it have been possible for orders made in 2011 to stay matters filed in 2018? Counsel for the Applicant was not candid enough in this issue. The Ojwang J. orders of 2011 did not affect this matter. There is nothing on record to show that this current file is a product of the orders issued by Ojwang J.
37. If I get the Applicant correctly the reasons why there was no prosecution of this matter emanates from those “freeze orders” issued by Ojwang J. Even if this matter was reinstated, there are active files including but not limited to ELC No. 4 of 2019 and 104 of 2019, which this court has to wait for their determination before a hearing journey in this one is embarked. That then advances the conclusion that this matter was filed in this court to remain at the “parking lot” until those other matters are heard and determined. It is not clear the attachment this matter has with those other matters, and the ones Ojwang J. gave “freezing orders” filed and pending since 2002. Surely, that is an abuse of the court process! As stated by Wabwoto J. in the case of [\*Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 others\*](#) [2022] eKLR:

“Abuse of judicial process is a term generally applied to a proceeding which is wanting in *bona fides* and is frivolous vexations and oppressive. It also means abuse of legal procedure or improper use of the legal process. It creates a factual scenario where a party is pursuing the same matter by two court processes. In other words, a party in the two-court process is involved in some gamble, a game of chance to get the best in the judicial process.

30. The point to underscore is that a litigant has no right to pursue paripassua more than once processes which will have the same effect at the same time or at different times with a view of obtaining victory in one of the process or in both. I have in previous decisions stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. Litigation is a contest by judicial process where the parties place on the table of justice their different position, plainly, and without tricks.



31. Multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose, and aim of person exercising the right, to harass, irritate, and annoy the adversary and interfere with the administration of justice
32. Abuse of court process is an obstacle to the efficient administration of justice. Tinkering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which such abuse cannot complacently be tolerated consistent with the good order of society.”
38. I was not meant to discuss the merit of this case. This Court dismissed the current suit for want of prosecution. In my view, the dismissal was warranted because, from the material placed before me, the suit was filed, and the orders sought are expected in the infinite future dependent on the determination of the other pending active cases including but not limited to ELC No 4 of 2019 and 104 of 2019. There are no new materials or discovery of new facts placed before me as held in the case *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others* [2021] eKLR, where the Court stated that:
- “Ordinarily, the expression 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 order was made would refer only to a discovery made since the order sought to be reviewed was passed. An applicant alleging discovery of new and important evidence must demonstrate that he has discovered it since the passing of the order sought to be reviewed. In the instant application, the applicant claims to have injected capital to the tune of US 1.5 million prior to the granting of the order sought to be reviewed. He is now claiming that he was not aware of the said evidence at the time of passing the order yet he claims he is the one who injected the capital. He claims he did not have the minutes. However, he had the information, so, nothing prevented him from availing the information to the court by way of a sworn affidavit. To pass the test, it must be demonstrated that the applicant was prevented by circumstances beyond his control from tendering the evidence to the court at the time when the judgment sought to be reviewed was delivered against him. The instant application cannot pass this test. If the information was with the liquidator as alleged, nothing prevented the applicant from procuring such evidence either by way of witness summons or by a sworn affidavit. To satisfy the test under the rules, an applicant must demonstrate discovery of new evidence, which he could not procure at the time the application was heard despite exercise of due care and diligence. Had the applicant exercised due care and diligence, certainly, he could have procured the evidence. The applicant has failed this crucial test.”
39. No explanation has been given as to why the current application took inordinately long to file from 18<sup>th</sup> of July 2022 to 3<sup>rd</sup> February 2023, the discovery of the orders made by the Judge having been in the knowledge of the Applicants by 25<sup>th</sup> July 2022. The COVID-19 narration does not add up in this scenario.
40. The review of the dismissal orders issued by Odeny J. on 18<sup>th</sup> July 2022, as envisaged under Section 80 of the *Civil Procedure Act* and Order 45 Rules 1 of the *Civil Procedure Rules*, stands undeserved.



What I garner is that I will reopen the current suit - for purposes of proliferation - to stay in our court system like those filed in 2002 and unknown others. Application dated 3<sup>rd</sup> February 2022 is hereby dismissed with costs.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS  
22<sup>ND</sup> DAY OF SEPTEMBER, 2023**

**E.K. MAKORI**

**JUDGE**

**NB: Parties absent. Ruling sent via email address for their advocates on record.**

