



Mainland Properties Limited v Attorney General & 3 others (Environment & Land Petition 13 of 2018) [2025] KEELC 3052 (KLR) (2 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3052 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 13 OF 2018**

SM KIBUNJA, J

APRIL 2, 2025

BETWEEN

MAINLAND PROPERTIES LIMITED PETITIONER

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

**CABINET SECRETARY, MINISTRY OF LANDS & PHYSICAL
PLANNING 2ND RESPONDENT**

**COUNTY COMMANDER KENYA POLICE SERVICE MOMBASA 3RD
RESPONDENT**

**THE INSPECTOR GENERAL NATIONAL POLICE SERVICE 4TH
RESPONDENT**

RULING

Notice Of Motion Dated 23rd May 2024

1. The applicants moved the court through the notice of motion dated 23rd May 2024, brought under Article 159(d) of *the Constitution*, sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act* and Order 12 Rules 6 & 7 of Civil Procedure Rules, seeking for the following orders:
 - a. Spent.
 - b. That this Honourable Court be pleased to review, discharge, vary and or set aside the Judgment by Hon. S.M. Kibunja J. delivered on the 11th April 2024.
 - c. That, there be stay of execution of the orders made on 11th April 2024 pending hearing and determination of the application inter-partes, or further orders of this court or determination of the petition herein.



- d. That this Honourable Court do declare that the proceedings were a nullity ex debito justitiae.
- e. That the counsel who purported to act for and on behalf of the Applicants herein be ordered to show cause why disciplinary action should not be taken against her for misrepresentation of fact material to the case.
- f. That the Honourable court do grant any orders or relief(s) it deems expedient and just in the interest of justice.
- g. That the costs of this application be provided for.

The application is based on the twelve grounds on its face marked (i) to (xii) respectively and supported by the affidavit of Mwadziwe Saha sworn on 23rd May 2024, in which he deposed inter alia that he is the chairman of the Applicant committee that is spearheading this proceeding and has authority to act on behalf of 67 others; that they filed HCCC No. 96 of 2003 whose judgment was delivered on 23rd July 2009 by Hon. Sergon J. dismissing their originating summons; that in that case one Ananias Mwaboza was their advocate, but after he joined politics, Ms. Mwashunga Mtana & Co advocates came on record for them and filed an application dated 23rd September 2009 for leave to file appeal out of time; that the application was never prosecuted and the same was dismissed by Yano J. on 18th May 2017; that the petitioner herein filed HCC No. 503 of 2011 – Mainland Properties Ltd versus Kazungu Kalama & 168 Others, and an application dated 4th October 2011 for summary judgment, they filed a defence and counterclaim and a reply to the application; that the application dated 4th October 2011 for summary judgment was heard and dismissed on 23rd February 2012 by Mary Kasango J. and an appeal No. 83 of 2012 was filed in the Court of Appeal but later withdrawn by consent of parties on 24th October 2013; that their advocates, Mwashunga Mtana & Co. Advocates, never informed them of the events after the Court of Appeal consent, and they later learnt the said firm had been suspended from the Roll of Advocates; that they filed E072 OF 2023 (OS) in the High Court to redress their grievances, and the respondent filed an application dated 31st January 2024 to strike out the Originating Summons; that the said application was served on his current advocates on 5th February 2024, and on 22nd February 2024 Justice Florence Macharia dismissed the said originating summons with costs for not being filed in the proper court; that it was through the striking out application that they found out that judgement was entered against them in HCC No. 503 of 2011 was dismissed on 12th July 2013, by Mukunya J; that a constitutional petition No. 13 of 2018 was filed, heard and decided in April 2024; that they were respondents in the said petition and ostensibly were represented by Ms. Shariff & Company Advocates, who they had not instructed; that the said advocates did not participate in the proceedings and that there was an attempt by the Petitioner to introduce 1388 aliens in the suit to defeat their cause; that whereas the petitioner had purchased the suit property for Kshs. 340,000, their demand was for Kshs.1,700,000,000, (One billion seven hundred million) from the Government to enable the suit property be divided among all the persons in a scheme such as it happened in the Waitiki Land; that they have applied to change their advocates from M/s Shariff & Co. Advocates. The depositions of Mwadziwe Saha are supported by John Lugwaru Tsuma through his affidavit sworn on 23rd May 2024.

2. The petitioner opposed the application through the replying affidavit of Karim S. Anjarwalla, advocate and director of the petitioner, sworn on the 27th June 2024, inter alia deposing that the 1388 other applicants have not been identified or evidence of ID cards given, as only the name of Kazungu Kalama has been disclosed; that the deponents of the two supporting affidavits have not annexed a power of attorney to demonstrate they have capacity to swear the said supporting affidavits; that it has been affirmed in at least four decisions that the suit property is registered in the petitioner's name; that in HCCC No. 96 OF 2003 the suit was dismissed and was never appealed; that suits belong to parties



and the parties have a duty to follow up on the suit parties; that Mr. Saha has been complaining at various stages during the previous litigation and he has not placed any evidence to show what steps he took against their advocates; that the applicants are not being candid about HCC No. 503 of 2011, as the main suit was heard and determined and judgment thereby delivered on 12th July 2013, and that 23 trespassers participated in the suit and called one witness Ruwa Kwonya Mwatela; that the applicants are misleading the court by stating that HCCC No. 503 of 2011 was compromised by consent as the judge simply refused to grant an order of summary judgment, and further that they were not kept abreast yet they were aware of the said judgment of 12th July 2013; that the trespassers attempts in prosecuting O.S No. E072 of 2023 were thwarted when the petitioner found out and applied to court to strike it out for being res judicata, and also informed the court of the existence of this petition; that the petitioner lodged this petition against the state seeking compensation and special damages for failing to aid in eviction of trespassers; that the AG filed a cross-petition and introduced the trespassers whom the petitioner challenged through a preliminary objection; that the court ordered for advertisement in a newspaper and subsequently the firm of Shariff & Co. Advocates came on record for the trespassers; that this application has not met the threshold for review, and is aimed at stalling the trespassers eviction from the suit property; that the applicants were aware of this petition as they filed originating summons which the petitioner responded to while this petition was still pending in court, they never took any steps to question the source of their advocates' instructions in this petition, until now that the advocate has become a judge; that Mr. Saha's lamentations about their advocate without raising challenges in the appropriate forum is an affront to the administration of justice; that the applicants have come to court with unclean hands, misrepresenting facts and peddling lies.

3. The applicants responded to the replying affidavit through the supplementary affidavit sworn by Mwadziwe Saha on 9th July 2024 inter alia reiterating that some trespassers in HCCC No. 503 of 2011, were planted, 47 have moved out and 12 are deceased; that it was realized in 1982 that the registered owners, Iris Kathleen, Moly-carter, Reginald Wylie Rand-overly And William Charles Lennox Rand-overly, had not given any power of attorney for the transfer to of the suit property, and hence any transfer was therefore fraudulent; that two directors of the petitioner namely, Bharmad Meghi Shah and HusseinBhai Karimbhi Anjarwalla, had relinquished the title to the residents in 1980's upon being confronted by the then Kisauni MP, Abdalla Mwaruwa, in a ceremony, but the other two directors, Asif Anjarwalla and Atiq Anjarwalla, are the ones fighting for their unjust enrichment; that the proceedings herein were never conducted in accordance with the principles of natural justice and that Ruwa Kwonya has never participated in any past or present proceedings; that the learned Judge Florence Macharia was wrong in striking out their suit for being filed before the High Court Commercial Court instead of Environment and Land Court, as she should have returned it to registry for rerouting to this court.
4. The application was canvassed through written and oral submissions. The learned counsel for the applicants and the petitioner filed their submissions dated 22nd October 2024 and 5th February 2025 respectively, and made oral highlighting on the 24th February 2025, which the court has considered.
5. The following are the issues for the determination by the court:
 - a. Whether the applicants have met the threshold for review and setting aside of the judgment dated 11th April 2024.
 - b. Whether the applicant has established a reasonable case for a show cause order to issue why disciplinary action should not be taken against Ms. Shariff & Company Advocates for misrepresentation of facts material to the petition.
 - c. Who pays the costs?



6. The court has carefully considered the grounds on the notice of motion, affidavit evidence, written and oral submissions by learned counsel, superior courts decisions relied upon thereon, the record and come to the following determinations:

- a. A perusal of this application is shows clearly the applicants main pursuit is for the review and or setting aside of the judgment delivered on 11th April 2024 for reasons that they were not served and or represented in its hearing. Review of judgements, decrees and or orders is provided for under section 80 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, and guided by Order 45 Rule 1 (1) of the Civil Procedure Rules. In the case of Republic versus Public Procurement Administrative Review Board & 2 others [2018] e KLR the court held that:

“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.”

Similarly in the case of Ajit Kumar Rath versus State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608 the Supreme Court of India 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”

Also in the case of Republic versus Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR the court proffered the following principles from a number of authorities as a guide in review applications:

- 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.”
- b. The applicants have relied on Order 12 Rules 6 & 7 of the Civil Procedure Rules in their prayer for setting aside judgement. The said provision guides in applications for setting aside judgements or dismissal orders entered for reasons of non-attendance during the hearing. The applicants contention in the instant application is that in this petition, they were not served, they did not get a chance to be part of the proceedings, or file any pleadings and that those respondents represented by Ms. Shariff & Company Advocates were people who were planted by the petitioner. From the applicants grounds and depositions relevant to the prayer of setting aside the judgement of 11th April 2024, it would appear the correct provision would be Order 10 Rule 11 and not Order 12 Rule 6 & 7 of the Civil Procedure Rules. In the case of Stephen Ndichu versus Monty’s Wines and Spirits (2006) eKLR the court opined as follows:

“The principles governing the exercise of judicial discretion to set aside ex-parte judgements are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it (See Patel –vs-E. A. Cargo Handling Services



Ltd (1974) E. A. 75). The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah –vs- Mbogo (1969) E. A. 116). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration –vs- Gasyali (1968) E. Way. 300). It also goes without saying that the reason for failure to attend should be considered.”the court citing relevant cases on the issue held inter alia:-

”the discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd. the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise , to obstruct or delay the cause of justice(see Shah vs. Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali.) It also goes without saying that the reason for failure to attend should be considered.”

- c. Having looked at the applicable provisions of the law as set out above that is applicable in prayers for review and setting aside of the judgement, it is time to now apply the same to the facts herein. The first indisputable fact is that the main petition herein was aimed at the state for failing to provide support at evicting the trespassers on the suit property. The petitioner was simply executing the order dated 9th February 2017 in HCCC No. 503 OF 2011, in which this court granted declarations that the state ought to have complied with eviction to stop the trespassers from infringing on the constitutional rights of the petitioner. This court also ordered the state agencies cited as respondents to come up with a resettlement solution within 60 days from the date of ruling failure to which an order of mandamus do issue to ensure compliance with the orders in HCCC No. 503 of 2011. This inevitably means that the battle for ownership or possession of the suit property was dealt with in HCCC No. 503 of 2011, and the petitioner was declared the winner in a judgment delivered on 9th February 2017.
- d. The applicants in the instant application has made allegations on the petitioner planting respondents from the first case in 2003 to the present petition. They have also denied M/s. Shariff & Company Advocates was their appointed representative in this suit. That as the main petition was filed for the purposes of executing as it were the court order made in HCCC No. 503 of 2011, it is only proper that the applicants allegations that the petitioner had planted respondents should have been raised in that suit where the questions of title and possession of the suit property was decided.
- e. That reviewing, setting aside and staying the judgement of 11th April 2024, would in my view serve no purpose as it would not alter the judgement and decree of 9th February 2017 in HCCC No. 503 of 2011, on the title and possession of the suit property. I therefore find no merit in the prayers (b), (c) & (d) for review, stay and setting aside on the notice of motion dated 23rd May 2024. In my view, those prayers should have been pursued through HCCC No. 503 of



2011, in which the applicants admits they were parties and had legal representation, and where the ownership and possession questions over the suit property were decided.

- f. The court is aware of the superior courts decisions emphasizing that courts should be slow in looking litigants out of the citadel of justice due to inadequacies in their pleadings where amendments can cure the same. See *Luseno & Another (Suing as the Administrators of the Estate of Dorcas A. Luseno) versus Wafula (Suing as the Administrator of the Estate of Julius Wafula) & Another* [2025] KEELC 1258 (KLR) the court cited with approval *D.T. Dobie Co. (K) Ltd versus Joseph Mbaria Muchina & Another* [1980] eKLR. The instant application cannot benefit from any amendments.
 - g. The applicants, alleged to be represented by the deponent of the supporting and supplementary affidavits, were not disclosed, and the petitioner has taken an objection to the application on that ground among others. Assuming that Mwadziwe Saha, the deponent, had authority from the 1388 applicants, and had succeeded or failed in the application, the question that arises is how would the court issue a ruling or order for or against people whose identity has not been disclosed in their in the application? Parties to suit processes should be named as such, and in representative suits, consents of those being represented by others in writing should obtained and filed.
 - h. The prayer for notice to show cause why disciplinary action should not be taken against Ms. Shariff & Company Advocates is an issue raised before the wrong forum. That as the applicants have a counsel representing them in this application, they should consider lodging the matter before the appropriate forum for appropriate reliefs.
 - i. Under section 27 of the *Civil Procedure Act*, chapter 21 of Laws of Kenya, costs follow the event unless where the court for good cause directs otherwise. That as the court has found the application dated 23rd May 2024, is to be struck out, it is only fair that the identified applicant and deponent of the supporting and supplementary affidavits, Mwadziwe Saha, bears the petitioner's costs in the application.
7. From the foregoing, I find for the reasons set out above that the application dated the 23rd May 2024 is without merit and the orders that commend themselves to be issued under the circumstances, which I hereby issue, are as follows:
- a. The application dated 23rd May 2024 is without merit and is hereby struck out.
 - b. The petitioner's costs in the said application to be borne by Mwadziwe Saha.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 2ND DAY OF APRIL 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Petitioner : M/s Onesmus

Respondents : Mrs Nyange For 171st To 1388 Respondents.

Applicants : Mr Gichana.

Shitemi – Court Assistant.

