Republic v District Land Officer Kilifi & 2 others; Yama (Exparte) (Miscellaneous Case 43 of 2019) [2025] KEELC 537 (KLR) (7 February 2025) (Ruling)

Neutral citation: [2025] KEELC 537 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

MISCELLANEOUS CASE 43 OF 2019

LL NAIKUNI, J

FEBRUARY 7, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE DISTRICT LAND OFFICER KILIFI ..... 1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT .... 2ND RESPONDENT

THE CHIEF LAND REGISTRAR ..... 3RD RESPONDENT

AND

MOHAMED MENZA YAMA ..... EXPARTE

RULING

I. Introduction

1. Before the Honourable Court for its determination is the Notice of Motion application dated 15th November, 2022. The application was filed by the Intended Interested Parties, Paul Okolo Ananga, Rebecca Nduku Musau and Sos – Peter Wambua Mulwa. It was brought under the provision of Order 45 Rules 1, 2, 5 and Order 53 Rule 6 Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Sections 1A and 1B of the *Civil Procedure Act*, Cap. 21.

2. Upon service of the application, the Ex – Parte Applicants opposed it through filing of Grounds of Opposition. However, the 3rd Respondent never opposed the application. All said and done, the Honourable Court will make a determination based on its own merit whatsoever.

II. The Intended Interested Parties/Applicants' case

3. The Applicants through the said application sought for the following orders:-

a. Spent.

b. That this Honourable Court be pleased to enjoin the Applicants as Interested parties in this suit.

c. That the Honourable Court be pleased to issue a temporary stay of execution of the decree and all consequential orders issued herein pending the hearing and determination of this application.

d. That this Honourable Court be pleased to set aside the Judgement entered herein on 29th September, 2020 and direct that this matter be heard afresh with full participation of the Applicants and/or Interested Parties.

e. That this Honourable Court be pleased to make any other or such further orders as it may deem fit and just to issue.

f. That costs of this application be provided for.

4. The application was based on the grounds, testimonial facts and averments made out under the 15 paragraphed supporting affidavit of PAUL OKOLO ANANGA together with six (6) annextures marked as "POA 1 to 6" annexed thereto. He averred as follows:-

a. He was a male adult of sound mind and disposition hence competent to swear and make this Affidavit.

b. He was the registered owner as proprietor of the Parcel of Land known as Plot No. Madzimbani/Mitangoni/764 situate near Mariakani township within Kilifi County. Annexed hereto is a copy of a temporary Plot Certificate Marked as "POA - 1".

c. On or about 4th November, 2022 he was served with Notice of Boundary Dispute by the Kilifi Land Registrar requesting me to attend a meeting at my said property on 9th November, 2022. Annexed hereto was a copy of the said Notice marked as "POA - 2"

d. On 9th November, 2022 he duly availed himself as requested and attended the meeting on site at Mariakani where the Land Registrar Kilifi gave him and others a copy of a Court Order directing the Land Registrar to issue Title for Plot No.Madzimbani/Mitangoni/185. Annexed hereto was a copy of the said Court Order Marked as "POA - 3".

e. He had now had occasion to go through the Court file at the Court registry and had learnt of the existence of the suit herein which suit was filed by the Ex - Parte applicant against the named Respondents therein way back in the year 2019.

f. He had since then further established and noted that there was a Judgment already passed in favour of the Ex - Parte applicant as per the annexed copy of the Judgment marked as "POA-4".

g. The Orders obtained by the Ex - Parte applicant herein had far reaching consequences and adversely affects his Plot Title No. Madzimbai/Mitangoni/764 as while on site on 9th November,2022 it emerged that the boundaries of the Ex - Parte's said Plot No.Madzimbani/MMitangoni/185 encroaches on a huge chunk of his said Title.

h. He acquired his Title legally and procedurally through the Adjudication process duly conducted by the Government of Kenya and all the disputes raised during the adjudication exercise have been fully heard and determined. Annexed hereto was a copy of the Adjudication proceedings marked as "POA - 5".

i. The Judgment passed herein on 29th September, 2020 together with the subsequent orders made by this Honourable Court had the effect of causing him to unfairly lose part of his Land without first being given an opportunity to be heard in this matter.

j. The Ex - Parte applicant moved this Honourable Court by concealing material facts that the parcel of Land he wanted allocated to him will affect several other parcels of Lands including his Plot No. Madzimbani/Mitangoni/764.

k. The Ex - Parte applicant had the duty at the inception of this suit to included him in the Suit herein since he well knew that the adjudication exercise had been carried out and concluded and Titles were to be issued as could be seen from the Adjudication Officer's letter dated 15th September, 2017 and addressed to the Ex - Parte applicant and marked as "POA - 6".

l. The passage of Judgment herein in favour of the Ex - Parte applicant thus affecting his said parcel of Land amounted to being condemned without first being heard in contravention of the principles of natural justice.

m. As he had been advised by his Advocates on record, that the judicial review proceedings brought by the Ex - Parte applicant in this Suit was a nullity since the same were commence after the time for doing so had lapsed.

n. In the interest of Justice and fair play, he humbly beseeched this Honourable Court to grant the Orders prayed for herein as he stood to suffer irreparable loss of his said Parcel of Land if the orders issued by this Honourable Court were implemented.

III. The Grounds of Opposition by the Ex – Parte Applicant

5. The Ex – Parte Applicant filed a Grounds of opposition under the following aspects:-

a. The Judgement in favour of the Ex – Parte Applicant sought to be set aside had already been executed. The Title Deed was issued to the Ex – Parte Applicant.

b. The Interested Parties' right to be joined in the proceedings under Order 53 Rule 6 of the Rules was extinguished when the suit was heard and Judgement entered in favour of the Ex – Parte Applicant.

c. There was no joinder of parties under Order 53 of the Rules when the suit was heard and determined.

d. The orders sought in the application were incapable of being granted by Court.

e. The current proceedings were initiated by the Land Registrar Kilifi – M/s. Stella Kinyua under contempt of orders of the Court. She was conducting a hearing on an alleged boundary dispute instead of complying with the orders of the Court.

f. The anneture marked "POA – 6" is a letter dated 15th September, 2017 from the 2nd Respondnet addressed to the Ex – Parte Applicant was clear that it was only parcel Land Reference Number 29600 that overlapped with parcel Land Reference No. Madzimbani/Mitangoni/185. All the other plots were a creation of M/s. Kinyua who was not willing to comply with the court orders.

g. The Ex – Parte Applicant was allocated Parcel No. Madzimbani/Mitangoni/185 on 7th June, 2012 while the current Applicants were allegedly allocated their plots on 4th September, 2013,

28th September, 2012 and 18th October, 2012 respectively. This was was way back after the Ex – Parte Applicant had been allocated his parcel of land pursuant to the Judgement of the Court.

h. This Honourable Court has no jurisdiction to entertain the application as was now "Functus Officio".

IV. Submissions.

6. The Honourable Court directed that the application be disposed off by way of written submissions. Pursuant to that only the Applicant and the Court proceeded to render its Ruling accordingly.

A. The Written Submissions by the Intended Interested Parties/ Applicants

7. The Intended Interested Parties/Applicants herein through the Law firm of Messrs. Mokaya & Onyambu Advocates filed their written submissions dated 17th February, 2023. Mr. Mokaya Advocate commenced his submissions by stating that the application before Court was one dated 15th November, 2022. It sought the above stated reliefs. The application was supported by the averment in the Affidavit of the Applicants and the grounds on the face of the Application.

8. He stated that the Applicants were the owners as allottees of parcels of Lands known as Plots Nos. Madzimbani/Mitangoni/764, 144and 73 respectively. The Applicants were allocated the said parcels of lands after an adjudication exercise carried out by the Land Adjudication and Settlement Department of the Government of the Republic of Kenya in the area where the respective stated parcels of Land are situate. On 9th November, 2022 the Applicants were served with a Boundary Dispute Notice by Kilifi Land Registrar requesting them to attend a meeting on the ground where the respective parcels of Lands are situate. It was at the said meeting on the ground/site that the Applicants came to know of the existence of the suit herein and that the Ex - Parte applicant, Mohamed Menza Yawa had a claim allegedly on a parcel of Land being plot No. Madzimbani/Mitangoni/ 185.

9. It was the Applicants' contention that the Ex - Parte Applicant/Respondent Mohamed Menza Yawa was a stranger to them. He was is not a resident nor habitant on the Land being claimed by him this suit. During the meeting of 9th November, 2022 after introductions and other preliminaries the Land Registrar Kilifi first requested the Applicants to point out the boundaries and beacons of their respective parcels of Lands i.e. Plots Nos. 73, 114, 764 and 54 which they duly did.

10. Thereafter the Ex - Parte Applicant herein was also asked to point out the boundaries and of his parcel of Land Plot No. 185 which he also did. After the said exercise it emerged that the Ex - Parte Applicant's parcel No. Madzimani/Mitangoni/185 transcends and traverses over all the Applicants' parcels of Lands and totally eclipses some of them completely. On learning of the existence of the suit herein and the Ex-pate Applicant's alleged parcel of Land being Plot No. Madzimani/Mitangoni/185 and the orders already issued the Applicants promptly moved to this Honourable Court and filed the Application before now Court. The Applicants were seriously aggrieved by the Judgment of this Court delivered on 20th September, 2020 and the resultant decree thereof. They averred that it incapable of being effected as the Land being claimed by the Ex - Parte Applicant never existed on the Ground since the Applicants had already been allocated all the Lands in question in the area and therefore incapable of being implemented and/or executed.

11. The Land being claimed by the Ex - Parte Applicant had already been allocated to the Applicants through an already concluded adjudication exercise. Moreover, the Ex - Parte Applicant must have deliberately misled this Honourable Court while preferring and prosecuting the suit herein, since before the launch of the Suit he was fully aware of the concluded adjudication process in the Area/ Region he wished to be allocated Land. In the circumstances obtaining in this matter and in the

interests of fairness and justice it was prudent that the Applicants be enjoined in this suit and the Judgment passed in favour of the Ex - Parte Applicant be set aside and to grant the Applicants an opportunity to be heard in regard to the Ex - Parte Applicant's judicial review Application. The Applicants herein stood to be extremely prejudiced as the decree passed herein, if executed will disinherit and disposes them of the Lands allocated to them legally, procedurally, justifiably and rightfully so by the Government which would in all likelihood result into total chaos on the ground as the Applicants would be rendered destitute among others.

12. To buttress his point, the Learned Counsel cited the provision of Section 80 of The *Civil Procedure Act* Cap. 21. The Learned Counsel reiterated that the Applicant's came to know of the existence of the suit herein on 9th November, 2022 when they were summoned and served with a Boundary Dispute Notice by the Kilifi Land Registrar and the subsequent meeting on site. After establishing the existence of Judgment and adverse decree passed herein the Applicants swiftly moved and filed the current application now before Court. It was the Applicants' contention that the Ex - Parte Applicant was guilty of non disclosure of material facts at the inception of this suit in that he did not disclose to the Court that the area he was claiming to be allocated a parcel of Land had already been adjudicated upon and allocated and the exercise concluded.

13. It was the Ex - Parte Applicant's duty to present all material facts and all relevant documents touching on the Land in question to this Honourable Court but which never did. The Applicants should be given an opportunity to present their side of the case before the Court can pronounce itself on the Ex - Parte's application and the orders sought.

14. Further, the Learned Counsel submitted that the matter was time – barred. He referred Court to the provision of Section 9 (2) of the *Law Reform Act*, Cap. 26 states:-

> " Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates"

15. The Ex - Parte Applicant's Judicial Review and complaint in the proceedings herein was premised on the decisions made on 6th March, 2012 by the Land Adjudication Department of the Government of the Republic of Kenya. The Ex-- Parte Applicant sought for certiorari to quash the said decisions. The Ex - Parte Judicial Review suit herein was filed in the year 2019 after a lapse of six (6) years from the time the impugned decision was made which squarely places the Ex - Partes Applicant's suit outside the six (6) months period provided under the Law, which consequently makes the Ex - Parte's suit time barred. The same having been filed outside the provided six (6) months period.

16. Moreover, no extension of time was sought out by the Ex - Parte applicant to extend the time for seeking leave and to lodge his Ex - Parte Application which makes the Ex - Parte Applicant's entire suit herein contra-statute as it offended the express provisions of Section 9 of The *Law Reform Act* and the same amounts to a nullity

17. In the interests of justice and fair play it was imperative that the Applicants be enjoined in this suit by allowing the Application before Court so to accord them an opportunity to agitate their case before the making of the final decision of the Ex - Parte Applicant's case.

V. Analysis & Determination

18. I have keenly assessed the Notice of Motion application dated 15th November, 2022, the written submission by the Intended Interested parties, the relevant provision of *the Constitution* of Kenya, 2010

and the statures. In order to reach an informed, fair and Equitable decision, the Honourable Court has summed up the subject matter into the following four (4) issues for its determination. These are:-

a. Whether the Notice of Motion application dated 15th November, 2022 by the Intended Interested Parties has any merit whatsoever.

b. Whether the Judgement delivered by this Honourable Court on 29th September, 2020 should be sustainable in law.

c. Whether the findings and conclusions of the report dated 27th October, 2023 by the Government Sub County Land Surveyor should be bidding and thus adopted by this Honourable Court as its orders.

d. Who will bear the Costs of the application.

ISSUE No. 1). Whether the Notice of Motion application dated 15th November, 2022 by the Intended Interested Parties has any merit whatsoever.

19. Under this sub – title, the Honourable Court has taken cognisance that the Application was brought under the provision of Order 45 Rules 1, 2, 5 and Order 53 Rule 6 Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Sections 1A and 1B of the *Civil Procedure Act*, Cap. 21. In a nutshell, from these legal citations, the implication is that the Applicant sought solely for the review of the Judgement delivered by this Honourable Court on 29th September, 2020. Critically speaking, I hold that parties are bound by their own pleadings. In saying so, I am informed by the provision of Order 2 Rule 6 of the Civil Procedure Rules, 2010 which holds that:-

> " No party may in any pleading make an allegation of fact or raise any new ground of claim, inconsistent with the previous pleadings of his in the same suit"

20. Be that as it may, based on the fact that this Court is guided by the provision of serving substantive justice, fairness and Equity under the provision of Article 159 (1) & (2) of *the Constitution* of Kenya, 2010, Sections 1 & 1B of the *Civil Procedure Act*, Cap. 21; Sections 101 of the *Land Registration Act*, No. 3 of 2012; Section 150 of the *Land Act*, Cap. 6 of 2012; Sections 3 and 13 of the Environment & *Land Act*, No. 19 of 2011, the Honourable Court will proceed to specifically consider the reliefs sought by the Applicant. These are summarised as follows:-

a. Granting enjoiner of the Applicants as Interested parties in this suit.

b. Granting to issue a temporary stay of execution of the decree and all consequential orders.

c. To set aside the Judgement entered herein on 29th September, 2020 and direct that this matter be heard afresh with full participation of the Applicants and/or Interested Parties.

On the enjoiner of the Applicants as Interested parties in this suit.

21. Under the provision of Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010 provides that a court may, either on application made by a party or without, allow joinder of a party whose presence it considers to be necessary in a suit. The full text of the Rule provides as follows: -

> " The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant,

or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

22. The power of a court to order joinder is one based on its discretion. The discretion must however be exercised judiciously and in accordance with the parameters set out in the provision of Order 1 Rule 10 (2) of the Civil Procedure Rules. This position was ably elucidated in "Civicon Limited – Versus - Kivuwatt Limited and 2 Others [2015] eKLR" as follows:-

> " Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a Defendant in a suit based on the general principles set out in Order I Rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the Plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.".

23. In the case of "Joseph Njau Kingori – Versus - Robert Maina Chege & 3 Others [2002] eKLR" the Court distilled the guiding principles in considering whether to allow joinder of an intending party as follows:-

> " 1. He must be a necessary party.
>
> 2. He must be a proper party.
>
> 3. In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff.
>
> 4. The ultimate order or decree cannot be enforced without his presence in the matter.
>
> 5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit."

24. Courts have held that a party is necessary to a suit where it is shown that the legal reliefs sought would directly affect the person sought to be joined, to avoid a multiplicity of suits or where it is shown that the Defendant cannot effectually set a defence unless that person is joined in it. This position was set out in the Ugandan case of "Departed Asians Property Custodian Board – Versus - Jaffer Brothers Ltd [1999] 1 EA 55" quoted with approval by the Court of Appeal in "Civicon Limited – Versus - Kivuwatt Limited & 2 others [2015] eKLR" as follows:-

> " A clear distinction is called for between joining a party who ought to have been joined as a Defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because

that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter...For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the Plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co - Defendant, where it is shown that the Defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person."

25. The Court of Appeal also quoted its earlier decision in Meme v Republic (2004) KLR637 wherein it held that joinder will be permissible:-

i. Where the presence of the party will result in the complete settlement of all the question involved in the proceedings;

ii. Where the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law: and

iii. Where the joinder will prevent a likely course of proliferated litigation.

26. Further, in the case of: "Skov Estate Limited & 5 others – Versus - Agricultural Development Corporation & another [2015] eKLR" Justice Munyao Sila in dealing with the issue of an Interested Party seeking to be enjoined in a suit stated as follows:-

> "In my view, for one to convince the court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation. Litigation invariably affects many people. A judgment or order in most cases does not only affect the litigants in the matter. It does have ramifications for others as well and one may very well argue that these others have an interest in the litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in the settlement of the questions involved in the suit, is not enough to entitle one be enjoined in a suit as Interested Party.
>
> In other words, there needs to be a demonstration that the interest of the person goes further than "merely being affected" by the Judgment or order. It must be shown that the presence of that person is necessary, so that the issues in the suit may be settled, and that if the person is not enjoined, the court may not be fully equipped to settle the questions in the suit or may be handicapped in one way or another. A joinder may also be allowed if the Intended Interested Party has a claim of his own, which in the circumstances of the matter, needs to be tried, or is convenient to be tried alongside the claims of the incumbent Plaintiff and Defendant. The threshold for joinder of an Interested Party should not be too low, or else, this is prone to open doors for busybodies to be joined to proceedings, merely to spectate or confuse the issues in the matter. Apart from the above, whether or not to enjoin a person as an interested party, must be looked at within the context and surrounding circumstances of each particular case."

27. On the basis of the above legal provisions and authorities, the surrounding facts and inferences in the instant case, the court finds that there is no sound reasoning and objective on granting the order for

joinder of the Applicants into the suit at this stage. Their presence will not be necessary taking that the Judgement has already been delivered and therefore the prayer is disallowed.

On issuance of a temporary stay of execution of the decree and all consequential orders.

28. The law concerning stay of execution pending Appeal is found in the provision of Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, 2010 which stipulates as follows:

> " No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except in so far as the Court Appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court Appealed from, the Court to which such Appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the Appeal is preferred may apply to the appellate Court to have such order set aside.
>
> (2) No order for stay of execution shall be made under sub rule (1) unless—
>
> (a) the Court is satisfied that substantial loss may result to the 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.

29. It is trite law that stay of execution pending appeal is a discretionary power bestowed upon this court by the law. In the initial stages of building Jurisprudence around this legal aspect, the Court of Appeal in the case of "Butt –Versus- Rent Restriction Tribunal {1982} KLR 417" gave guidance on how a court should exercise the said discretion and held that:

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

own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

30. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in the provision of Sections 1A and 1B of the *Civil Procedure Act*, Cap. 21 the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act*, cap. 21 or in the interpretation of any of its provisions.

31. The provision of Section 1A (2) of the *Civil Procedure Act* provides that:-

> " The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under the provision of Section 1B some of the aims of the said objectives are:-
>
> > "the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties."

32. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which:

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

ii. The application is brought without undue delay and

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

33. I find issues for determination arising therein namely:

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

ii. What orders this Court should make

34. The purpose of stay of execution is to preserve the substratum of the case. In the case of "Consolidated Marine – Versus - Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)", the Court held that:-

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

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

36. As for the applicant having to suffer substantial loss, in the case of "Kenya Shell Limited – Versus - Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018" the Court of Appeal pronounced itself to the effect that:

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

37. The Court of Appeal in the case of "Mukuma – Versus - Abuoga (1988) KLR 645" where their Lordships stated that;

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

the Applicants were the owners as allottees of parcels of Lands known as Plots Nos. Madzimbani/Mitangoni/764, 144and 73 respectively. The Applicants were allocated the said parcels of lands after an adjudication exercise carried out by the Land Adjudication and Settlement Department of the Government of the Republic of Kenya in the area where the respective stated parcels of Land are situate. On 9th November, 2022 the Applicants were served with a Boundary Dispute Notice by Kilifi Land Registrar requesting them to attend a meeting on the ground where the respective parcels of Lands are situate. It was at the said meeting on the ground/site that the Applicants came to know of the existence of the suit herein and that the Ex - Parte applicant, Mohamed Menza Yawa had a claim allegedly on a parcel of Land being plot No. Madzimbani/Mitangoni/ 185.

38. It was the Applicants' contention that the Ex - Parte Applicant/Respondent Mohamed Menza Yawa was a stranger to them. He was is not a resident nor habitant on the Land being claimed by him this suit. During the meeting of 9th November, 2022 after introductions and other preliminaries the Land Registrar Kilifi first requested the Applicants to point out the boundaries and beacons of their respective parcels of Lands i.e. Plots Nos. 73, 114, 764 and 54 which they duly did.

39. From the record, it is evident that the Land Surveying exercise over the boundaries onto the suit land has been undertaken severally. The last one being on 27th October, 2024 whereby all the parties including the Applicants were present. Eventually, a report was prepared and filed in Court. There was no objection nor any appeal preferred against the said report. The matter is "fait compli". Based on this fact, the Honourable Court is fully satisfied that there will be no substantial loss that may result to the Applicant if the stay of execution is not ordered.

40. Further, its instructive to note that Judgement in this matter was delivered on 29th September, 2020, close to four (4) years todate. However, the Applicant claim to have known about the suit on 9th November, 2022 when the Land Registrar and the Surveyor invited them through a notice to a surveying exercise meeting. Despite of that, they filed this application on 15th November, 2022. The Honourable Court would not hesitate to hold that the application was not brought without undue delay. Undoubtedly, the delay was inordinate to say the least. Finally, there was no security as the Court orders for the due performance of such decree or order as may ultimately be binding on them was given by the Applicants. For all these reasons, this prayer must fail.

ISSUE No. 2). Whether the Judgement delivered by this Honourable Court on 20th September, 2020 should be sustainable in law.

41. Under this sub – title, the Honourable Court will examine the parameters of review and setting aside of Judgement. In the instant application the Applicants have sought to have the Judgement delivered on 29th September, 2020 set aside. Further, they have sought that this matter be heard afresh with full participation of the Applicants and/or Interested Parties.

42. The laws government the setting aside Judgement is founded under the provision of Order 12 Rule 7 of the Civil Procedure Rules, 2010. It provides:-

> " Where under this Order Judgement has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the Judgement or order upon such terms as may be just".

In an application for setting aside Judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously.

43. The decision whether or not to set aside Ex – Parte Judgement is discretionary is not in doubt and that the discretion is intended so to be exercised to avoid injustice and 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 course of justice – See "Shah – Versus – Mbogo & Another (1967) EA 116.

The Applicants have indicated that there were never aware of the suit until the 9th November, 2022. I find that rather difficult to understand. Based on the averments made out by the Applicants, the Honourable Court has not found any empirical evidence nor reasons adduced by the Applicants to warrant this Court to set aside the Judgement by this Court.

44. As indicated, the Applicants only cited the provision of Order 45 of the Civil Procedure Rules, 2010 and from the submissions filed by the Learned Counsel referred Court the provision of Section 80 of the Rules. This implied that they wished this Court to consider the review of the afore – mentioned Judgement and Decree. The provision of Section 80 of the *Civil Procedure Act* Cap. 21 states:-

> " Act 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"

While the provision of Order 45 Rule 1 of the Civil Procedure Rules 2010 states:-

"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, later 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, desire to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or Order without unreasonable delay"

45. Briefly, and prior to proceeding further, the Honourable Court wishes to extrapolate on a few case law 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."

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.

46. 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."

Courts have severally dealt with the issue of review. The Supreme Court in "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 "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.

48. Now applying these legal parameters to the instant case. In all fairness, there is no doubt that there is a Decree dated 30th September, 2020 upon the Applicants considers aggrieved against. However, the Honourable Court has already noted that the Decree was made close to four (4) years ago. Clearly, the period of making the said order is with unreasonable and inordinate delay. Additionally, there is no 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 them 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.

49. Therefore, for these reasons whatsoever, the prayer sought by the Applicants for setting aside or review of the said Judgement and causing the hearing to commence afresh cannot succeed.

ISSUE No. 3). Whether the findings and conclusions of the report dated 27th October, 2023 by the Government Sub County Land Surveyor should be bidding and thus adopted by this Honourable Court as its orders.

50. Under this sub – heading, I will now embark on making a determination over the report and to chart a way forward on what is to happen in the instant suit. From the very onset, I wish to emphatically state that this Honourable Court has no jurisdiction to deal on matters of boundaries.

The law of resolving boundary issues is found in Section 18 of the *Land Registration Act*, No. 3 of 2012, which provides as follows:

> " Boundaries
>
> (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
>
> (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land, unless the boundaries have been determined in accordance with this section.
>
> (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary: Provided that where all the boundaries are defined under section 19 (3), the determination of the position of any uncertain boundary shall be done as stipulated in the *Survey Act* (Cap. 299)."

Section 19 of the *Land Registration Act*, No. 3 of 2012 states as follows:-

> " Fixed boundaries
>
> (1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.
>
> (2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.
>
> (3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section."

51. Keeping in mind the above provisions of law and bearing in mind the mandate of the court in administration of justice and efficient resolution of disputes, it is proper that this matter be heard by the Land Registrar and the Land Surveyor specifically on the boundaries dispute as it is well within the mandate of the 3rd Respondents office. It is noteworthy that the boundaries have not yet been fixed. It is for that reason that this Honourable Court directed that the County Land Registrar, Kilifi County through the 3rd Respondent proceeds with hearing of the boundary dispute and fix the disputed boundaries of the suit property and other parcels being P/No 73 and 764 within the next 90 days from the date hereof. Further, it ordered that any party dissatisfied with the exercise be at liberty to appeal the same as a fresh suit since the rest of the proprietors sharing boundaries with the suit property were not parties to this suit. In so doing, the Court was guided by the dictum in the Court of Appeal Case of "Azzuri Limited – Versus - Pink Properties Limited [2018] eKLR, the court stated as follows in relation to the application of Section 18 of the *Land Registration Act*;

> "This means that under the aforesaid provisions, boundary disputes pertaining to lands falling within general boundary areas must be referred to the Land Registrar for resolution. From this analysis of the law, it should be clear from the above that, we are in agreement with the learned Judge's conclusion that the dispute ought to have been heard by the Land Registrar as stated in the statute. Jurisdiction is everything. It has been said many times before, that, without it a court has no powers to make one more step, irrespective of the strength and nature of evidence in the parties' possession".

52. Pursuant to that, the afore - stated exercise was successfully undertaken. Eventually, a report was prepared dated 27th October, 2024. From the said report no objection nor appeal preferred. For ease of reference, the said report is re – produced verbatim herein below.

> "RE:GROUND PICKING FOR KILIFI/MADZIMBANI MITANGONI/185
>
> 1. Authority: Request by the Land Registrar through a court Order.
> 2. Objective: To pick the ground boundaries of the above-mentioned parcel.
> 3. Instruments: - Handheld GPS.
> 4. Datum:Preliminary Index Diagram and Ground coordinates.
> 5. Present: The Area Chief, the Owner of subject P/No. 185, Neighbours and security officers.
> 6. Date of Survey: 9th NOVEMBER 2022.
> 7. Methodology:The exercise involved picking of the ground boundaries of the subject P/No.185 as shown by its owner and those of the neighbours as shown by their respective owners. The ground boundaries were then overlaid on the Map.
> 8. Findings: The following are the findings:
>
> 1) The ground boundaries of the subject P/No. 185 enclose an acreage of approximately 3.74 ha which differs with that on the Map.
>
> 2) The southern ground boundaries of the subject P/No. 185 encroach onto P/Nos.73 and 764 as per their respective ground boundaries.
>
> A drawing for further reference is herewith attached.

Theophilus Koi.

For:- Sub - County Surveyor - Kilifi North, Kilifi South, Kaloleni, Rabai, Ganze Sub – Counties".

53. From this rather straight forward report by the Sub - County Surveyor Kilifi North, Kilifi South, Kaloleni, Rabai and Ganze Sub Counties, the Honourable Court holds that it and its conclusions be found to be proper and thus adopted henceforth.

ISSUE No. 3. Who will bear the costs of the application

54. It is now well established that the issue of costs is at the discretion of the Court. Costs mean the award that a party is granted at the conclusion of any legal action or proceedings.

The provision of Section 27 (1) of the Civil Procedure Rules, 2010 holds that costs follow the events. By events it means the result or outcome of the legal action or proceedings.

55. In the instant application, although the application has been found to lack merit, it's just reasonable, fair and cogent that each party bears it's on cost.

VI. Conclusion & Disposition

56. Having caused an indepth analysis of the issues crafted herein, the Honourable Court proceeds to make the following determination: -

a. That the Notice of Motion Application dated 15th February, 2022 by the Intended Interested Parties be and is hereby found to have no merit and thus dismissed in its entirety.

b. That the findings and conclusion of the Land Surveyors report dated 27th October, 2023 be and is hereby adopted as an order of this Court.

c. That the Judgement of this Honourable Court delivered on 29th September, 2020 subsists to wit granting:-

a. An order of "Certiorari" to quash the decision of the Respondents of 6th March 2013 acknowledging, approving and issuing title with regard to all that parcel of land known as LR No 29600.

b. An order of Mandamus to issue directed at the 3rd Respondent to forthwith release the title for parcel no MAZDIMBANI/MITANGONI/PLOT NO 185 Kilifi county in the favour of the Ex - Parte Applicant.

c. That each party to bear their own costs.

IT IS SO ORDERED ACCORDINGLY

RULING DELIVERED THROUGH THE MICRO – SOFT VIRTUAL MEANS, SIGNED AND DATED THIS 7TH DAY OF FEBRUARY 2025

.....

HON. MR JUSTICE L.L. NAIKUNI,

ENVIRONMENT & LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

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

b. Mr. Ondambu Advocate for the Ex – Parte Applicant.

c. Mr. Mokaya for the Intended Interested Parties/Applicants.

d. No appearance for the Respondents.

RULING ELC. MISC. 43 OF 2019 Page 12 of 12 HON. JUSTICE L.L. NAIKUNI