Kilifi Hotels Limited v Ibrahim & another (Environment & Land Case 130 of 2020) [2023] KEELC 22024 (KLR) (5 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22024 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 130 OF 2020

LL NAIKUNI, J

DECEMBER 5, 2023

BETWEEN

KILIFI HOTELS LIMITED ..... PLAINTIFF

AND

OMAR GUMA IBRAHIM ..... 1ST DEFENDANT

CHIEF LAND REGISTRAR ..... 2ND DEFENDANT

RULING

I. Introduction

1. On the 8th December, 2022, the 1st Defendant/Applicant, herein Omar Guma Ibrahim filed a Notice of Motion application dated 1st December, 2022 against the Plaintiff/Respondent herein. It was brought under the provision of Sections 13(7) of the *Environment and Land Court Act*, No. 19 of 2011; Section 80 of the *Civil Procedure Act*, Cap 21; Order 45 Rules 1 and 2 of the *Civil Procedure Rules*, 2010; Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21; Article 159 (2) of the *Constitution* of Kenya, 2010 and all other enabling provisions of the law.

2. Upon service of the application, the Plaintiff/Respondent opposed the application by way of a Replying Affidavit sworn by Mercy Mberia dated 25th January, 2023.

II. The 1st Defendant's/Applicant's case

3. The 1st Defendant/Applicant sought the following orders;

    a. Spent.

    b. Spent.

c. The Honourable Court be pleased to review, set aside, discharge and/or vary the orders and directions made on 2nd November, 2022 by Honourable Justice L.L. Naikuni closing the Defendants' case and scheduling the matter for Judgment.

d. The Honourable Court be pleased to grant the 1st Defendant leave to avail his witnesses and set down the matter for hearing of the Defendants' case.

e. The costs of this Application be in the cause.

4. The application was based the grounds, the testimonial facts and the averments of the 17 Paragraphed Supporting Affidavit sworn by Omar Guma Ibrahim dated on 1st December, 2022 together with annextures marked as "OGI" annexed thereto. He averred That:

a. Vide the directions of the Honourable issued on 28th April, 2022, this Honourable Court set down this matter for hearing of the Defendants' case on 12th October, 2022.

b. When the matter came up for hearing on 12th October, 2022, the 1st Defendant/Applicant was informed by his Advocates That the Court was not sitting and That fresh hearing dates would be issued at the ELC Registry.

c. The 1st Defendant/Applicant variously sought to know from his Advocates if the matter had since been fixed for hearing. His Advocates informed him That he was yet to be served with a hearing date, or an invitation to take a date from the Plaintiff's Advocates.

d. Unbeknownst to the 1st Defendant/Applicant, the matter had been fixed for a mention on 2nd November, 2022 and, on account of his Advocates' absence on That day, the matter was scheduled for delivery of Judgement on 14th March, 2023.

e. The 1st Defendant/Applicant only learnt of the foregoing developments per chance through a litigant acquaintance who had a matter on the material date the Judgement date was given by the Court.

f. The absence of the 1st Defendant/Applicant and his Advocates on 2nd November, 2022 when the matter was mentioned was not deliberate on the part of the 1st Defendant/Applicant, and if there was a mistake or negligence on account thereof, then That was a mistake or negligence on the part of the 1st Defendant/Applicant's Advocates for which the 1st Defendant/Applicant could not be blamed.

g. Proceeding to the Judgment without hearing the 1st Defendant/Applicant's witnesses and considering the 1st Defendant/Applicant's documents would greatly prejudice the 1st Defendant/Applicant's case and would be tantamount to shutting the doors of justice on the Applicant inimical to the Applicant's Constitutional rights to fair hearing under the provision of Article 50(1)of the *Constitution* and access to justice under Article 48 of the *Constitution*.

h. The Applicant has a viable defence in law and unless the Application herein was heard and determined on priority basis and the Judgement scheduled for delivery on 14th March 2023 was stayed and/or arrested, the Applicant would be greatly prejudiced.

i. By virtue of the foregoing, there was a sufficient cause to warrant the review, setting aside and/or vacation of the orders issued by this Honourable Court on 2nd November, 2022 and setting down of the matter for Defendants' case hearing.

j. This Application had been brought in good faith and in the interest of justice, equity, expediency and good order.

III. Submissions

5. On 13th February, 2023 the Honourable Court in the presence of all the parties gave directions on the disposition of the Notice of Motion application dated 1st December, 2022 by way of written submission. On the material date, the Plaintiff was directed to file its response by close of business.

6. Pursuant to That, all the parties obliged and the Honourable Court set down the ruling to be delivered on notice.

A. The written submissions by the 1st Defendant/ Applicant

7. On 2nd March, 2023, the 1st Defendant/ Applicant through the Law firm of Messrs. H & K Law Advocates, filed their written submissions dated 23rd February, 2023. The Learned Counsel commenced by stating That the 1st Defendant/Applicant herein filed a Notice of Motion application dated 1st December, 2022 under the provision of Sections 13 (7) of the *Environment and Land Court Act*, No. 19 of 2011; Section 80 of the *Civil Procedure Act*, Cap 21; Order 45 Rules 1 and 2 of the *Civil Procedure Rules*; Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21; Article 159(2) of the *Constitution* of Kenya, 2010 and all other enabling provisions of the law seeking for the orders as already stated herein.

8. The application was grounded upon the grounds espoused therein and by the sworn affidavit of one Omar Guma Ebrahim dated 1st December, 2022. The Plaintiff/Respondent opposed the application by way of a Replying Affidavit sworn by Mercy Mberia dated 25th January, 2023. This Court then directed That the application be disposed of by way of written submissions.

9. The Learned Counsel relied on the following three (3) issues for Court's determination and consideration. Firstly, on the issue of whether the Applicant had demonstrated sufficient cause to warrant setting aside of "the ex parte" decision or proceedings of 2nd November 2022. The Learned Counsel submitted That the 1st Defendant/Applicant herein is the registered owner of all That parcel of land being Plot Number 28432/2 Kilifi (Land Title Number CR.70282) ("the Suit Property") as evinced by the annexure marked as "OGl - 1" on the supporting affidavit dated 1st December, 2022. The Plaintiff/Respondent filed the present suit against the 1st Defendant on 21st September, 2020 alleging ownership of the suit property and seeking, inter alia, orders of permanent injunction from trespassing, accessing and/or dealing in the Suit Property. Save for the few times when the 1st Defendant/Applicant sought adjournments on medical or other legitimate grounds, the matter has proceeded smoothly with the hearing of the Plaintiff/Respondent's witness and was pending the hearing of the Defendants' witnesses but for the directions issued by this Honourable Court on 2nd November 2022.

10. The Learned Counsel further argued That vide the directions of the Honourable court issued on 28th April, 2022, this Honourable Court set down this matter for hearing of the 1st Defendant/Applicant's case on 12th October, 2022, when the matter came up for hearing on 12th October 2022, the 1st Defendant/Applicant was informed by his erstwhile Advocates, the Law firm of Messrs. Munyoki Maheli & Company Advocates, That the Court was not sitting and That fresh hearing dates would be issued at the Registry. The 1st Defendant/concedes to the well - settled motif..."a case belongs to the litigant', consequently, the 1st Defendant/Applicant variously sought to know from the said Advocates if the matter had since been fixed for hearing for which his Advocates advised him That they were yet

to be served with either a hearing date or an invitation to take a date from the Plaintiff/Respondent's Advocates.

11. The Learned Counsel argued That unbeknownst to the 1st Defendant/Applicant, the matter had been fixed for a mention on 2nd November 2022 and, on account of the 1st Defendant's Advocates' absence on That day, the hearings had been closed and the matter scheduled for a judgement on 14th March 2023. The 1st Defendant/Applicant learnt of the foregoing developments perchance through a litigant acquaintance who had a matter on the material date the Judgement date was given by the Court.The 1st Defendant/Applicant's absence and That of his erstwhile Advocates on 2nd November 2022 when the matter was mentioned was not deliberate, and if there was a mistake or negligence on account thereof, then That was amistake or negligence on the part of his Advocates for which it would be unjust to be blamed on the 1st Defendant/Applicant himself.

12. The Learned Counsel submitted That the 1st Defendant/Applicant pleaded That the mistakes of the outgoing Counsel ought not to be visited upon him. In espousing this position, the Learned Counsel relied on the case of: "*Belinda Muras & 6 others v Amos Wainaina* [1978] KLR" in which Hon Madan JIA (as) he then was defined what constitutes a mistake as follows:-

> " A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate."

13. Similarly in the case:- "*Phillip Chemwolo & Another v Augustine Kubede* [1982-88] KLR 103 at 1040" Apaloo J/A as he then was stated thus:-

> " Blunders 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".

14. The court further stated That...the broad equity approach to this matter was That unless there was fraud or intention to overreach, there was no error or default That could not be put right by payment of costs. The court, as was often said, existed for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline. By virtue of the foregoing, there was a sufficient cause to warrant the review, setting aside and/or vacation of the orders issued by this Honourable Court on 2nd November, 2022 and setting down of the matter for 1st Defendant/Applicant's case hearing.

15. Secondly, on whether the Court was vested with the requisite discretion to grant the orders sought. The Learned Counsel submitted That the Law allows this Court to exercise its unfettered discretion in allowing a party to either reopen its case, recall a witness for further examination in chief, cross-examination and re-examination, That there was no rider to the Law and That a party could make an application any time before Judgment was rendered. Setting aside an ex - parte Judgement/order or proceedings was a matter of the discretion of the court as was held in the case of:- "*Esther Wamaitha Njihia & 2 Others v Safaricom Ltd*" and also relied on the case of "*Shah v Mbogo*" and "*Ongoma v Owota*" where the court held That for such orders to issue, the Court must be satisfied That either the Defendant/Applicant was not properly served with summons and/or That the Defendant/Applicant failed to appear in court at the hearing due to sufficient cause. The Learned Counsel referred Court to the provision of Articles 48 and 50 of the *Constitution* 2010, guarantees every Kenya right to access

to justice and fair hearing. Article 159 of the *Constitution* of Kenya requires That justice shall be administered without undue regard to technicalities whereas Sections 3, 4 and 13 of the *Environment and Land Court Act* as read together with Section 1A, 1B and 3A of the *Civil Procedure Act*, 2010 expects the court to strive towards substantive justice. See the case of:- "*Lochab Brothers Ltd* (Supra)". The 1st Defendant/Applicant submitted That the provision of Article 50(1) of the *Constitution* makes provision for fair hearing. The Article was to the effect That every person had the right to have any dispute That can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

16. He asserted That the right to fair hearing was evidently closely intertwined with fair administrative action. The often-cited case of "*Ridge v Baldwin* [1964] AC 40" restated the right to fair hearing as a rule of universal application in the case of administrative acts or decisions affecting rights. In his speech to the House of Lords in 1911, Lord Loreburn aptly put as a 'duty lying upon everyone who decides anything' That may adversely affect legal rights'.

17. He referred Court to the *Halsbury Laws of England*, 5th Edition 2010 Vol. 61 at para 639 on the right to be heard states That:-

> " The rule That no person is to be condemned unless That person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice."

18. The Learned Counsel humbly beseeched this Honourable court to look at the totality of the circumstances in this matter, where it is our considered view is the route of lesser risk of injustice is to allow the application otherwise the 1st Defendant/Applicant would be more prejudiced if denied a chance to ventilate his defense. See the case:- "*Gladys Njeri Kirugumi v Langata Development Co. Limited & Another* [2016] eKLR" and "*Films Rover International Limited v Cannon Film Sales Limited* [1986] 3 All E.R. 772".

19. He averred That proceeding to the Judgment without according to the 1st Defendant/Applicant an opportunity to present his witnesses before court would be greatly prejudicial to his case and would be tantamount to shutting the doors of justice on him, an action That inimical to my Constitutional rights to fair hearing under Article 50(1) of the *Constitution* and access to justice under Article 48 of the *Constitution*.The 1st Defendant/Applicant had a viable defence in law and unless the Application herein was heard and determined on priority basis and the judgement scheduled for delivery on 14th March 2023 was stayed and/or arrested, the Applicant stood to suffer great prejudice as my defence would not have beenconsidered in its totality.

20. The Counsel contended That it is trite law That the failure of a Defendant to call witnesses during trial; presumes That the Plaintiff's case was uncontroverted. In the case of "*E M M & Another v Joseph Njuguna Kuria & Another* [2016] eKLR" it was held That it is not enough for the Defendants to deny a claim, shift blame or rely on their submission to sustain their defense. They have a positive duty to prove their allegations as contained in the statement of defense. Allowing the orders sought herein would not in any way prejudice the Plaintiff/Respondent but, on the contrary, would help the Court consider the issues before it judiciously, completely and effectually. The trial court ought to find a balance with regard to the scales of justice between the expedient disposal of suits vis a vis the locking out of a litigant from trial as was held by the Court of Appeal in the case of "*Japheth Pasi Kilonga & 8 others v Mombasa Autocare Ltd* [2015] eKLR".

21. The Counsel cited the case of "*Mbogo & Another v Shah*(1968) EA 93 at 96", where the Court of Appeal stated That an appellate court will not interfere with the exercise of discretion by a trial court

unless the discretion was exercised in a manner That is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. The jurisdiction was exercised to obviate injustice or hardship resulting from accident, inadvertence, or excusable mistake or error.

22. He averred That the key consideration for this Honourable was set in the case of in "*Patel v E.A. Carge Handling Services Ltd* [1974] EA75" cited in "*James Wanyoike & 2 others v C M C Motors Group Limited & 4 others* [2015] eKLR" at page 76 C and E the court held as follows:-

> " There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgment except That if he does vary the judgement, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules."

23. Thirdly, on whether the Plaintiff/Respondent shall suffer any prejudice if orders were granted. The Learned Counsel submitted That the court had to balance the 1st Defendant/Applicant's natural right to have his case heard on merit and the plaintiff's right to enjoy the fruits of litigation. The suit property which formed the subject matter of the suit and the present application, was of unquantifiable sentimental value to the Defendant/Applicant for the reasons it was a culmination of lifelong work and dedication. The Court could not, therefore, rectify the 1st Defendant/Applicant's loss by an order of costs or liquidated damages for the loss of the suit property.

24. The Learned Counsel opined That the Plaintiff/Respondent had had their day in court. The Plaintiff/Respondent's case was heard conclusively. Therefore there was no prejudice to be suffered by the Plaintiff/Respondent if the Defendant/Applicant was allowed to be heard. All That the Plaintiff/Respondent shall suffer was a slight delay in the conclusion of this case. Furthermore, the instant application was not intent on the introduction of new evidence. The 1st Defendant/Applicant was only interested in ventilating issues raised in his defense and adducing evidentiary material That was already filed in court. There was no prejudice to be suffered on this front as well. The instant application was filed timeously. There was no inordinate delay and therefore the 1st Defendant was not guilty of laches. To buttress his point, the Counsel quoted the case of:- "*John Peter Kiria & Another v Pauline Kagwiria* [2013] eKLR" the court while setting aside interlocutory Judgment held:

> " The Respondent would not be prejudiced in any way as she shall have an opportunity to be heard and prove her case on balance of probability. Further no party should be condemned unheard in any matter and especially where he demonstrates there is defence on merits and That there is no prejudice to the other party and lastly an explanation for any delay has to be given and considered...."

25. In conclusion, the Learned Counsel asserted That in Kenya the attachment to land was passionate, emotional and almost fanatical. Nations, neighbors, siblings, spouses and even strangers fight over land. In some instances, the disputes degenerate into bloodshed and death. The Court of Appeal in "*Gitamaiyu Trading Company Ltd v Nyakinyua Mugumo Kiambaa Co. Limited & 11 others* Civil Appeal No. 84 of 2013", explained why land was such an important asset thus;

> " Land, no doubt, is not only the most important factor of production but also a very emotive issue in Kenya. Land remains the most notable source of frequent conflicts between persons and communities."

26. It was thus a travesty of justice if the conflict before court shall be summarily determined in the manner in which it persists as per the prevailing status quo. In view of the foregoing submissions, pleadings filed in the matter and the documents on record, it was the Learned Counsel's humble submission That the prayers sought therein be granted.

B. The written submissions of the Plaintiff/Respondent

27. On 6th March, 2023 the Plaintiff/Respondent through the Law firm of Messrs. H. Kago & Company Advocates filed their written submissions dated 2nd March, 2023. The Learned Counsel argued That the submissions were tendered on behalf of the Plaintiff/Respondent herein for the 1st Defendant/Applicant application dated 1st December 2022.

28. According to the Learned Counsel, the brief background of the suit was That the Plaintiff filed the suit on 15th September 2020 with regards to a parcel of land legally owned by him known as L.R No. 10173 Grant No. CR 19906 and L.R 10174, Grant No. CR 19907 (suit properties) located in Kilifi County.On 4th September, 2020 the Plaintiff's advocates on record, under the instructions of the Plaintiff, visited the said properties and were dumbfounded to find persons clearing the premises and demolishing the perimeter wall it had constructed. Upon interrogation, the said persons informed the Plaintiff's advocates That the 1st Defendant/Applicant was the current owner of the properties and he intended to sub-divide the said parcels of land. The Plaintiff's advocates on record proceeded to make enquiries at the Kilifi and Mombasa Land's Registry and found That there had been fraudulent and illegal transactions undertaken over the said. The Counsel stated the application by the 1st Defendant/Applicant was tantamount to an abuse of the process of Court, The Counsel held That:-

> " The term abuse of Court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of process has an element of malice in it...The concept of abuse of judicial variety and conditions. It's one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice."

29. The Counsel further cited the Court of Appeal case of:-"*Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* (supra)" opined That:

> " In our view, the often-quoted principle That a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine.
>
> Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.
>
> We have no doubt That what is before us is a matter That could have been determined summarily and the matter finalized. We are certain this is what is contemplated by section 57 of the Registration of Titles Act cap 281 and also Order 36 of the *Civil Procedure Rules*.

We approve and adopt the principles so ably expressed by both Lord Roskil and Lord Templeman in the case of *Ashmore v Corp Of Lloyds* [1992] 2 ALL E.R 486 at page 488 where Lord Roskil states:

> "It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges' time as is necessary for the proper determination of the relevant issues.
>
> Unless a trial is on discernable issues it would be farcical to waste judicial time on it."

25. I therefore agree with the Respondent That the said prayer amounts to playing lottery with judicial process and is an abuse of the process of the court.....'

30. Additionally and as has been seen in the Replying Affidavit of the Plaintiff/ Respondent dated 25th January, 2023, together with the annexed documents, the 1st Defendant/Applicant had done everything to frustrate this Court and the parties to the suit herein and thus did not even require a minute of this courts time.

31. The Learned Counsel humbly submitted That the Court in closing the 1st Defendant/Applicant case had been satisfied with the fact That the 1st Defendant/Applicant had absconded court more than once and as such had waived its right to earn audience. In light of the same reiterated using the words of Justice E.K Wamwoto (as he then was) in "*Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 Others* [2022] eKLR case E246 of 2021" where in finding That the applicants application was an abuse of court process stated the following;

> " 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."

32. The Learned Counsel opined That the Applicant's actions had deeply caused the Plaintiff, anguish, mental, financial and emotional distress. The Counsel referred Court to the case of:- "*Kivanga Estates Limited v National Bank of Kenya Limited* [2017] eKLR civil appeal 217 of 2015", the three-judge bench on the question of abuse of court process stated;

> " A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action?" See *Trust Bank Limited v Amin Company Ltd & Another* (2000)KLR 164."

33. In the foregoing, the Learned Counsel submitted That this Honourable Court as a temple where unfairness shouldn't be entertained. Therefore, it was imperative That this Honourable Court urgently cut all these vices in the bud.

34. In conclusion, the Learned Counsel submitted That this Honourable Court should dismiss the 1st Defendant/Applicant's application prayers as per the application dated 1st December, 2022 in its entirety.

IV. Analysis and Determination

35. I have carefully read and considered the pleadings herein being the application dated 1st December, 2022 by the 1st Defendant/Applicant and the responses by the Plaintiff/Respondent, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of the *Constitution* of Kenya, 2010 and statures.

36. 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 date 1st December, 2022 by the 1st Defendant/Applicant has made out a case of the review and setting aside of the orders of this Honourable Court issued on 2nd November, 2022?

    b. Who will bear the Costs of the Notice of Motion application dated 1st December, 2022.

Whether the Notice of Motion application date 1st December, 2022 by the 1st Defendant/Applicant has made out a case of the review and setting aside of the orders of this Honourable Court issued on 2nd November, 2022?

37. Under this Sub – heading, the main substratum is on causing the Honourable Court to consider review, setting aside, varying and/or discharging its orders. The application by the 1st Defendant/Applicant was brought under the provisions of Section 80 of the *Civil Procedure Act*, Cap. 21 and Order 45 rule 1 of the *Civil Procedure Rules*, 2010. These provisions provides as follows:- 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. While the provision of Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 provides as follows: -

> " 1.
>
> (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. Broadly speaking, in the case of "*Republic v 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 stated 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. The 1st Defendant/Applicant has urged the Court to review its orders directing That the hearing of the matter had been closed and a judgement in the current suit would be delivered on the 14th March, 2023.

44. The starting point is That the background of the case at hand. The Plaintiff filed a suit on 15th September 2020 with regards to a parcel of land legally owned by him known as L.R No. 10173 Grant No. CR 19906 and L.R 10174, Grant No. CR 19907 (suit properties) located in Kilifi County. According to the record, on 12th October, 2022, the Honourable Court was sitting and there are proceedings to That effect in That the 1st Defendant's claim was taken out for non- attendance and the Honourable Court set the matter down for highlighting of submissions and subsequently fixing the judgment date.

45. On different occasions the Honourable Court set down a date and on the said date the 1st Defendant nor his Counsel attended Court. On the 12th October, 2022 the Court being satisfied That the 1st Defendant was served according to the affidavit of service on record directed the hearing to proceed ex parte.

46. On 2nd November, 2022 at the confirmation That the written submissions had been filed, the Honourable court reserved judgment for the 14th March, 2023.

47. I have keenly perused the record of the Court and I am satisfied That the Honourable Court was just to dismiss the 1st Defendant's case under Order 12 rule 1 and Order 17 rule 1, 2 and 3 of the *Civil Procedure Rules*, 2010 after being satisfied That the 1st Defendant was properly served with the hearing notice the Honourable Court dismissed the 1st Defendant's case for non attendance. On 1st December, 2022 the 1st Defendant after almost three months filed the present application under certificate of urgency. However the advocate appearing for the applicant has not sworn an affidavit stating why he failed to attend court with the applicant for the hearing of this case on the hearing date. The Courts have pronounced themselves on the principles of setting aside a dismissal of suit for want of prosecution. First the court must be satisfied with the Plaintiff's excuse for the delay and That justice can still be done to the parties. The Applicant must also demonstrate That the application has been made without unreasonable delay and That no prejudice will be occasioned to the opposite party.

48. There is no doubt in my mind That the application of 1st December, 2022 has not been brought without undue delay and no excusable explanation given for the non-attendance in the previous attendances.The Applicant's advocate has not offered any explanation by way of an affidavit evidence why he received the hearing notice but failed to attend court together with his client. The Applicant took more than one year to bring this application for reinstating this suit. A period of three months in my view is inordinate.

49. In this case the 1st Defendant was served but failed to defend his case even after the Court ordering That he be served more than once. Even if the Court had directed the case to be closed, there would be nothing judiciously wrong with That. In any event the Court need not make a pronouncement at all. The Court rightly reserved the judgment for the 14th March, 2023.

50. Back to the prayer for review, according to the provisions of Order 45 of *Civil Procedure Rules*, review is granted by the Court to an Applicant who must show That there is new evidence or discoveries which after exercise of due diligence was not within his knowledge or could not be produced at the time the decree was passed. Secondly on account of some mistake which is apparent on the face of the record and thirdly for any sufficient cause.

51. The Applicant has urged the Court That has alleged That this Honourable Court was not sitting when in the real sense the Honourable Court on the 22nd February, 2022 ordered That the matter was adjourned to the 28th April, 2022 being the last adjournment as the defence would stand dismissed for want of prosecution and none attendance. The Honourable Court notes That on the 28th April, 2022 the 1st Defendant was not in attendance after which there was no attendance by the 1st Defendant in the proceeding Court reserved dates. It is to be noted That the Honourable Court has not delivered any judgement in this case and therefore there is no judgment to be arrested. Ideally, I emphatically state That the 1st Defendant/Applicant has not satisfied any of the requirements as set out neither under the provisions of Sections 80 of the *Civil Procedure Act*. Cap. 80 nor Order 45 Rules 1, 2 and 3 of the *Civil Procedure Rules*, 2010.

52. Be That as it may, this being a land matter with its abundant sensitivities in this Country, the interest of natural Justice, Equity and Conscience, the consideration of the principles of the Overriding objectives founded under the provisions of Sections 1A and 1B of the *Civil Procedure Act*, Cap. 21, Sections 3 and 13 of the *Environment and Land Act*. No. 19 of 2011; Sections 101 of the *land Registration Act*, No. 3 of 2012 and 150 of the *Land Act*, No. 6 of 2012 and Articles 25 (c), 50 (1) and (2) 159 (1) and (2) of the *Constitution* of Kenya, 2010 and while relying on the legal ratio set out in the case of "//Shah v Mbogo (1968) EA 93 page 95" where the Court shall exercise its unfettered discretion so long as its not capriciously applied but judiciously, the Honourable Court being a temple of Justice, has considered and felt it fit and suitable rather than driving the 1st and 2nd Defendants away from the seat of Justice, to conditionally allow them to be heard and prosecute their case on the principles of fair hearing. They shall be allowed call their witnesses for examination in chief, cross-examination and re-examination and hence in essence setting aside the ex - parte proceedings of this matter. While making this hard decision, I have critically considered the position of the Plaintiff/Respondent in this matter whom though has been frustrated, anguished and traumatized mentally and in terms of resources should and will not be prejudice apart from having to be preserve a little bit of time before the conclusion of the full trial whatsoever.

Who will bear the Costs of the Notice of Motion application dated 1st December, 2022

53. 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 v Tarchalan Singh*" eKLR (2014) and *Cecilia Karuru Ngayo v Barclays Bank of Kenya Limited*, eKLR (2014) where courts held:-

> " The basic rule on attribution of Costs is That Costs follow the events.....it is well recognized That the principles costs follow the events is not to be used to penalize the losing party rather it is for the compensating the successful party for the trouble taken in defending the case..

54. In this case, this Honourable Court finds That although the 1st Defendant has succeeded in prosecuting the Notice of Motion application dated 1st December, 2022, but arising from the surrounding facts and inferences herein the Plaintiff shall have the costs of the application.

55. At the same time, while observing the records and the submissions by the Plaintiff/Respondent, I am compelled to fully concur with the sentiments expressed by the Learned Counsel for the Plaintiff/Respondent to the effect the Applicant's actions had deeply caused the Plaintiff, anguish, mental, financial and emotional distress. Indeed, while stating so, the Counsel referred Court to the case of:- "*Kivanga Estates Limited* (*Supra*) where the three-Judge bench stated;

> " .....the opposite party causes unnecessary anxiety, trouble or expenses. .....and which may involve expenses which will prejudice the fair trial of the action?".

56. For these reason, to balance the scale of Justice and not also to send the Defendants away from the seat of Justice, I hold That they should pre – conditionally be made to pay the Plaintiff some reasonable thrown away costs within some stringent timeframe.

V. Conclusion and Disposition

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

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

    a. That the Notice of Motion application dated 1st December, 2022 be and is hereby found to have merit and hence its is allowed in its entirety.

    b. That the 1st Defendant herein condemned to pay the Plaintiff a thrown away costs of Kenya Shillings Fifty Thousand (Kshs. 50, 000.00/=) within the next thriety (30) days from the date of the delivery of this Ruling. In default to comply, this Court proceeds to fix a date for the delivery of Judgement accordingly.

    c. That the Defence hearing fixed for 4th June, 2024 for the examination in Chief, Cross – examination and Re – Examination of the witnesses to be summoned by the 1st and 2nd Defendants and upon closure the filing of written submissions.

    d. That the matter to be mentioned on 4th March, 2024 for compliance and further directions.

    e. That the Plaintiff/Respondent shall have the costs of this application.

    It is so ordered accordingly.

RULING DELIEVERED VIA EMAIL AS PER THE NOTICES DISPATCHED TO ALL THE PARTIES SIGNED AND DATED AT MOMBASA THIS 5TH DAY OF DECEMBER 2023.

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