Njoroge v Kimondo (Legal Representative of the Estate of the Late Stephen Kimondo Kamau - Deceased) (Environment & Land Case 32 of 2012) [2025] KEELC 534 (KLR) (7 February 2025) (Ruling)

Neutral citation: [2025] KEELC 534 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 32 OF 2012

LL NAIKUNI, J

FEBRUARY 7, 2025

BETWEEN

DOUGLAS MUNGAI NJOROGE ..... PLAINTIFF

AND

PETER KAMAU KIMONDO (LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE STEPHEN KIMONDO KAMAU - DECEASED) ..... DEFENDANT

RULING

I. Introduction

1. This Honourable Court is tasked to make a determination onto two (2) Notice of Motion applications dated 12th June, 2024 and 2nd October, 2024 respectively both by Peter Kamau Kimondo (Legal Representative of the Estate of the late Stephen Kimondo Kamau (Hereinafter referred to as "The Deceased"), the Defendant/Applicant herein.

II. The Notice of Motion application dated 12th June, 2024

2. The first Application was brought under the provision of Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Order 45 of the Civil Procedure Rules (Amendment) 2020 and all other enabling laws. The Applicant sought for the following orders that:-

    a. This Honourable Court be pleased to review and vary its Judgment dated 28th April, 2022 to amend the Order on Costs.

    b. Costs of this application be provided for.

3. The application was premised on the grounds, facts and testimony on the face of it and further supported by the 11 paragraphed annexed affidavit of PETER KAMAU KIMONDO the Legal

Representative of the Estate of the Late Stephen Kimondo Kamau, the Defendant in the Plaint and the Plaintiff in the Counter - Claim in the suit herein. The Applicant averred that:

a. The Affidavit was sworn in support of the Application for review of the Judgment of the Honourable Justice Naikuni delivered on the 28th April, 2022. Annexed in the affidavit was the copy of the said Judgment marked as 'PKK - 2'.

b. At Paragraph 77 of the said Judgment, the Honourable Court condemned the 1st and 2nd Defendants in the Counter - Claim to pay costs to the Plaintiff in the Counter - Claim.It stated as follows verbatim:

> " The events in the instant case is the Plaintiff in the Counter Claim has succeeded in his case. For that very fundamental reason therefore, the costs of this suit will be made to the Plaintiff in the Counter - Claim by the 1st and 2nd Defendants in the Counter - Claim herein."

c. However in the dispositive orders there is an error apparent on the face of the record.

d. The said dispositive order on costs states as follows:

> " (h) That Costs and interest of the suit to be awarded to the Defendant in the Plaint and 1st Defendant in the Counter - Claim by the Plaintiff in the Plaint herein"

e. In his humble view the dispositive order (h) was not in line with the finding of the Court at Paragraph 77 of the Judgment because it made the Plaintiff in the Plaint solely liable for costs and interest payable to both the Defendant in the Plaint and 1st Defendant in the Counter - Claim.

f. He prayed that the said order be reviewed and varied to read that both the Plaintiff in the Plaint (the 2nd Defendant in the Counter - Claim) and the 1st Defendant in the Counter - Claim are jointly and severally liable for costs and interest of the suit payable to the Defendant in the Plaint (the Plaintiff in the Counter - Claim).

g. This application had been made with due speed after the appeal filed by the Plaintiff in the Plaint (the 2nd Defendant in the Counter - Claim) in "(Mombasa) Court of Appeal Civil Appeal No. E069 of 2022 - Douglas Mungai Njoroge – Versus - Stephen Kimondo Kamau" was dismissed with costs on 24th May, 2024.

h. The subject of this application was not an issue before the Court of Appeal.

i. He prayed that his application be granted with costs.

III. The Notice of Motion application dated 2nd October, 2024

4. The second application was brought under the provision of Sections 1A, 1B, 3A, 34, 44 and 63 of the *Civil Procedure Act*, Cap. 21; Order 22 Rule 22 (1), Order 50 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling laws. The Applicant sought for the following orders that:-

a. Spent.

b. Spent.

c. This Honourable Court be pleased to set aside and/or annual the Warrants of Execution issued on 13th September, 2024.

d. Costs of this application be provided for.

5. The application by the Applicant was premised on the grounds, facts and testimony on the face of it and further supported by the 17 paragraphed annexed affidavit of PETER KAMAU KIMONDO the legal representative of the Estate of the Late Stephen Kimondo Kamau, the Defendant in the Plaint and the Plaintiff in the Counterclaim in the suit herein. The Applicant averred that:

a. The Affidavit was sworn in support of the Application for review of the Judgment of the Honourable Justice Naikuni delivered on the 28th April, 2022. Annexed in the affidavit was said Warrants for Execution marked as 'PKK - 2'.

b. The Plaintiff was not the Decree Holder and indeed he was condemned to pay the costs of the suit to the Defendant according to the Judgment and Decree dated 28th April, 2022. He annexed the Certificate of costs marked as "PKK – 3".

c. The Plaintiff was dissatisfied with the said Judgment and appealed in "(Mombasa) Court of Appeal Civil Appeal No. E069 of 2022 - Douglas Mungai Njoroge – Versus - Stepien Kimondo Kamau" which was dismissed with costs on 24th May, 2024. Annexed in the affidavit was a copy of the Judgment of the Court of Appeal marked as 'PKK - 4'.

d. The Judgment and Decree dated 28th April, 2022 erroneously ordered that the Defendant be paid the said balance of the purchase price and interest.

e. He noted that as per the Judgment of the Court of Appeal and according to the said Judgment of the Environment and Land Court the Defendant is required to pay the 1st Defendant in the Counter - Claim, PETER KAMAU NGUATHA, who was the Land Owner or Vendor, the said balance of the purchase price and interest and not to the Plaintiff.

f. There was an error in the calculation of interest which was cited as a sum of Kenya Shillings Four Million Six Fourty Four Thousand Three Eighty Nine Hundred and Fourty Cents (Kshs 4,644,389.40/-) in the application for execution whilst it should have been a sum of Kenya Shillings Nine Fourty Five Thousand Eight Fifty Two Hundred (Kshs. 945,852/-) (i.e.12% of Kshs 342,700/- x 23 years).

g. His advocates had written to the law firm of Messrs. J.O. Magolo Advocates informing them of the error in the calculation of interest. Annexed in the affidavit was a copy of the said letter marked as 'PKK - 5'.

h. The application for execution by way of sale of MOMBASA/BLOCK III/462 which was the suit property expressly contravenes and disobeyed the Honourable Count Orders which bar the Plaintiff from laying claim to or in any way interfering with the Defendant's peaceful occupation of the suit property.

i. The application for execution by the Plaintiff for sale of the suit property which this Honourable Court held was fraudulently and illegally registered in the Plaintiff's name would be a travesty of justice and an abuse of the count process.

j. There was pending before this Honourable Court an application for review dated 12th June, 2024 which sought to review the Judgment and Decree dated 28th April, 2022 to correct an error apparent on the face of the record.

k. If the execution proceeded it would render nugatory the entire Judgment of the Environment and Land Court and the Judgment of the Court of Appeal.

l. The intended execution was fraudulent, illegal and contemptuous of this Honourable Court's Judgment and Decree.

m. The warrants of execution were not drawn according to the Decree and are aimed at reversing and nullifying the Judgment of the Environment and Land Court and the Judgment of the Court of Appeal.

n. He prayed that his application be granted with costs.

IV. Submissions

6. On 14th November, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion applications dated 12th June, 2024 and 2nd October, 2024 be disposed of by way of written submissions. Pursuant to that on 28th January, 2024 all the parties obliged and a ruling date was reserved on 7th February, 2025 by Court accordingly.

A. The Written Submissions by the Defendant/Applicant.

7. The Defendant/Applicant through the Law firm of Messrs. C. Katisya & Co. Advocates filed their written Submissions dated 6th November, 2024. M/s. Katisya Advocate commenced by stating that the application before Court was for review to correct an error apparent on the face of the record in the delivered Judgement by this Court. She submitted that this Honourable Court has the inherent power and powers under the provision of Sections 80 and 99 of the *Civil Procedure Act*, Cap. 21 to correct clerical errors on the face of the record.

Section 99 of the *Civil Procedure Act* states as follows:

> 'Clerical or arithmetical mistakes in Judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.'

8. The Learned Counsel submitted that the error the Defendant/Applicant sought to correct was to interchange a preposition (the word 'by') and a conjunction (the word 'and') in the dispositive part of the Judgement. The error is that at Paragraph 77 of the Judgement the Court held as follows:

> 'The events in the instant case is the Plaintiff in the Counterclaim has succeeded in his case. For that very fundamental reason, therefore, the costs of this suit will be made to the Plaintiff in the Counterclaim by the 1st and 2nd Defendants in the Counterclaim herein. Emphasis mine.

In the dispositive order of the Judgement at 79(h) it states as follows:

> 'THAT costs and interest of the suit to be awarded to the Defendant in the Plaint and 1st Defendant in the Counterclaim by the Plaintiff in the Plaint herein.' (Emphasis mine).

9. The main body of the Judgement would not be changed or altered in any way. No new evidence was being introduced for the Court to consider. The Learned Counsel referred to the case of "Outa –

Versus - Okello & 3 others (Petition 6 of 2014) [2017] KESC 25(KLR) (24 February 2017) (Ruling)", where the Court considered the Slip Rule and stated as follows:

> 'By nature, the Slip Rule permits a Court of law to correct errors that are apparent on the face of the Judgment, Ruling or Order of the Court. Such errors must be so obvious that their correction cannot generate any controversy, regarding the Judgement or decision of the Court. By the same token, such errors must be of such nature that their correction would not change the substance of the Judgement or alter the clear intention of the Court. In other words, the Slip Rule does not confer upon a Court any jurisdiction or powers to sit on appeal over its own Judgement, or, to extensively review such Judgement as to substantially alter it. Indeed, as our comparative analysis of the approach by other superior Courts demonstrates, this is the true import of the Slip Rule.'

10. It was plainly manifest on the face of the Judgement that Paragraph 79(h) contradicted Paragraph 77 because of the aforementioned interchange of words, which was an accidental slip during the typing of the Judgement. The Defendant in enforcing the decree was faced with a challenge due to the said clerical error which made it impossible for the intent of the Judgement to be realised.

11. The effect of appeal. The Plaintiff had laid emphasis on the fact that the said Judgement was appealed against and the Court of Appeal made certain changes to the Judgement. The issue of the typing error was not before the Court of Appeal. It was not for consideration by the Court of Appeal. Further, it was their submission that the clerical error could not have been an issue before the Court of Appeal.

12. The Learned Counsel referred court to the provision of Section 79 of the *Civil Procedure Act*, Cap. 21 which expressly excludes errors from consideration during appeals. It provided as follows:-

> 'No decree to be altered for error not affecting merits or jurisdiction
>
> No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the court.'

13. Thus, the Counsel averred that the error herein was the type anticipated by the provision of Section 79 A. Therefore, the application steered clear of any issue that may have or should have been considered in the appeal.

14. The Learned Counsel addressed Court to the exceptions to the Doctrine of "functus officio". The Counsel stated that the interest of justice is to ensure finality of litigation to avoid reopening and relitigating issues. Hence one of the principles to this effect is "the functus officio" doctrine. However "the functus officio" doctrine makes an exception that allows Courts to reconsider a matter decided by it for purposes of correcting errors thereon. It was her submission that a correction of clerical errors such as is presented by this case fell within the exceptions to the doctrine of "functus officio". To support the argument, the Learned Counsel cited the case of:- "Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] KECA 600 (KLR)" where the Court recognized that there are exceptions to the rule, one of which is correction of errors, as in the instant case. It stated as follows:

> ''In the Canadian case of CHANDLER vs ALBERTA ASSOCIATION OF ARCHITECTS [1989] 2 S.C.R. 848, Sopinka J. traced the origin of the doctrines as follows (at p 860); "The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in re St. Nazaire Co., (1879), 12 Ch. D.

88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to exceptions:

1. Where there had been a lip in drawing it up, and,

2. Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. Vs. J. O. Rose Engineering Corp. [1934] S.C.R. 186" Emphasis mine

'The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgement has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in JERSEY EVENING POST LTD VS AI THANI [2002] JLR 542 at 550, also cited and applied by the Supreme Court; "A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors...'

15. The Learned Counsel averred that the Defendant/Applicant's application was not merit based nor does it invite the Court to pronounce itself on matters decisional in nature, therefore there was no danger of the parties rehashing matters that are now done and dusted. The Learned Counsel urged the Court to hold that it has residual jurisdiction under the exceptions of the doctrine of "functus officio" to make clerical corrections so as to give full effect to the Court's decision. Additionally, the Defendant/Applicant invoked the overriding objective of the Court to do justice. The subject error had the effect of confusing the liabilities of the parties on the issue of costs. If the error was left on the fact of the Judgement and Decree then the Defendant would be unable to execute for costs from the Judgement Debtors thereby in effect denying the Defendant his costs. This would be a grave injustice to the Defendant/Applicant herein who had litigated this matter since the year 2012 and incurred considerable costs.

On submissions regarding the second application - Notice of Motion dated 2nd October, 2024

16. The said application before Honourable Court sought a stay of execution and setting aside and nullification of warrants of execution dated 13th September, 2024. By virtue of the provision of Section 34(1) of the *Civil Procedure Act* Cap 21 Laws of Kenya this Court has powers to determine all questions regarding the execution of the Decree herein. It provides:-

'All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.'

17. It was their contention that the Plaintiff/Respondents' warrants of execution had been procured by fraud and are fraught with illegalities. It was clear from the face of the application for execution that the Law firm of Messrs. J. O. Magolo Advocates made the application on behalf of the Plaintiff alone. They referred to the annexure to their further affidavit marked as "PKKB'. She averred that the Plaintiff was not the successful party in the suit or the appeal. As a way of recapitulation, in its Judgement of 28th April, 2022, the Court ordered as follows: -

i. the Defendant was granted the subject property MOMBASA/BOCK/MS/III/462.

ii. the 1st Defendant in the Counter - Claim (Peter Nguatha) was ordered to transfer the subject property to the Defendant.

iii. the registration of the subject property in the name of the Plaintiff was cancelled and the registration records were to be rectified by registering the subject property in the name of the Defendant.

iv. the Plaintiff was barred from interfering with the Defendant's quiet occupation of the subject property.

v. The Defendant was to pay the 1st Defendant in the Counter - Claim (Peter Nguatha) the balance of the purchase price of Kshs. 342,700 plus interest at 12% p.a. for 23 years.

vi. The Defendant was awarded costs payable by the Plaintiff and the 1st Defendant in the Counter - Claim.

18. It is clear from the Judgement of this Court that the Plaintiff did not succeed in the suit. The provision of Section 2 of the *Civil Procedure Act*, Cap. 21 defines a Decree - Holder as follows:

> " Decree - Holder" means any person in whose favour a decree has been passed or an order capable of execution has been made and includes the assignee of such decree or order".
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> A Judgement Debtor is defined as follows:
>
> "Judgment - Debtor" means any person against whom a decree has been passed or an order of execution has been made;

19. The provision of Section 38 of the *Civil Procedure Act*, Cap. 21 states that an application for execution can only be made by the Decree holder not the Judgement Debtor. In this case it is the Judgement Debtor that has applied for execution thus rendering the warrants of execution and all consequential actions illegal.

Ex - turpi causa.

20. The Learned Counsel submitted that it is an established principle of law that the court cannot participate in or aid a party that is perpetrating a fraud, illegality or criminality. This was based on public policy considerations. On this point, the Learned Counsel referred Court to the case of "Domitillah Wanzila Muvanya – Versus - Jubilee *Insurance Company limited Civil Appeal no. 225 of 2018*", where the Court cited Chitty on contracts as follows:

> " ... ."The principle of public policy," said Lord Mansfield, "is this ex dolo malo non oritur action. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the Plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground that court goes; not for the sake of the Defendant but because they will not lend their aid to such a Plaintiff...".

21. The Court was further referred to the case of "Wambui Mwangi & 3 others (civil appeal 465 of 2019) [2021] KECA 144 (KLR) which concerned proceedings and a Judgement that was found in fraud and deceit.

> 'On the law, the record is explicit that the Judge took into consideration persuasive jurisprudence among these the often cited case of Macfoy – Versus - United Africa Co. Ltd. [supra] whose cumulative legal position is that a Judgement founded on null and void

proceedings I a nullity and any action stemming from it or rooted thereon is also null and void abinitio.

'64. ...our take on the same is that the jurisprudential thread running through all of them is that no court of law should sanction and pass as valid any title to property founded on: fraud, deceitfulness; a contrived decree; illegality; nullity; irregularity, unprocedurality or a corrupt scheme.'

22. The Plaintiff's application for execution herein sought to dispose the suit property by public auction. Thus, it was their submission that this Honourable Court should not sanction a process that was flawed, null and void. This Honourable Court was urged to refuse to participate in the illegalities and criminality of the Plaintiff herein. In other words, the Counsel held that the Plaintiff's application for execution and all the ancillary proceedings thereafter were tainted with fraud and illegalities for the reasons highlighted below. The Judgement of the Honourable Court was clear, the Plaintiff was totally unsuccessful, he lost on all counts. In the words of the Judgement at paragraph 78 thereof it states:

> 'Ultimately, following the in depth analysis of the framed issues herein, the Honourable Court finds that the Plaintiff's suit is unmeritorious and must fail.'

23. The Plaintiff was not the decree holder. Therefore, he was not entitled to apply for execution. Indeed the Decree dated 28th April, 2022 was drawn by the Defendant (the Decree Holder) and not the Plaintiff (Judgement Debtor). The balance of the purchase price and interest thereon was awarded the 1st Defendant to the Counterclaim as vendor/landowner in the subject transaction and not the Plaintiff who is seeking to execute. Refer to paragraph 74 at page 87 of the Judgment. By fraud, deceit and concealment, the Plaintiff was attempting to twist the Judgement to his favour. The firm of Messrs. J.O. Magolo & Co. Advocates had clearly made the application for execution on behalf of the Plaintiff who is falsely referred to as the Decree Holder. The Plaintiff was only using the court process to extort the Defendant he was but also denying the Estate of the Deceased, the 1st Defendant to the Counter - Claim, the fruits of his Judgement. This tantamount to intermeddling in the Estate of the deceased which is a criminal offence contrary to the provision of Section 45 of the *Law of Succession Act* Cap 160 of the Laws of Kenya.

24. The Learned Counsel further argued that the Plaintiff fraudulently created and relied upon a forged affidavit to oppose their application. The said Replying Affidavit was purportedly deponed by the 1st Defendant to the Counter - Claim who was deceased. They annexed a copy of the Certificate of Death of the 1st Defendant marked as annexure 'PKK A'. The deponent claimed that the affidavit could not be signed because of injury suffered by the deponent who was masquerading as the deceased, the 1st Defendant to the Counter - Claim. This was an outright lie aimed at hoodwinking this Honourable Court to accept unsigned affidavit of a deceased person. The Honourable Court should not countenance such fraudulent actions in court proceedings.

25. The Learned Counsel held that the Plaintiff's application was in contempt of the very same Judgement he purported to enforce. The contempt arose from a breach, defiance and derision of the express orders barring the Plaintiff from interfering with the Defendant's occupation of the suit property. In contempt of the said orders, the Plaintiff sought to sell by public auction the very same suit property he was barred from interfering with. Further, instead of cancelling his name from the registration records of the suit property as ordered in the Judgement, he sought to own or benefit from the same property. The Plaintiff/Respondent's application for execution was a direct challenge, sabotage, demeans and derides the Judgment of this Honourable Court.

26. The Counsel asserted that as though the above illegalities and fraud were not enough, the Plaintiff/ Respondent was claiming for interest at a sum of Kenya Shillings Four Million Six Fourty Four Thousand Three Hundred and Eighty Nine Fourty Cents (Kshs. 4,644,389.40/). Apart from the fact canvased earlier that the Plaintiff/Respondent was not entitled to the said Judgement. The said interest amount which was the basis for execution had no correlation to the award of this Honourable Court. The Defendant/Applicant had calculated interest on the balance of the purchase price for 23 years at 12% to get 342,700 x 23 x 12 = 945,852 and communicated this amount to the Plaintiff's Advocates. Refer to annexure 'PKK. The calculation of interest on the Application for execution ("PKK - 2") was erroneous and incorrect. The Plaintiff/Applicant was seeking an amount that was more than four times what was due to the rightful party. This was an abuse of the Court process and should be condemned in the strongest terms.

27. The Learned Counsel submitted that apart from the blatant miscarriage of justice that would result from this Honourable Court declining to a stay of execution or nullification of the warrants of execution herein, the Defendant/Applicant would suffer substantial loss. Firstly, the Plaintiff/ Respondent would succeed by deception and fraud to gain from the suit property which he lost in the Judgement of this Court.

    Secondly the Defendant/Applicant had undertaken extensive developments on the suit property. Thirdly, the Defendant/Applicant would be compelled to pay an exorbitant unrealistic and fantastical amount as interest. Fourthly, there was no likelihood of a refund or return of the monies because the rightful party was deceased. It is trite law that a deceased person can only be represented by his personal representatives, and non have been enjoined in this suit.

28. In conclusion, the Learned Counsel submitted that for the foregoing reasons submitted the prayer for security of costs was not deserved in the circumstances of this case. Thus, prayed that their two applications be granted as prayed.

B. The Written Submissions by the Plaintiff/Respondent.

29. The Plaintiff/Respondent through the Law firm of Messrs. J.O Magolo & company filed their written Submissions dated 3rd December, 2024. Mr. Paul Magolo Advocate commenced by stating that before the Honourable Court were two (2) Notice of Motion applications dated 12th June 2024 and 2nd October 2024 respectively. The Learned Counsel dealt with these applications separately as follows.

30. With regard to the application dated 12th June, 2024, he stated that it sought the above stated orders. The application was opposed by way of Replying Affidavit of Douglas Mungai Njoroge dated 23rd October, 2024. The Learned Counsel made reference to the law regarding review orders being the provision of Section 80 of the *Civil Procedure Act* Cap 21 and Order 45 of the Civil Procedure Rules, 2010. The law is that, any person who considers himself aggrieved by a Decree or Order from which an Appeal is allowed under the Act, but from which no Appeal has been preferred, or by a Decree or order from which no Appeal is allowed by the Act may apply for review of judgment to the Court which passed the Decree or Order, and the Court may make such order thereon as it thinks fit. The Learned Counsel noted that in the instant case there had been an appeal to the Court of Appeal in this matter which was Civil Appeal Number E069 of 2022 which Judgment was delivered by the Court of Appeal on 24th May, 2024. Therefore, the instant application sought to have this Court to sit on Appeal on the decision of the Court of Appeal. This court should not allow such an invitation.

31. The Learned Counsel submitted on an error on the face of the record by citing the case of "Nyamogo & Nyamogo Advocates – Versus - Moses Kogo Civil Appeal No. 322 of 2000 (2001) I EA 173", where the Court opined thus at Page 174:-

> " An error on the face of the record can only be determined on the facts of each case. For an error of law on the face of the record to form a ground for review, it must be of a kind that states one in the face and on which there could reasonably be no two opinions. If a Court's original view was a possible one, it cannot be a ground for review even though it may be one for Appeal...'
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> At Page 175, the Court further observed that;
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> 'A point which may be a good ground of Appel may not be a ground for an application for Review though it may be a good ground for an Appeal'

32. Moreover, in the case of "Abasi Balinda – Versus - Fredrick Kangwamu and Another (1963) E.A 557", the Court held, inter-alia, that a point which may be a good ground of appeal may not be a ground for an Application for Review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for an Appeal. The Learned Counsel averred that in "the Nyamogo Case (Supra)", the Court drew a distinction between a mere error and an error apparent on the face of the record.

33. Additionally, the Learned Counsel referred Court to the case of "Civil Appeal No. 211 of 1996 - National Bank of Kenya Limited" where the Court of Appeal stated as follows:-

> " A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

34. Thus, the Learned Counsel contended that, what the Applicant was raising was not an error or omission on the part of the court. Instead, it was an issue that required an elaborate argument to establish and could only be raised on appeal and not review. He further argued that that there was no error, some mistake or error apparent on the face of the record and the court was very clear in its mind.

35. In conclusion, the Learned Counsel urged the Honourable Court to dismiss with costs the Applicant's Application dated 12th June 2024 as it failed to meet the test for review.

36. With regard to the Defendant/Applicant's Notice of Motion application dated 2nd October 2024. It sought the above stated orders. The application was opposed. According to the Learned Counsel, the law regarding granting of stay of execution was under the provision of Order 42 (6) of the Civil Procedure Rules. It states as follows:-

> '(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court of 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 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 applicant.'

37. To buttress on this point, the Learned Counsel referred Court to the case of "James Mwangalwa & Another – Versus - Agnes Naliaka Chesoto [2012] eKLR" where the Learned Justice Gikonyo noted that for orders of stay are grantable at the discretion of the court on sufficient cause being established by the applicant. He went further to state as follows:-

> "Sufficient cause being a technical as well as legal requirement depend entirely on the Applicant satisfying the court that:
>
> a. Substantial loss may result to the applicant unless the order is made,
>
> b. The application has been made without unreasonable delay, and
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> c. Such security as the court orders for the due due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

38. In conclusion, the Learned Counsel submitted that the reasons provided by the Defendant/Applicant were not sufficient for the orders sought to be granted. It was a case of Justice delayed is justice denied. Therefore, the Learned Counsel urged this Court to dismiss the application dated 2nd October 2024 and enable the decree holder enjoy the fruits of his Judgement.

V. Analysis and Determination

39. I have carefully read and considered the pleadings herein, the written submissions and the cited authorities by the Learned Counsels and the relevant provisions of *the Constitution* of Kenya, 2010 and the statures. In order to arrive at an informed, just, fair and reasonable decision, the Honorable Court has crafted three (3) following salient issues for its determination.

a. Whether the Notice of Motion application date 12th June, 2024 by the Defendant/ Applicant has made out a case of the review and setting aside its Judgment dated 28th April, 2022 to amend the Order on Costs?

b. Whether the Defendant/ Applicant has made out a case for the setting aside and/ or annulment of the Warrants of Execution issued on 13th September, 2024?

c. Who meets the costs of the Notice of Motion application dated 12th June, 2024 and 2nd October, 2024?

ISSUE No. a) Whether the Notice of Motion application date 12th June, 2024 by the Defendant/ Applicant has made out a case of the review and setting aside its Judgment dated 28th April, 2022 to amend the Order on Costs.

40. Under this Sub – heading, the main substratum is on causing the Honourable Court to consider review, setting aside, varying and/or discharging orders made in the Judgment dated 28th April, 2022. Essentially, it is to amend the Order on Costs. The application by the Applicant was brought under the provisions of Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Cap. 21; Order 45 of the Civil Procedure Rules (Amendment) 2020 and all other enabling laws. 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.

41. The provision of 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."

42. 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."

43. Briefly, and prior to proceeding further, the Honourable Court wishes to extrapolate on a few caselaw on this subject matter. In the case of:- "Republic – Versus - Public Procurement Administrative Review Board & 2 others [2018] eKLR" 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."

44. Additionally, in the case of "Sarder Mohamed – Versus - Charan Singh Nand Sing and Another (1959) EA 793" where the High Court held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.

45. Broadly speaking, 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."

46. Courts have severally dealt with the issue of review. The Supreme Court in the case of:- "Application No 8 of 2017, Parliamentary Service Commission – Versus - Martin Nyaga Wambora & others [2018] eKLR", quoted with approval the findings of the East Africa Court of Appeal in the decision of: "Mbogo and another - Versus - Shah [1968] EA", upon establishing the following principles: -

(31) Consequently, drawing from the case law above, particularly Mbogo and Another – Versus - Shah, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:

i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.

ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;

iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.

iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.

v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.

vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:

a. as a result, a wrong decision was arrived at; or

b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.

47. From the stated provisions, it is quite clear that the powers to cause any review, variation or setting aside a Court's decision 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.

48. 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) – Versus - 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."

49. The Applicant contends that at Paragraph 77 of the said Judgment, the Honourable Court condemned the 1st and 2nd Defendants in the Counter - Claim to pay costs to the Plaintiff in the Counterclaim. It stated as follows verbatim:

> " The events in the instant case is the Plaintiff in the Counter - Claim has succeeded in his case. For that very fundamental reason therefore, the costs of this suit will be made to the Plaintiff in the Counter - Claim by the 1st and 2nd Defendants in the Counter - Claim herein."

50. According to the Applicant, the dispositive orders there was an error apparent on the face of the record. The said dispositive order on costs states as follows:

> " (h) That Costs and interest of the suit to be awarded to the Defendant in the Plaint and 1st Defendant in the Counter Claim by the Plaintiff in the Plaint herein"

51. I have examined the records and the and it is clear that the Honourable Court overlooked the dispositive order (h). I concur that it was not in line with the finding of the Court at Paragraph 77 of the Judgment because it makes the Plaintiff in the Plaint solely liable for costs and interest payable to both the Defendant in the Plaint and 1st Defendant in the Counter Claim. Thus, I find that this qualifies as an error apparent on the record of the Court. Having considered the application, rival affidavits and submissions as well as the background of this suit and the relevant law, I am of the view the orders sought are warranted. In view of the foregoing and having regard to the overriding objective of the *Environment and Land Court Act*, No. 19 of 2011 which is to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by this Act, I am inclined to exercise my discretion in favour of the Applicant. I shall therefore proceed to review the Judgment dated 28th April, 2022 to amend the Order on Costs.

52. Be that as it may, the dispositive order (h) be and is hereby amended to read:-

> " The Plaintiff in the counter claim shall have the costs of the Plaint and the Counter Claim to be paid jointly by the 1st and 2nd Defendant in the Counter claim."

53. The Notice of Motion application dated 12th June, 2024 is therefore found to have merit and the same is allowed. The dispositive order (h) shall be reviewed and the Amended Judgment availed to the parties.

ISSUE No. b). Whether the Defendant/ Applicant has made out a case for the setting aside and/ or annulment of the Warrants of Execution issued on 13th September, 2024

54. Under this sub title the Applicant has contended that the Judgment and Decree dated 28th April, 2022 erroneously ordered that the Defendant be paid the said balance of the purchase price and interest. The Applicant noted that as per the Judgment of the Court of Appeal and according to the said Judgment of the Environment and Land Court the Defendant is required to pay the 1st Defendant in the Counter - Claim, PETER KAMAU NGUATHA, who was the Land Owner or Vendor, the said balance of the purchase price and interest and not to the Plaintiff. There was an error in the calculation of interest which is cited a sum of Kenya Shillings Four Million Six Fourty Four Thousand Three Eighty Nine Hundred and Fourty Cents (Kshs 4,644,389.40/-) in the application for execution whilst it should have been a sum of Kenya Shillings Nine Fourty Five Thousand Eight Fifty Two Hundred (Kshs. 945,852/-) (i.e.12% of Kshs 342,700/- x 23 years).

55. The application for execution by way of sale of MOMBASA/BLOCK III/462 which was the suit property expressly contravenes and disobeyed the Honourable Count Orders which bar the Plaintiff from laying claim to or in any way interfering with the Defendant's peaceful occupation of the suit property.

56. According to the Applicant the application for execution by the Plaintiff for sale of the suit property which this Honourable Court held was fraudulently and illegally registered in the Plaintiff's name will be a travesty of justice and an abuse of the count process. There was pending before this Honourable Court an application for review dated 12th June, 2024 which sought to review the judgment and decree dated 28th April, 2022 to correct an error apparent on the face of the record.

57. I have already allowed the Application dated 12th June, 2024 for the review of Judgment delivered on 28th April, 2022 in which the Plaintiff in the Counter - Claim who is the Applicant in this suit was awarded judgment as per his Amended Statement of Defence and Counter - Claim dated 22nd April, 2013; therefore, the Plaintiff was in contravention of the Judgment and Decree delivered on 28th April, 2022.

58. For this reason, therefore, I discern that the Notice of Motion application dated 2nd October, 2024 is hereby found to have merit consequence of which this Court annuls the Warrants of execution issued on 13th September, 2024.

ISSUE No. c). Who will bear the Costs of Notice of motion application dated 12th June, 2024 and 2nd October, 2024

59. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of "Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

60. In the present case, the Honourable Court elects not to award any costs.

VI. Conclusion & Disposition

61. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Clearly, the Applicant has made out their case as per the Notice of Motion applications dated 12th June, 2024 and 2nd October, 2024.

62. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-

    a. That the Notice of Motion application dated 12th June, 2024 be and is hereby found to have merit and the same is allowed in its entirety.

    b. That the Notice of Motion application dated 2nd October, 2024 be and is hereby found to have merit and the same is allowed in its entirety.

    c. That this Honourable Court hereby reviews and varies its Orders dated 28th April, 2022 to amend the Order on Costs.

    d. That this Honourable Court sets aside and annuls the Warrants of Execution issued on 13th September, 2024.

    e. That there shall be costs to this Application.

    IT IS SO ORDERED ACCORDINGLY.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS .....7TH .....DAY OF .....FEBRUARY.....2025.

.....

HON. MR. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT

AT

MOMBASA

Ruling delivered in the presence of:

a. M/s. Firdaus Mbula, the Court Assistant.

b. Mr. Paul Magolo Advocate for the Plaintiff/Respondent.

c. M/s. Katistya Advocate for the Defendant/Plaintiff in Counter - Claim.

d. M/s. Nderitu Advocate for the Applicant.