Thathini Development Company Limited v Gachogu & 3 others (Civil Suit 149 of 2014) [2023] KEELC 21452 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21452 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL SUIT 149 OF 2014

LL NAIKUNI, J

OCTOBER 31, 2023

BETWEEN

THATHINI DEVELOPMENT COMPANY LIMITED .... PLAINTIFF

AND

DAVID GACHOGU .... 1ST DEFENDANT

ANN WAMBUI NJUGUNA (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE DECEASED – PETER OWEN NJUGUNA) .... 2ND DEFENDANT

SAFARICOM COMPANY LIMITED .... 3RD DEFENDANT

THE LAND REGISTRAR MOMBASA .... 4TH DEFENDANT

RULING

I. Introduction

1. This ruling is in respect to two Notice of Motion applications dated 8th March, 2023 by David W. Gachogu, the 1st Defendant and another dated 9th March, 2023 by Thathini Development Company Limited, the Plaintiff herein. Bothe the applicants moved this Honourable Court for the hearing and determination of these afore stated applications. Each party did file their replies according and for good order the Honourable Court will be dealing with each of them separately but simultaneously.

2. As indicated, upon service of the applications to the Plaintiff and the Defendant, the Plaintiff responded to the Notice of Motion application by the 1st Defendant dated 8th March, 2023 through a replying affidavit sworn on 23rd March, 2023 and the 1st Defendant responded to the Notice of Motion application dated 9th March, 2023 through grounds of opposition dated 20th March, 2023.

II. The Notice of Motion application dated 8th March 2023 by 1st Defendant

3. This application was brought under the provisions of Sections 1(A),1(B),3(A),63(e) and Orders 42 Rules 6 (1) (2) and 51 Rules 1 and 3 of the *Civil Procedure Act*, Cap. 21. It sought for the following orders:-

    a. Spent.

    b. Spent.

    c. That, subsequently, there be a stay of execution of the judgment and decree of Honourable Justice L.L. Naikuni issued on 15th February 2023 Mombasa ELC 149 OF 2014 pending the hearing and determination of the Appeal.

    d. That costs of this application be provided for.

4. The application by the 1st Defendant herein was premised on the grounds, testimonial facts and averments made out under the 13th Paragraphed Supporting Affidavit of David W. Gachogu sworn and dated 8th March, 2023. The 1st Defendant himself averred That:

    i. The Honourable Justice L. L. Naikuni after hearing the case, delivered the Judgment in this suit on 15th February 2023 in favour of the Plaintiff's against the 1st, 2nd, 3rd and 4th Defendants jointly and severally with costs to be borne by the 1st Defendant.

    ii. The 1st Defendant was aggrieved by the said Judgment and decree and is preferring an appeal at the Court of Appeal.

    iii. The Appeal would be rendered nugatory if the order of this court is acted upon as the 1st Defendant was required to 'inter alia' surrender the original Certificate of Title of the suit parcel of land reference No. MOMBASA/MN/ThatHINI/112 to the Land Registrar Mombasa for cancellation and/or revocation and rectification of the entries of the Lands Registry in favour of the Plaintiff.

    iv. The 1st Defendant's Appeal had high chances of success and particularly on the issues of surrender of the Certificate of Title and remittance of the monies received in respect of the lease.

    v. The matter before the court was a land matter and the 1st Defendant prayed That he should be given an opportunity to canvass his appeal.

    vi. There was a danger That the land subject matter of this suit could be dealt with in a manner likely to affect the appeal and more so if the 1st Defendant succeeded.

    vii. In the interest of justice required That this court considers this application positively and allow the interim prayers sought and subsequently grant a stay pending hearing and determination of the Appeal.

III. Response by the Plaintiff on the Notice of Motion application dated 8th March, 2023

5. The Plaintiff through its director Mungai Wainaina, opposed the Notice of Motion application dated 8th March, 2023 through filing a 14th Paragraphed Replying affidavit sworn on 23rd March, 2023. He deposed That:-

    i. The said application was misconceived, a nonstarter and an abuse of the due process of the court.

    ii. This application ought to have been made on the 15th February, 2023 when the Judgment was delivered if at all the Applicant was serious in exercising his right of Appeal.

    iii. Upon the Judgement being pronounced on the 15th February, 2023 and the Defendant's failure to move the court orally for a stay of execution the Plaintiff embarked on sub - division of the suit property and allocated it to deserving shareholders.

    iv. The process of sub - division and allocation of the suit premises ended on 20th February 2023, fourteen (14) days before the filling of this application.

    v. As such the substratum of the impending alleged Appeal had already been dealt with and this application had been overtaken by events.

    vi. There was no appeal That had been filed as a Notice of Appeal was not an appeal in itself.

    vii. No draft Memorandum of Appeal which was alleged to have 'high chances of success' has been annexed to warrant this court to exercise its discretion in favor of the 1st Defendant.

    viii. The inordinate delay and inaction by the Applicant to file this application on time has not been explained and as such it is clearly an afterthought.

    ix. The affidavit is in full opposition of the application before the court as it had been overtaken by events.

    x. Allowing this application would be prejudicial to over twenty (20) shareholders who had been allocated the suit land and had commenced constructions thereon and would be a recipe for anarchy and bloodshed.

    xi. Should the Honourable court find merit in the application dated 08th March, 2023 they prayed That the 1st Defendant/Applicant be ordered to deposit a sum of Kenya Shillings Five Million Six Hundred Thousand (Kshs. 5, 600, 000.00/=) being the rental income That he had received from the 3rd Defendant - Safaricom Company Limited - in court. Further, That the Applicant should be ordered to deposit the original Certificate of Title to the suit property in court, and lastly the Applicant should offer a bank guarantee of Kenya Shillings Five Million (Kshs. 5. 000, 000.00/=) as security for costs failing which the application should be dismissed with costs.

IV. The Notice of Motion Application dated 9th March, 2023 by Plaintiff

6. As indicated, the Plaintiff/ Applicant herein, Thaathini Development Company Limited also moved this Honorable Court for the hearing and determination of their Notice of Motion application dated 9th March, 2023. It was brought under a Certificate of urgency and the dint of the provisions of Order 45 of the Civil Procedure Rules, 2010. The Plaintiff sought for the following orders:-

   a. Spent

   b. That the Honourable court be pleased to review its judgment That was read and delivered on the 15th February 2023 by removing the names of Anna Wambui Njuguna and Peter Owen Njuguna.

   c. That an order do issue reviewing the judgment as follows:

      That the correct parties to this suit are 1st Defendant David Gachogu, 2nd Defendant Safaricom Company Limited and the 3rd Defendant is the Land Registrar Mombasa.

   d. That costs of this application be provided for.

7. The application by the Plaintiff herein was premised on the grounds, testimonial facts and averments made out under the 6 Paragraphed Supporting Affidavit of Mwaniki Gitahi sworn and dated 9th March, 2023. He deposed That:-

   a. He was the Advocate of the High Court of Kenya in conduct of this matter for the Plaintiff and hence competent and authorized to swear this affidavit.

   b. The Honourable court delivered its Judgement in this matter on the 15th February 2023.

   c. There was an apparent error on the face of the record wherein the Court has referred to Anna Wambui Njuguna and Peter Owen Njuguna who were never party to the suit.

   d. The Plaintiff had filed an application dated 30th March, 2015 seeking to enjoin Anna Wambui Njuguna in the place of Peter Owen Njuguna who had been sued as the 2nd Defendant not knowing That he was deceased, but before the application could be heard, the parties consented to have the application withdrawn hence Anna Wambui Njuguna was never made a party to this suit.

   e. Owing to the mix up in the names of the Defendants it presents a problem on how the Judgement could not be implemented hence necessitating this application.

   f. It was in the interest of justice and all fairness That the application was heard and determined in favour of the Applicant.

V. The Response by the 1st Defendant to the Notice of Motion application dated 9th March, 2023

8. In opposition to the Plaintiff's application, the 1st Defendant filed a 15 Paragraphed grounds of opposition dated 20th March, 2023. They were based on the following:-

    a. The same was not one which was available for review for reason That there was a Notice of Appeal by the 1st Defendant in this matter and as such order 45 Rule 1. (1) (a) and (b) was not applicable.

    b. The review would interfere with the entire structure of the Judgement and this application was not an issue for review but for appeal.

    c. The title deed which is a subject matter of this suit was co-owned by the 1st Defendant and the late Peter Owen Njuguna the husband to Anna Wambui Njuguna and a Review in terms of what the Plaintiff wanted would amount to removing the late Peter Owen Njuguna's name from the Title and placing all the Responsibility on the 1st Defendant's yet he only co - owned the property.

    d. The issues raised by the Applicant were issues to be considered on appeal and not on an application for review since the decision was not an erroneous one but a possible decision.

    e. The Application be dismissed with costs.

VI. Submissions

9. On 18th April, 2023 while all the parties were present in Court, they were directed to have the Notices of Motion application dated 8th March, 2023 and 9th March, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to That all the parties obliged and on 22nd June, 2023 a ruling date was reserved on Notice by Court accordingly.

A. The Written Submissions by the Plaintiff

10. The Plaintiff through the Law firm of Messrs. Mwaniki Gitahi & Partners Advocates filed their submissions dated 21st June, 2023. Mr. Mwaniki Advocate, commenced the submissions by stating That the application dated 9th March, 2023 sought to correct an apparent error on the face of the Judgment as regards to the proper parties to the suit.The said application was duly served upon all the parties on 15th March 2023 including the Honorable Attorney General who later claimed he had not been served. They annexed a duly served and received copy of the application by the Attorney General.

11. He intimated That on 30th March 2015 the Plaintiff made an application seeking to join Anna Wambui Njuguna, the wife of Peter Owen Njuguna who had been sued as the 2nd Defendant, not knowing That the said Peter Owen Njuguna was long dead. However, before the application could be heard and determined the parties consented to have the application withdrawn. Thus, the said application was withdrawn by consent on 25th June 2015. As such Anna Wambui Njuguna and Peter Owen Njuguna were never parties to this suit. From the Judgment delivered, the court made erroneous reference to them as parties and this application seeks to cure the said apparent error.

12. The Learned Counsel submitted That as such they prayed for an order reviewing the Judgment as follows; the 1st Defendant, be David W Gachogu, the 2nd Defendant be Safaricom Company Limited and 3rd Defendant be the Land Registrar of Mombasa. The reason for the review was That there

had occurred a problem in implementing/ executing the said Judgment within the strict timelines as directed by the Court. As such they prayed That the application be allowed as prayed.

13. On the application dated 8th March, 2023 by the 1st Defendant, the Learned Counsel submitted That the application sought for orders:-

    a. Spent.

    b. That there be a stay of execution of the Judgment and Decree of Honourable LL Naikuni issued on 15th February, 2023 ELC 14 of 2014 pending hearing and determination of this application.

    c. That subsequently there be a stay of execution of the judgement of Hon L.L. Naikuni dated 15th February, 2014 pending hearing of the appeal.

    d. That Cost of suit be provided for.

14. Upon being served by the said application they proceeded to file their Replying Affidavit dated 23rd March, 2023 where they filed their replies accordingly. The Learned Counsel submitted That the said application was misconceived and a non-starter and an abuse of due process of the court. The substratum of the impending appeal had already been dealt with and this application has been overtaken by the events. The inordinate delay and action to file this application timely had not been explained and it was clearly an after-thought.

15. However, should this Honourable court find merit in the application dated 8th March, 2023 which they find no merit, the Learned Counsel prayed That the 1st Defendant/Applicant to be ordered to deposit a sum of Kenya Shillings Five Million Six Hundred Thousand (Kshs. 5, 600, 000.00/=) been the rental income received from the 2nd Defendant - Safaricom Company Limited. The said sum be deposited in court in addition the original title to the suit property be deposited in court and finally the Applicant be compelled to offer a bank guarantee of a sum of Kenya Shillings Five Million (Kshs. 5, 000, 000.00/=) as the security for costs failure of which the application should be dismissed with costs.

VII. Analysis & Determination.

16. I have carefully read and considered the pleadings herein by the Plaintiff and the 1st Defendant, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statures.

17. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-

    a. Whether the Notice of Motion application dated 8th March, 2023 by the 1st Defendant/Applicant herein seeking to stay execution of the Judgment delivered on 15th February, 2023 pending Appeal is merited?

    b. Whether the Notice of Motion application dated 9th March, 2023 by the Plaintiff/Applicant herein seeking to have the judgment delivered on 15th February, 2023 reviewed is merited?

    c. Who will bear the Costs of Notice of Motion applications dated 8th and 9th March, 2023 respectively.

Whether the Notice of Motion application dated 8th March, 2023 by the Plaintiff/Applicant seeking to stay execution of the Judgment delivered on 15th February, 2023 pending Appeal is merited

18. Under this Sub heading, the main substratum is granting of stay of execution order pending the hearing of appeal. The law concerning stay of execution pending Appeal is found in the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010 which stipulates as follows:

> " No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except in so far as the Court Appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court Appealed from, the Court to which such Appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the Appeal is preferred may apply to the appellate Court to have such order set aside.
>
> (2) No order for stay of execution shall be made under sub rule (1) unless—
>
> (a) the Court is satisfied That substantial loss may result to the 1st Applicant unless the order is made and That the application has been made without unreasonable delay; and
>
> (b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the 1st Applicant.

19. Stay of execution pending appeal is a discretionary power bestowed upon this court by the law. In the very initial stages of building jurisprudence over the said subject matter, the Court of Appeal in the case of "*Butt v Rent Restriction Tribunal* {1982} KLR 417" gave guidance on how a court should exercise the said discretion and held That:

> " 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
>
> 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so That an appeal may not be rendered nugatory should That appeal Court reverse the Judge's discretion.
>
> 3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
>
> 4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were That there

was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

20. There are three conditions for granting of stay order pending Appeal under the provision of Order 42 Rule 6 (2) (a) and (b) of the *Civil Procedure Rules*, 2010 to which:

    i. The Court is satisfied That substantial loss may result to the Applicant unless stay of execution is ordered;

    ii. The application is brought without undue delay and

    iii. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

21. I find issues for determination arising therein namely:

    i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.

    ii. What orders this Court should make

22. Ideally, the purpose of stay of execution is to preserve the substratum of the case. In the case of "*Consolidated Marine. v Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi)", the Court held That:-

> " The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so That the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory".

23. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court That substantial loss may result to him unless the stay is granted, That the application has been made without undue delay and That the applicant has given security or is ready to give security for due performance of the decree.

24. As for the applicants having to suffer substantial loss, in the case of "*Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga* (1982-1988)KAR 1018" the Court of Appeal pronounced itself to the effect That:

> " It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay."

25. The Court of Appeal in the case of "*Mukuma v Abuoga* (1988) KLR 645" where their Lordships stated That:-

> " Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory."

26. The Applicant has a burden to show the substantial loss they are likely to suffer if no stay is ordered. This is in recognition That both parties have rights; the Applicant to the Appeal which includes the prospects That the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. {See the case of "*Absalom Dora v Turbo Transporters* (2013) (eKLR)"}.

27. As F. Gikonyo J stated in "*Geoffery Muriungi & another v John Rukunga M'imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (Deceased)* [2016] eKLR" and which wisdom I am persuaded with; -

> " ...the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason That he cannot realize the fruits of his success in the appeal. I always refer to That eventuality as ''reducing the successful appellant into a pious explorer in the judicial process''. The said state of affairs is what is referred to as "substantial loss" within the jurisprudence in the High Court, or "rendering the appeal nugatory" within the juridical precincts of the Court of Appeal: and That is the loss which is sought to be prevented by an order for stay of execution pending appeal..."

28. The 1st Defendant/Applicant has averred That the Appeal will be rendered nugatory if the order of this court is acted upon as the 1st Defendant is required to inter alia surrender the original certificate of title of the suit parcel of land reference No. MOMBASA/MN/ThatHINI/112 to the Land Registrar Mombasa for cancellation and/or revocation and rectification of the entries of the Lands Registry in favour of the Plaintiff. The Plaintiff on the other hand submitted That the substratum of the impending appeal has already been dealt with and this application has been overtaken by the events.

29. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under Order 42 Rule 6. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself That substantial loss may result to the Applicants unless stay of execution is granted; and thirdly such security as the court orders for the due performance of such decree or order as may ultimately be binding on them has been given by the Applicant.

30. Regarding the pre-requisite in Order 42 Rule 6, That is substantial loss occurring to the 1st Defendant/ Applicant, the court has already referred the consideration to be made in the case of "*Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu* (Supra)". I find That the 1st Defendant/ Applicant has proved That he will suffer substantially if the orders for stay of the execution are not granted as prayed.

31. The second issue to determine is where the application for stay of execution was made without inordinate delay. From the record, the judgment being appealed against was delivered on 15th February, 2023 and the application herein was filed on 8th March, 2023. This was after about 21 days after the judgment was delivered. In this Honourable Court's opinion, the application was made timeously without any delay. The application was therefore made and filed expeditiously and without undue delay.

32. On the last condition as to provision of security, I find That Order 42 Rule 6 (2) (b) of the *Civil Procedure Rules* stipulate in mandatory terms That the third condition That a party needs to fulfil so as to be granted the stay order pending Appeal is That (s)he must furnish security. The Applicant has pledged his willingness to deposit the title deed for the suit land with the Court as security for due performance of any decree That may be binding on him. In the case of "*Aron C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates*" the court held That:

> "The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor … Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve That purpose."

33. The grant of stay remains a discretionary order That must also take into account the fact That the Court ought not to make a practice of denying a successful litigant the fruits of their judgment.

34. The Court of Appeal in "*Butt v Rent Restriction Tribunal* (Supra) gave guidance on how discretion should be exercised as follows:

    1. "The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
    2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, stay must be granted so That an appeal may not be rendered nugatory should That appeal court reverse the judge's discretion.
    3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
    4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were That there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
    5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

35. According to the Plaintiff in their submission should this Honourable Court find merit in the application dated 8th March, 2023 which we find no merit, we pray That the first defendant/applicant to be ordered to deposit a sum of Kshs. 5.6 million been the rental income received from the 2nd Defendant Safaricom Company Ltd. The said sum be deposited in court in addition the original title to the suit property be deposited in court and finally the applicant be compelled to offer a bank guarantee of Kshs.5 million as the security for costs failure of which the application should be dismissed with

costs. The 1st Defendant has not in any way indicated their ability to pay security. The order for security of cost is discretionary.

36. Thus, this court shall exercise its discretion regarding the security of costs to be offered by the Applicant and direct That he does so within the time to be stipulated in this ruling if he intends to proceed with the Appeal.

Whether the Notice of Motion application dated 9th March, 2023 seeking to have the judgment delivered on 15th February, 2023 reviewed is merited

37. The main issue under this Sub title is on review of Court's decisions – Orders, Rulings or Judgements. 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.

38. Section 80 of the *Civil Procedure Act* Cap 21 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."

39. 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."

40. In the case of "*Republic - Versus - Public Procurement Administrative Review Board & 2 others* [2018] e KLR" it was held: -

> "Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) 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 decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement That the application has to be made without unreasonable delay."

41. 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.

42. I have previously in this Honourable Court in the case of "*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)" held That:-

> "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."

43. 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..."

44. 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....."

45. From the instant case by the Plaintiff/Applicant, the Honourable Court delivered its judgment on the 15th February, 2023. According to the Plaintiff there was an apparent error on the face of the record wherein the court has referred to Anna Wambui Njuguna and Peter Owen Njuguna who were never party to the suit. The Plaintiff had filed an application dated 30/03/2015 seeking to enjoin Anna Wambui Njuguna in the place of Peter Owen Njuguna who had been sued as the 2nd defendant not knowing That he was deceased, but before the application could be heard, the parties consented to have the application withdrawn hence Anna Wambui Njuguna was never made a party to this suit. Owing to the mix up in the names of the defendants it presents a problem on how the judgement cannot be implemented hence necessitating this application.

46. According to the 1st Defendant, he argued That the application for review is not one which is available for review for reason That there is a Notice of Appeal by the 1st Defendant in this matter and as such Order 45 Rule 1. (1) (a) and (b) is not applicable. The review will interfere with the entire structure of the judgement and this is not an issue for review but for appeal. The title subject matter of this suit is co-owned by the 1st Defendant and the late Peter Owen Njuguna the husband to Anna Wambui Njuguna and a Review in terms of what the Plaintiff wants will amount to removing the late Peter Owen Njuguna's name from the Title and placing all the Responsibility on the 1st Defendant's yet he only co-owns the property.

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

> " the power can be exercised on the application of a person on 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 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 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”

48. In “T*okesi Mambili and others vs Simion Litsanga*” the Court held as follows: -

“ i. In order to obtain a review an applicant has to show to the satisfaction of the court That there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show That there was a mistake or error apparent on the face of the record or for any other sufficient reason.

ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.

49. In the case of “*Nyamongo & Nyamongo* (Supra) 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.....”

50. I further refer to the case of:- “*Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR” High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 John M. Mativo Judge culled out the following principles from a number of authorities: -

“ i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

ii. The expression “any other sufficient reason” appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development

cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show That such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

51. The case here is That the Plaintiff was the registered and beneficial owner of all That parcel of land known as Land Reference Number Mombasa/MN /ThatHINI /112 measuring approximately three Nought decimal five (30.5) Hectares (hereinafter referred to as “The Suit Land”). It held That on or about the 17th day of March, 20-07, the 1st and 2nd Defendant all being then Directors of the Plaintiff’s Company and with sole intention to defraud the Plaintiff Company of its land did execute an illegal transfer of the said land in their favour. The said illegal and unlawful fraud was reported to the police. The Plaintiff provided the particulars of the fraud by the 1st Defendant. Under the Paragraph 6- (a) to (f) of the Plaint.

52. Thereafter having obtained the transfer of the said land to themselves, the 1st and 2nd Defendants went ahead and leased part of the suit land particularly That area known as “Nguu Tatu Hills” measuring about sixteen metres by twelve metres (16m X 12m) to the 3rd Defendant herein (Safaricom) at a consideration of Kenya Shillings One Hundred and Sixty Thousand (Kshs. 160,000.00/=) appreciating at the rate of 5% per annum for a period of nine (9) years and elven (11) months. Pursuant to That the 3rd Defendant (Safaricom Ltd) then embarked on installation of Safaricom Base station which included a tower equipment shelter antennae and Communications equipment on the said portion of land.

53. In the case of “*Evan Bwire v Andrew Aginda* Civil Appeal No. 147 of 2006” cited fin the case of “*Stephen Githua Kimani v Nancy Wanjira Waruingi T/A Providence Auctioneers* (2016) eKLR” the Court of Appeal held as follows:

> “ An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate That the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence.”

54. I take note That this Honourable Court indicated in the judgment delivered on 15th February, 2023 upon obtaining leave of Court on 21st November, 2019 the Plaintiff filed an Amended Plaint dated 30th March, 2015. From the amendment the Plaintiff dropped the names of the 2nd Defendant Peter Owen Njuguna. Consequently, it clear by now That the alleged mistake or error apparent on the face of the record does exist. But the Court notes That the mistake does not in any way change the substratum of the Judgment delivered on 15th February, 2023.

55. Having found That there was a mistake and error apparent on the face of the record, which is the main thrust of the application, I must hold That the application has meet the legal threshold for granting review of the impugned judgment and it is allowed with no orders as to costs.

56. As a parting shot, I wish to state That I have noted some typographical error on the judgment with the citation, which this Honourable Court notes That at Paragraph 3 of the said judgment had made clarification for the said party and only made a mistake on the citation where it stated:-

> " 3. On 13th January, 2017 the 3rd Defendant filed its statement of Defence dated 9th January, 2017. On 31st January, 2017, following the unfortunate demise of the 2nd Defendant the late Peter Owen Njuguna on 5th July, 2019 seeking to substitute the deceased with one Anne Wambui Njuguna, the duly appointed Legal Administrator to the estate."

57. Save for the citation and the indication That Peter Owen Njuguna and Ann Wambui Njuguna which should have indicated That it was Ann Wambui for the estate of the deceased Peter Owen Njuguna and the number of Defendants to be indicated as four Defendants, the rest of the judgment remains unchanged.

Who will bear the Costs of Notice of Motion application dated 8th March, 2023 and Notice of Motion application dated 9th March, 2023.

58. It is now well established That the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds That costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court "*Jasbir Rai Singh – Versus Tarchalan Singh*" eKLR (2014) and *Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited*, eKLR (2014).

59. In this case, this Honourable Court for found both applications to have merit but in all fairness and interest of Justice, was of the opinion That each party to bear their own costs.

VIII. Conclusion & Disposition

60. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to the Preponderance of probabilities and the balance of convenience.

61. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes these orders:-

   a. That the Notice of Motion application dated 8th March, 2023 be and is found to have merit hence allowed in its entirety pending the amendment of the Judgment dated 15th February, 2023.

b. That the Notice of Motion application dated 9th November, 2023 be and is hereby found to have merit hence is allowed in its entirety.

c. That this Honourable Court shall only review the Part of the Judgment That differentiates the 2nd and the 3rd Defendants instead of substituting the 3rd Defendant with the 2nd Defendant.

d. That subject to the fulfilment of the pre – condition under Order (e) herein below, there be an order of stay of the execution of the Judgment/decree delivered on 15th February, 2023 herein be and is hereby granted pending hearing and determination of the Applicant's intended Appeal subject to the review of the Judgment on the names of the parties.

e. That an order be and is hereby made for the 1st Defendant to deposit as security a sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs. 5,500,000/=) being monies garnered and/or collected from the rental income ever since the execution of the Lease, terms and conditions stipulated thereof with respect to the suit property received from Safaricom Company Limited, the 2nd, Defendant herein in a fixed Escrow Joint interest earning bank account, in a reputable Commercial bank to be held in the names of Messrs. Mwaniki Gitahi & Company Advocates and Oddiaga & Company Advocates both being the Counsel for the parties Within the 60 (thirty) days from the date of delivery of this ruling. In default, the stay orders granted herein shall automatically lapse.

f. That there shall be no orders as to costs.

It Is So Ordered Accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 31ST DAY OF OCTOBER 2023.

HON. JUSTICE L.L. NAIKUNI, (MR.)