Gichengo v Ndiva (Environment and Land Appeal 66 of 2021)
[2024] KEELC 801 (KLR) (8 February 2024) (Ruling)

Neutral citation: [2024] KEELC 801 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 66 OF 2021

LL NAIKUNI, J

FEBRUARY 8, 2024

(FORMERLY CIVIL APPEAL 216 OF 2019)

BETWEEN

JANE WANGECHI GICHENGO ..... APPELLANT

AND

KENNEDY MUTHINI NDIVA ..... RESPONDENT

RULING

I. Introduction

1. This ruling is in respect of the Notice of Motion application dated 29th May, 2023 by Jane Wangechi Gichengo, the Appellant/Applicant herein. The application was brought under the provision of Articles 47,50 and 159 of *the Constitution* of Kenya, 2010, Sections 1A, 1B, 3, 3A of the *Civil Procedure Act*, Cap. 21, Order 45 Rule 1 of the Civil Procedure Rules 2010, Sections 152E and 152F of the Land Laws (Amendment Act), 2016.

2. Upon service of the application dated 29th May, 2023, the Respondent opposed the application through a Replying Affidavit filed on 13th June, 2023. The Honourable Court will deal with the replies at a later stage of the Ruling herein.

II. The Appellant/Applicant's case

3. The Appellant/Applicant sought for the following orders:-

    a. Spent.

    b. Spent.

    c. That this Honourable Court be pleased to order the Deputy Registrar to visit the suit property parcel of land known as Kilifi/Mtwapa/1765 to confirm the

current status of the suit land in respect to the issue of occupation and prepare a report pending the hearing and determination of this application Inter - Partes.

d. That this Honourable Court be pleased to review, vary or set aside Order Number (b) of the Ruling delivered by this Honourable Court on the 8th day of March, 2023 requiring the based on "the Doctrine of Lis Pendens" under the provisions of Section 52 of the Transfer of Property Act.

e. That costs of this application be in the cause.

4. The application by the Appellant herein was premised on the grounds, testimonial facts and averments made out under the 37 Paragraphed Supporting Affidavit of Jane Wangechi Gichengo sworn and dated 29th May, 2023 with five (5) annexures marked as "JWG - 1" to "JWG - 5" annexed hereto. The Appellant herself averred that:

a. This Honourable Court delivered a Ruling on the 8th day of March, 2023 where "inter alia" it granted a stay of execution of the Judgment and/or decree delivered by the Honorable Kiage in the Resident Magistrate's Court at Mombasa on the 11th day of October, 2019 in RMCC No. 2324 of 2013. (Annex in the affidavit and mark as "JWG -1" a copy of the Ruling delivered on 8th day of March, 2023.

b. Among the orders issued by this Honourable Court in the aforesaid ruling was order number (b) which stated; that an order be made that the Respondent shall take possession of the suit properties but based on 'the Doctrine of Lis Pendens' under the provisions of Section 52 of the Transfer of Property Act, the Respondent shall not sell, charge or in any other way dispose Plot No. Kilifi/Mtwapa/1756 pending the hearing and determination of the Appeal.

c. However, through inadvertence and honest mistake, occasioned by the Notice of Delivery of the Ruling sent by the court on the 3rd day of March, 2023 being delivered as spam mail in the Appellant's Counsel email address, the Appellant's Counsel failed to attend court on the said date of the 8th day of March, 2023 when the aforesaid Ruling was delivered.

d. The Appellant's Counsel only learnt of this oversight much later when the Appellant's Counsel Inquired from the Respondent's Counsel the purpose of the Mention that was scheduled for the 8th day of May, 2023.(Annex and mark as "JWG - 2" a copy of a letter dated 22nd March 2022 making the said inquiry and a Mention Notice dated 13th March 2023).

e. The Appellant's Counsel failure to attend court on 8th day of May, 2023 was not deliberate but was an unfortunate and inadvertent lapse. It was a mistake which ought not to be visited to the client which this Honourable Court should pardon in the wider interests of justice.

f. The Appellant was faced with the challenge of giving possession of the current status of the suit property was that the Appellant had leased out suit property since the year 2014 to date with her family. It appeared that when this Honourable Court was writing its Ruling, the court was not "Doctrine of Lis Pendens" but rather the same was leased out to the said 3rd party.

g. The Respondent had already served the Appellant's tenant with a Notice to vacate the suit property parcel of land known as Kilifi/Mtwapa/1765 within Seven (7) days from the 26th day of May, 2023 which lapsed on the 2nd day of June, 2023 and in default the said tenant would be forcefully evicted from the suit land together with her entire family and properties hence the present application for orders sought.

h. The Notice requiring the Appellant's tenant to vacate the suit property which she had occupied from the year 2014 to date within Seven (7)days was contrary to the provision of Section 152E and 152F of the Land Laws (Amendment Act) 2016 which require a notice of eviction to be of at least Three (3) months hence the present application before this Honourable Court.

i. It was only fair and in the best interest of justice to allow the orders sought so as to prevent an injustice to occur after the lapse of the Seven (7) days as envisaged in the said order. The truth of the matter was that the suit property parcel of land known as Kilifi/Mtwapa/1765 had never been vacant at any given time as the Appellant had rented and/or leased out since the year 2014 whereby the said tenant a widow Rosenely Ayako Injeni, aged 69 had been staying there with her children whereby they had done temporary developments and planted crops in it.

j. For instance, during the recent rains, the said Appellant's tenant had already planted maize, African nightshade (managu), amaranthus or pigweed (mchicha), kales among others on part of the said suit property, reared chicken both broilers and "kienyeji", for her own small scale farming and it would be in the best interest of justice and humanity that the said order requiring the Respondent to take possession of the suit land which was tantamount to eviction of the said elderly tenant as per Order Number (b) of the said ruling be stayed pending the hearing of the appeal.(Annex in the affidavit and mark as "JWG - 4" were photographs of the suit land as it is currently showing the said temporary developments).

k. The said Appellant's tenant had been paying nominal rent of a sum of Kenya Shillings Four Thousand Five Hundred Only (Kshs. 4,500/-) monthly from 2014 which monies were being paid by her late husband vide Mpesa to the Appellant which amount was Increased to a sum of Kenya Shillings Five Thousand Only (Kshs.5,000/-) as from the year 2018 after the demise of the husband in June, 2017 and the same had been continually paid by the Son vide Mpesa as such the said Order Number (b) was detrimental and unjustifiable to them hence the present application for review of the same.(Annex in the affidavit and mark as "JWG - 5" were copies of the Mpesa Statements).

l. The said Appellant's tenant had made temporary developments since 2014 and removing the said temporary developments shall require more time as opposed to the said Seven (7) days' notice to vacate and also bearing in mind the current economic hardship everyone is experiencing it would not me just to uproot the recently planted maize hence the present application before this Honourable Court.

m. It was evident that there was material non-disclosure on both parties on the part of the current status and/or occupation prior to the issuance of orders of "doctrine of lis pendens" which information had it been availed to this Honourable Court the said orders would not have been issued at this juncture as the same affects an innocent third party who in the best interest of justice and humanity requires time to vacate the suit premises once the appeal has been heard and determined as she isn't a party and/or privy to the issues at the appeal and the same doesn't concern her at all.

n. The said Appellant's tenant was not opposed to vacating the suit property parcel of land known as Kilifi/Mtwapa/1765 to whoever the appeal would have favoured once the appeal had been heard and determined as she isn't a party and/or privy to the issue at hand and the same doesn't concern her at all. A visit by the Deputy Registrar of this Honourable Court on the suit property parcel of land known as Kilifi/Mtwapa/1765 would confirm the status of the

suit property currently as such the need to vary the said order only in respect to order number (b) hence the present application.

o. There was a delay on the part of the Respondent after receiving the said Ruling Ex - Parte on the 8th day of March, 2023, only extracted the Court Order on the 11th day of May, 2023, and only managed to serve the Appellant's tenant on the 26th day of May,2023 thus the reasons the Appellant was made aware of the said ruling hence the present application before this Honourable Court. Additionally, prior to the Respondent extracting the order made by Respondent did not serve the Appellant Counsel with a copy of the draft Civil Procedure Rules 2010 hence the delay on filing the present application.

p. In the circumstances, and based on the undisputed facts on current status of occupation and/or possession of the suit land property parcel of land known as Kilifi/Mtwapa/1765 there existed sufficient reason to warrant this Honourable Court to review, vary and/or set aside order number (b) of the Ruling delivered by the Court on the 8th day of March, 2023, requiring the Appellant to give possession of the suit property to the Respondent based on "the Doctrine of Lis Pendens" pending the hearing an determination of the Appeal. Unless the order requiring the Appellant to give possession of the suit property to the Respondent is reviewed, varied and/or set aside, the effect of the said order is to have the Appellant's tenant evicted from the suit property thereby interfere with the said tenant's right of lawfully occupying the suit property.

q. The Appellant had already filed her written submissions in support of her Appeal in a bid to expeditiously have the appeal prosecuted. The Respondent would therefore not be unduly prejudiced with the varying of the order requiring the Appellant to give possession of the suit property to the Respondent. The Appellant stood to suffer great loss and damage if the Respondent herein was allowed to take possession of the suit property based on "the Doctrine of Lis Pendens" pending the hearing and determination of the Appeal as the said tenant shall stand to be evicted unceremoniously without regards to her basic human rights, dignity and her wellbeing hence the need to allow the present application as prayed and grant the orders sought herein as a matter of doing justice and fairness.

r. It would therefore be in the best interest of justice that the Respondent, be restrained from effective the said order number (b)pending the hearing and determination of this present application and the appeal in general. If the application was not heard and/or orders sought herein issued and/or granted immediately the Respondent shall proceed to give effect to the meaning of the said order number (b) thus render this application and the appeal in general nugatory and academic purposes. This Instant application had been necessitated by the order as the Respondent were not given an opportunity to either argue and/or evidence showing the danger of the suit property being transferred to a and in the best Interest of justice to allow the review of the said order.

s. This instant application was brought promptly within Six (6) months as per the law and in utmost good faith as soon as the Appellant was made aware of the said Ruling which was delivered on the 8th day of March, 2023, without her Advocates knowledge due to the Innocent mistake explained above on spam folder, extracted on the 11th day of May, 2023, and only served upon her tenant on the 26th day of May, 2023 so as to avoid injustice occasioning upon the said tenant and the Appellant in general. Based on the undisputed facts of the tenant occupation on the suit property, parcel of land known as Kilifi/Mtwapa/1765 since 2014 to date and the dispute in the Appeal concerning the competing interests of both the Appellant

and the Respondent over the said suit property it is only just for the orders of status quo to be maintained pending the hearing and determination of the Appeal hence the present application for review in respect to that order.

t. The Appellant was willing to comply with the other conditions set by this Honourable Court and any other discretion this Honourable Court may deem fit and just. In regards to the depositing of the original Certificate of Title Deed document and a Current Certificate of Official Search for all that parcel of land known as Land Reference No. Kilifi/Mtwapa/1765 as per Order Number (c), the same is in possession of one of the Respondent's Advocate Mr. Ananda, who was handling the said impugned conveyance of the suit property on behalf of the Respondent then and therefore there is need for the Respondent to inform him to comply with the said order and have the said original documents submitted to this Honourable Court and as such the Respondent was the one in a better position to comply with the same promptly. The orders sought herein were available to the Appellant in law and therefore deserving the exercise of this Honourable Court's discretion in the best interest of justice. No prejudice would be suffered should the orders sought herein issued as justice must not only be done, but must be seen to be done. It was in the best interests of justice so as to prevent a miscarriages of justice from occurring as justice demands ought to be seen.

u. The Honourable Court has inherent jurisdiction to issue such orders as would ensure that the ends of justice are met and to ensure that the subject matter of the appeal is preserved to prevent the appeal from being rendered nugatory and for academic purposes. It is in the best interest of justice and fairness that the orders sought are granted so as to protect the Appellant's tenant from being evicted from the suit property. More Importantly, the order sought would effectively ensure that the subject matter of the appeal is preserved to prevent the appeal from being rendered nugatory and for academic purposes.

III. The Replying Affidavit by the Respondent

5. The Respondent while opposing the Notice of Motion application by the Appellant/Applicant herein filed a 23 Paragraphed Supporting Affidavit sworn by Kennedy Muthini Ndiva and dated 13th June, 2023 together with two (2) annextures marked as "KMN – 1 to 2" annexed thereto. He averred as follows:-

a. He was the Respondent herein well versed with all the facts of this case and therefore competent to swear this affidavit.

b. He had read the Appellant/Applicant's Notice of Motion dated 29th May, 2023, the Supporting Affidavit and the annextures thereto and where necessary had sought advice from his Advocates.

c. He was aware that the Appellant/Applicant filed a similar application for stay of execution dated 19th August, 2021 and this Honourable Court delivered a well thought, elaborate ruling on the 8th March, 2023 allowing the same on condition that the Appellant/Applicant hands over the suit property to him and annexed marked as "KMN - 1".

d. He was advised by his Advocates on record on four aspects namely:-

i. that the law never allowed an Applicant to file a similar application seeking for the same or similar orders as the Appellant/Applicant had done.

ii. That the only avenue open to the Appellant/Applicant was to appeal against the ruling dated 8th March, 2023 and that the application herein was not an appeal.

iii. that this application never fitted the bill for issuance of any order of review as the same never satisfied the parameters for issuance of review orders at all.

iv. that the Appellant/Applicant by filing this application was inviting this Honourable Court to sit on appeal on its own order.

e. He was aware that the Judgement subject matter of this entire appeal was delivered by the Honourable Resident Magistrate Hon. Kiage on 11th October, 2019 which was now 4 years past and he had never enjoyed the fruits of this Judgement whereas the Appellant/Applicant herein had been leasing the suit property from the year 2010 (as admitted by herself) and deriving benefit at his own expense.

f. From the conduct of the Appellant/Applicant of not proceeding with the appeal and filing application after application it was clear that she was using these applications and the court as a conduit to enrich herself at his own expense.

g. That from the reading of the supporting affidavit and the grounds in the application it is clear that the Appellant/Applicant was making a presumption that the court must grant automatic stay of execution every time it delivered a ruling which was not the case.

h. The Appellant/Appellant in paragraph 9 that a notice of 3 months must be issued was not correct and further that the Appellant/Applicant had not been served with such a notice and that the only thing that was served was a letter giving notice of the ruling.

i. Further the Deponent was aware that it was not the Appellant/Applicant who was in occupation of the suit property but instead she has leased it out contrary to the court ruling and was benefiting at his own expense.

j. On the date when the Process Server was serving the letter written by his advocates dated 24th May, 2023, he was present and even met and engaged the tenant and her son. They explained to him and the Process Server that they were never appraised by the Appellant/Applicant of the court order issued on 8th March 2023. They sought for time to move out. He was aware that they were in the process of moving out.

k. Contrary to the allegations that the tenant was harassed, he confirmed that the process was cordial and no threats at all were issued either by the process server or by himself. The averments are meant to sensationalize this application.

l. The request that the tenant be given more time shall work against his rights as a property owner yet the said tenant was not a party to this suit nor had she filed any application to be joined in the case.

m. From simple calculation of the figures given in paragraph13 of the supporting affidavit; it was clear that the Appellant/Applicant had drawn almost a sum of Kenya Shillings One Million (Kshs. 1, 000, 000.00/=) from the time the Judgement by the Lower Court was delivered to date. It was clear her intention is to drag this case for eternity to continue illegally benefitting from her fraudulent transaction.

n. Contrary to what the Appellant/Applicant stated in paragraph 15, it was clear that she deliberately failed to inform the court of the fact that she had leased out the suit property at the Deponent's expense yet the lower court during the time of the pendency of the lower court case had issued a status quo order to maintain the circumstances prevailing then.

o. The Appellant's action of withholding that information to the court taints her and she should not now sought to benefit from the same.

p. He was further advised by his Advocates on record that the contents of paragraphs 16 and 17 were moot point. They were neither here nor there for the reason that the Honourable Court already pronounced itself on the issue of stay pending appeal on 8th March, 2023 and she should comply with the same.

q. The court was very lenient with the Appellant/Applicant by affording her stay and now she wished to overstretch the same in order to continue benefiting.

r. Additionally, he was advised by his Advocates that contrary to the contents of Paragraphs 18 and 19 of the supporting affidavit, the procedural requirements were followed but in any event failure to follow the procedure never in itself entitle the Applicant/Applicant to a reversal of the stay conditions set by the court.

s. The fact that the Appellant/Applicant leased out the land to the said tenant contrary to an order of status quo as given by the Lower Court neither entitled her to review nor the tenant to any right.

t. Contrary to the contents of paragraph 23; the tenant had not filed any application at all and hence there is no basis how the Appellant/Applicant was making the application on the tenant's behalf.

u. The Honourable Court had the discretion to issue the orders it did on 8th March, 2023.

v. Although the Appellant/Applicant filed this application within the stipulated time, but she had been benefitting from the suit premises information she never disclosed to this Honourable Court. Hence she never came with clean hands. Indeed she should be compelled to deposit all the rent collected from the year 2010 to date in a joint interest earning account by the two Advocates of the disputant parties.

w. Despite of the fact that the Appellant/Applicant had failed to comply with any of the limb of the orders issued on 8th March, 2023 but she kept on coming back to Court for further orders.

x. Contrary to the contents of Paragraphs 31,, 32 and 33 of the affidavit, the orders sought were discretionary.

y. Justice must be seen to serve all parties and not just the Appellant/Applicant as she seems to imply that she had all the entitlement.

IV. Submissions

6. On 12th July, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 29th May, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that on 5th October, 2023 all the parties obliged and a ruling date was reserved on Notice by Court accordingly.

A. The Written Submissions by the Appellant/Applicant.

7. Sometimes in July, 2023 the Learned Counsels for the Appellant/Applicant the Law firm of Messrs. Gikandi Advocates filed their written Submissions dated 7th July, 2023. Mr. Gikandi Advocate commenced by providing a brief background of the matter at hand. He stated that the submissions was

in support of their Notice of Motion application dated 29th May 2023. The Application was supported by an affidavit sworn by M/s. Jane Wangechi Gichengo on 29th May 2023.

8. He stated that Prayer (a) & (b) were spent. Prayer (b) which sought an interim stay was spent when on 6th June 2023, the Court granted a status quo order pending determination of the Application herein. Prayer (e) was on costs which in this case whereupon he proposed that the Court orders that they be in the cause.

9. According to him, what was left for consideration was prayer (c) which sought for an order that the Court conducts a site visit of the suit property so as to confirm the current status of the suit property and prayer (d) which sought to review/ vary or set aside Order Number (b) of the Ruling delivered by the Court on the 8th March, 2023 requiring the Appellant to give possession of the suit property to the Respondent.

10. The application was opposed by the Respondent vide his Replying Affidavit sworn on 13th June 2023. The facts leading to the application were captured in the supporting affidavit sworn by Jane Wangeci Gichengo on 29th May 2023. Therefore, it was not necessary to recite the facts. He would occasionally revert to the relevant ones in the course of addressing the issues for determination.

11. The Learned Counsel submitted on two (2) broad issues for the consideration by this Honourable Court in its determination. These were:-

> Firstly, whether Order Number (b) of the Ruling delivered by the Court on the 8th March, 2023 requiring the Appellant to give possession of the suit property to the Respondent should be reviewed /varied. The Learned Counsel begun by stating that the Appellant anchored its prayer for review wholly on "any other sufficient reason" limb, a ground that is provided for under Section 80 of the *Civil Procedure Act* Cap 21 and Order 45 Rule 1 of the Civil Procedure Rules 2010, It was settled that:-
>
> > " .....any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the *Civil Procedure Act* (George Ndemo Sagini – Versus - Attorney General & 3others [2017] eKLR)

12. According to the Learned Counsel, what qualified as sufficient reason was not easy to define. However, he would think that it was a term "wide to include misconception of fact or law by a Court or even by an advocate", and that:-

> " .....the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the Appellant (John Simiyu Khaemba & another – Versus - Cooperative Bank of Kenya & another [2019] eKLR).

13. With that liberal construction, he ventured to ask; do the facts here demonstrate sufficient reason to vary the order? He submitted it did. Here, the current status of the suit property was that the Appellant had leased out the suit property to a third party, a tenant of the Appellant who was a widow and who had been residing on the suit property since the year 2014 to date with her family. The tenant had planted crops on the suit property as well as constructed developments on it. It appeared that when this Honourable Court was writing its Ruling, the court was not aware that the suit property was not vacant. The Learned Counsel submitted that had the Court been aware of the actual status of the suit property as stated above, it would not have made an order requiring the Appellant/Applicant to give

possession of it to the Respondent before the Appellant/Applicant had an opportunity to ventilate her appeal on merits. To him this misconception of facts constituted sufficient reason to grant the orders sought herein. He felt the status quo of the property would be interfered rendering the Appeal nugatory, if successful. He emphasized that to review the orders of this Court made on 8th March, 2023 by varying, setting aside or discharge would be able to preserve the suit property and the appeal from being rendered nugatory, if successful.

14. He submitted that by all means while the Respondent would not suffer any prejudices, the Appellant/Applicant was subject to suffer loses if the orders sought were not granted. He urged Court to find that there existed adequate sufficient reason for granting the orders.

15. Secondly, whether an order should be made requiring the Court to conduct a site visit of the suit property. This was provided for under the provision of Order 18 Rule 11 of the Civil Procedure Rules, 2010. The law allowed Court to have a broad mind on the matter in question before it and to examine the suit property in depth. The Court was empowered by law to conduct the site visit at any stage of the proceedings to inspect any property or thing concerning which any question may arise. The Honourable Court may occasion the visit the site with a view of gathering further evidence to assist it in decision making function.

16. The Learned Counsel submitted that in the instant case, the Appellant/Applicant principally sought for the site visit by Court so that the Court could have an opportunity to have a first – hand glimpse of the current status of the suit property. He asserted that as it was the suit property was not vacant. It was leased out to a third party who was a tenant of the Appellant/Applicant. The tenant had been in occupation of the suit property since the year 2014 with her family. She had planted crops and caused development on it. To the Learned Counsel all these information which constituted sufficient reasons were never placed before Court prior to its penning down the Ruling which should be considered to review the said orders by setting aside or varying or discharging them altogether.

17. In conclusion, the Learned Counsel urged Court to allow the application by granting the prayers as sought accordingly.

B. The Written Submissions by the Respondent

18. On 29th May, 2023, the Learned Counsels for the Respondent the Law firm Messrs. Munyithya, Mutugi, Umara & Muzna Co. Advocates filed their written submission dated even date. Mr. Mutugi Advocate commenced his submission by providing Court with a brief background of matter. The Learned Counsel reminded the Honorable Court that the lower court (Honourable Kiage) delivered its Judgment on 11th October, 2019 in Mombasa RMCC No. 2324 of 2013. The Judgment was for specific performance, for the Appellant to transfer Land Parcel No. Kilifi/Mtwapa/1765 to the Respondent. The Appellant failed to do so and this prompted the Respondent to file an application dated 1st October, 2020 in the lower court seeking for enforcement of the Judgment.

19. He further informed Court that this application was allowed on 22nd October, 2021 by the Honourable Kiage and the Respondent proceeded to enforce the Judgment by transferring the suit property into his name. The Appellant filed an application for stay of execution on 27th August, 2021 and this court delivered its ruling on 8th March, 2023 in which conditional stay was granted on condition that pending the hearing and determination of the appeal the Appellant to hand over possession of the suit land to the Respondent.

20. The Learned Counsel stated that despite of this, again the Appellant refused to comply with the order prompting the Respondent to extract the court order and effect service of the same upon the Appellant and/or the occupants of the suit plot. This was what prompted the Appellant to file this current Notice

of Motion application dated 29th May, 2023. The Notice of Motion was opposed by the Respondent through the Replying Affidavit filed on 13th June, 2023.

21. He averred that the prayers sought in this current Notice of Motion application were almost a replica of the prayers sought in the Notice of Motion application dated 19th August, 2021 disguised as an application for review. He posited that the Appellant was seeking to have a second bite of the cherry.

22. The Learned Counsel referred to all the prayers sought in the current application are as follows:-

    a) Spent.

    b) Spent.

    c) That, this honourable court be pleased to order the Deputy Registrar to visit the suit property parcel of land known as Kilifi/Mtwapa/1765 to confirm the current status of the suit land in respect to the issue of occupation and prepare a report pending the hearing and determination of this application Inter - Partes.

    d) That, this honourable court be pleased to review, vary or set aside Order Number (b) of the ruling delivered by this honourable court on the 8/3/2023requiring the Appellant to give possession of the suit property to the respondent based on "Doctrine of Lis pendens" under the provisions of Section 52 of the Transfer 52 of the Transfer of Property Act.

    e) That, costs of the application be in the cause.

23. The Learned Counsel submitted that review was provided for in the provision of Section 80 of the *Civil Procedure Act* CAP-21 of Laws of Kenya and under Order 45 of the Civil Procedure Rules, 2010. To buttress his case, the Learned Counsel referred Court to the case of:- "Stephen Gathua Kimani - Versus - Nancy Wanjira Waruingi/Providence Auctioneers (2016) eKLR the Court stated that:-

> " Section 80 gives the power of review and Order 45 sets out the rules. The rules in my view restrict the grounds for review. In my view, the above rule lays 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."

24. Then the principles are set out in Order 45 (1) as herein below: -

    a) Discovery of new and important matter or evidence which, after 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 order made.

25. On this score, the Learned Counsel held that the Appellant's Notice of Motion application failed. The fact/evidence/matter which had led to the Appellant to file this application was another party who was in occupation of the suit land other than the Appellant. The Appellant had annexed receipts of rent she had been receiving from the purported other occupant. This simply informed the Court that all along the Appellant was aware of the other occupant. In fact the Appellant mischievously brought in this 3rd party into the property in order to defeat the enforcement of the Judgement delivered by the

Lower Court and also the order to hand over the plot issued by this court. The Appellant should not be allowed to benefit from her own mischief. The existence of the other occupant never required exercise of any due diligence from the Appellant to discover. In other words, it never required discovery. The information and/or fact was always within the knowledge of the Appellant. The Appellant's behavior of selling land to the Respondent then refusing to transfer the same after receiving the purchase price then upon being ordered by the lower court to surrender the plot to the vendor; she then decided to lease it to the other party to defeat the handing over possession, then rushing to court for stay bespoke of a person/litigant whose hands were tainted/unclean. She should not be a beneficiary of this court's discretionary orders.

26. On account of some mistake or error apparent on the face of the record, the Learned Counsel averred that as pertained to this parameter, there were no mistake or error apparent on the face of the record and therefore the Appellant could not rely on this ground.

27. On account of any other sufficient reason, desires to obtain a review of the decree or order. The Learned Counsel stated that the reason given by Applicant was that the plot was occupied by a tenant since the year 2014. The Applicant stated that the court was not aware of the occupation of the tenant at the time of issuing the court order. Further that the notice given by the Respondent was insufficient and never conformed to the provisions of Sections 152 E and 152 F of the Land Laws No.16 which requires a 3 - months notice. He held that it was his humble prayer that courts have held time and again that the phrase "any other sufficient reason" must be synonymous to the other parameter. The reasons given must not be far removed from the items (a) and (b). They must be analogous to them. He opined that the reasons cited by the Applicant could not be said to be consistent with the others. To support his legal position, the Learned Counsel referred Court to the case of "Khalif Sheikh Adan – Versus - Attorney General [2019] eKLR while citing with approval the Supreme Court of India case of: "Afit Kumar Rath -Versus - State of Orisa & Others (a Supreme Court cases) 596 at page 608. Where the Court held thus:-_

> " The power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for another sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law which states in the face without any elaborate argument being needed for establishing it. It may be pointed out that the expression "any other sufficient reason" used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule."

28. He submitted that the notice complained about was a notice pursuant to a Judgment delivered way back on 11th October, 2019. Further, the order issued by the court on the 8th March, 2023 was in exercise of this court's discretion in order to enable the appeal to be heard. However, the Appellant was hell bent on extending and stretching the same at the expense of the Respondent whose money the appellant dishonestly took in the year 2010 (in form of purchase price) and to date 13 years down the line she keeps shifting the goal posts. He asserted that it was very apparent that, as the parties are fighting in Court, the Appellant continued to draw benefits (in form of rent) out of her dishonest acts. This court should not countenance to this acts. It was clear that the Appellant would wish that the litigation herein continued ad infinitum.

29. Further, the legal provisions being cited now i.e. Lis pendens and the provision of Section 152 of the *Land Act* were not new or alien to this court. The court was alive to these provisions at the time of making the ruling it delivered and being aware of the same considered and found that justice of the matter would be better served by handing over possession to the Respondent.

30. The mention of the age of the tenant, the fact that she had cultivated the plot were extraneous issues which should not bog down this court in this application. Further, he submitted that the tenant was a stranger to these proceedings and could not be brought at this late stage to cause this court to review its ruling.

31. Finally, the Learned Counsel averred that the invitation being extended to the court to visit the site should be declined. He stated that this was an attempt to move the court to become an actor/party in the application instead of being an arbiter.

V. Analysis & Determination.

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

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

    a. Whether this Honourable Court should order for a site visit by the Deputy Registrar to access the current status of the suit land in respect to the issue of occupation and preparea report

    b. Whether the Notice of Motion application dated 29th May, 2023 seeking to have the ruling delivered on 8th March, 2023 reviewed is merited?

    c. Who will bear the Costs of Notice of Motion applications dated 29th May, 2023.

Issue No a). Whether this Honourable Court should order for a site visit by the Deputy Registrar to access the current status of the suit land in respect to the issue of occupation and prepare a report

34. The main substratum of this application is on whether the Honourable Court should conduct a site visit ("Locus in Quo) onto the suit land and cause review of its previous ruling on the same subject matter. I have carefully considered the Application and the submissions and the prayer on the visit to the suit property. The Honourable Court is empowered by the provisions of Order 18 Rule 11 and Order 40 Rule 10 of the Civil Procedure Rules, 2010 to inspect any suit ("Locus in Quo") property so as to help determine the real issues. Conventionally, the visit would take place prior, during or even immediately after the proceedings depending on the surrounding facts and inferences of the case.

    There are various Court cases that have spelt out the actual significance of conducting of Site Visits. While some Court perceive it to be critical others have their own legal misgiving on such visits. For instance, in the the case of "Beatrice Ngonyo Ndungu & another – Versus - Samuel K. Kanyoro & 2 Others [2017] eKLR", had this to say of the object of site visits by the court:-

> " From time to time it becomes necessary for the court to visit a site with a view to helping it reach a just decision in a matter. It must however be remembered that all decisions of the court are based on an interpretation of facts and the law. Facts are to be presented before the court as evidence whether oral or written. Evidence is the sole route through which parties introduce their version of facts before the court. In an adversarial system the burden of proof

is always on he who alleges and the court never goes out to seek facts on its own. It is always incumbent on parties to adduce sufficient evidence to prove the facts which they assert. On the other hand the law can be cited by parties in pleadings or submissions. The court can access the law on its own. Needless to state, parties are free to urge the court to interpret the law one way or the other.

If the court visits a site, it can only be for purposes of receiving evidence which will assist it make a just decision. So long as a site visit is incapable of yielding any evidence or for that matter any admissible evidence then the judge will be no better than a tourist satisfying curiosities and taking photographs during the site visit. A court in session must perform judicial functions and must resist distractions that take it away from its mission. The dispute herein is whether the property known as plot No. 100 Business Jewathu site is the same one also known as Njoro Township Block 1/1144 or whether they represent two different parcels on the ground. A visit to the site by a judge who is not a survey expert and who is not armed with survey equipment wouldn't yield anything. An expert report by a surveyor compiled with the aid of survey equipment would certainly be more useful."

35. While in High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division): Civil Case 577 of 2011: "Showcase Properties Limited – Versus - Bamburi Speicla Products Limited[2013] eKLR", where the Court made the following observations and gave directions:-

    5. It is now contended by the Respondents that the current application to visit the site is not a good use of judicial time, and that since the Applicant has chosen to go by expert evidence, there is no need for the court to visit the site as this would amount to duplication of effort.

    6. Supplying a number of authorities where the court visited the site under similar circumstances the Applicant submitted that the court would appreciate the matters at hand best if it visited the site.

    7. I have carefully considered the application and submissions. While I agree that there is adequate expert evidence now on record, I still believe that since a court is not an expert in the matter, the courts lay observation of the site would help the court to better understand the expert evidence. It would amount, so to speak, "to looking at the demeanor of the witness in court."

    8. Secondly, the Applicant is the owner of the case at hand, and to the extent judicially possible, the court would grant its wish for the court to visit the site. I do not think that the site visit is a waste, or imprudent use, of the judicial time. To grant this application would to the contrary allow the parties to move faster in the suit.

    9. I allow the application with costs in the cause.

    10. I direct that said site visit be arranged by the parties, and should be effected within the next 30 days, as time is of the essence.

    2. John K Koech Versus - Peter Chepkwony [2019] eKLR: In The Environment and Land Court at Kericho:elc No. 32 of 2017

        "9. The court visited the suit property on 13.7.18 in the company of the District Surveyor, Kericho in order to get a clear picture of the access road in relation to the suit property. The Surveyor then filed his report in court."

36. In the instant case, prays that there be a site visit by the Deputy Registrar of this Honourable Court on the suit property parcel which would specifically confirm the status of the suit property. Although the

Court is rather cautious that it is not perceived as being no better than a tourist satisfying curiosities and taking photographs of evidence which ideally its the Appellant/Applicant who should have undertaken to do and supplied the Court with as its empirical evidence. Nonetheless, despite of the fact that Court is likely to benefit from the report of a Land Valuer but for the benefit of doubt, the Court has reluctantly considered conducting a site Visit ("Locus in Quo") under the provisions of Order 40 Rule 10 and 18 Rule 11 of the Civil Procedure Rules, 2010. Therefore the prayer on the site visit succeeds.

Issue No. b). Whether the Notice of Motion application dated 29th May, 2023 seeking to have the ruling delivered on 8th March, 2023 reviewed is merited

37. Under this sub – heading, the principles governing review of Judgment are found in the provision Section 80 *Civil Procedure Act* Cap 21 and Order 45(1) and (2) of the Civil Procedure Rules, 2010 and an appeal has been preferred. Therefore, this Honorable Court finds it significant to critically examine the provisions for review, setting aside and/or varying Court orders and well elaborated by all the parties in this matter. These are found mainly under the provisions of law already stated herein. A clear reading of these provisions indicates that Section 80 of the *Civil Procedure Act*, Cap. 21 is on the power to do so while Order 45 of the Civil Procedure Rules, 2010 sets out the rules on doing it.

38. The provision of Section 80 provides as follows: -

> " Any person who considers himself aggrieved—
>
> a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

39. Whist, the provision of Order 45 Rule 1 provides as follows:-

> " 1.
>
> (1) Any person considering himself aggrieved—
>
> a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

40. 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."

41. From the stated provisions, it is quite clear that they are discretionary in nature. Thus, the unfettered discretion must be exercised judiciously, not capriciously and reasonably. To qualify for being granted the orders for review, varying and/or setting aside a Court order under the above provisions to be fulfilled, the following ingredients, jurisdiction and scope are required.

a. There should be a person who considers himself aggrieved by a Decree or order;

b. The Decree or Order from which an appeal is allowed but from which no appeal has been preferred;

c. A decree or order from which no appeal is allowed by this Act;

d. There is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made; or

e. On account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order.

f. The review is by the Court which passed the decree or made the order without unreasonable delay.

42. I have previously in this Honourable Court in the case of "Sese (Suing as the Administrator of the Estate of the Late Shali Sese) – Versus - Karezi & 8 others (Environment and Land Constitutional Petition 32 of 2020) [2023] KEELC 17427 (KLR)" opined that:-

> " The power of review is available only when there is an error apparent on the face of the record. Indeed, this Court emphasizes that a review is not an appeal. The review must be confined to error apparent on the face of the record and re – appraisal of the entire evidence or how the Judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is permissible."

43. Discussing the scope of the review, the Supreme Court of India also referred to by the Learned Counsel for the Respondent herein, in the case of "Ajit Kumar Rath – Versus - State of Orisa, (Supra)." had this to say:-

> " The power can be exercised on application of a person on the discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the

record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier; that is to say the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason".....means a reason sufficiently analogous to those specified in the rule..."

44. Additionally, in the case of:- "Nyamongo & Nyamongo – Versus - Kogo [2001] EA 170" discussing what constitutes an error on the face of the record, the Court rendered itself as follows:-

> " An error apparent on the face of the record cannot be defined or exhaustively, there being an element of definitiveness inherent in its very nature and it must be determined judicially on facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong is certainly no ground for review though it may be one for appeal....."

45. From the instant case by the Appellant/Applicant, the Honourable Court delivered its delivered a Ruling on the 8th day of March, 2023 where inter alia it granted a stay of execution of the judgment and/or decree delivered by Hon. Kiage in the Resident Magistrate's Court at Mombasa on the 11th day of October, 2019 in RMCC No. 2324 of 2013. Among the orders issued by this Honourable Court in the aforesaid ruling was order number (b) which states; that an order be made that the Respondent shall take possession of the suit properties but based on 'the Doctrine of Lis Pendens' under the provisions of Section 52 of the Transfer of Property Act, the Respondent shall not sell, charge or in any other way dispose Plot No. Kilifi/Mtwapa/1756 pending the hearing and determination of the Appeal.

46. However, through inadvertence and honest mistake, occasioned by the Notice of Delivery of the Ruling sent by the court on the 3rd day of March, 2023 being delivered as spam mail in the Appellant's Counsel email address, the Appellant's Counsel failed to attend court on the said date of the 8th day of March, 2023 when the aforesaid Ruling was delivered. The Appellant's Counsel only learnt of this oversight much later when the Appellant's Counsel Inquired from the Respondent's Counsel the purpose of the Mention that was scheduled for the 8th day of May, 2023. The Appellant's Counsel failure to attend court on 8th day of May, 2023 was not deliberate but was an unfortunate and inadvertent lapse. It Is a mistake which ought not to be visited to the client which this Honourable Court should pardon in the wider interests of justice.

47. According to the Respondent in their submissions, the discovery of new and important matter or evidence which, after 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 order made. The Learned Counsel on this score submitted that, the Appellant's Notice of Motion fails. The party who is in occupation of the suit land other than the appellant. The Appellant has annexed receipts of rent she has been receiving from the purported other occupant. This simply tells the Honourable Court that all along the Appellant was aware of the other occupant. In fact the appellant mischievously brought in this 3rd party into the property in order to defeat the enforcement of the lower court judgment and also the order to hand over the plot issued by this court. The Appellant should not be allowed to benefit from her own mischief. The existence of the other occupant didn't require exercise of any due diligence from the appellant to

discover. In fact, it didn't require discovery. The information and/or the fact on the matter was always within the knowledge of the Appellant. The Appellant's behavior of selling land to the Respondent then refusing to transfer the same after receiving the purchase price then upon being ordered by the lower court to surrender the plot to the vendor; she then decides to lease it to the other party to defeat the handing over possession, then rushing to court for stay bespeaks of a person/litigant whose hands are tainted/unclean. She should not be a beneficiary of this court's discretionary orders.

48. On the issue of the account of some mistake or error apparent on the face of the record, the Learned Counsel for the Respondent submitted that as pertains to this parameter, there is no mistake or error apparent on the face of the record and therefore the Appellant could not rely on this ground number 11. On the last issue of whether for any other sufficient reason, desires to obtain a review of the decree or order, the Learned Counsel for the Respondent submitted that the reason given by the Appellant/ Applicant was that the plot was occupied by a tenant since the year 2014.The Applicant says that the court was not aware of the occupation of the tenant at the time of issuing the court order. Further that the notice given by the Respondent was insufficient and never conformed to the provisions of Section 152E and 152F of the Land Laws No.16 which requires 3-month notice.

49. Discussing the scope of review, the Supreme Court of India in the case of "Ajit Kumar Rath – Versus - State of Orisa & Others, (Supra)" had this to say:-

> " the power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule"

50. Further, in the case of: - "Tokesi Mambili and others – Versus - Simion Litsanga" the Court held as follows: -

> " i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.
>
> ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion."

51. In the case of "Nyamongo & Nyamongo – Versus - Kogo" [2001] EA 170 discussing what constitutes an error on the face of the record, the Court rendered itself as follows:-

> " An error apparent on the face of the record cannot be defined or exhaustively, there being an element of definitiveness inherent in its very nature and it must be determined judicially on facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares

one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong is certainly no ground for review though it may be one for appeal....."

52. In the case:- "Republic – Versus - Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR" High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 John M. Mativo Judge culled out the following principles from a number of authorities: -

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

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

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

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

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

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

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

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

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

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

53. From the records, it is clear that the mistake as to why the Learned Counsel did not attend court on 8th March, 2023 is that the notice for the ruling was spammed in the mail and they did not receive it in time.

54. In the case of "Evan Bwire – Versus - Andrew Aginda Civil Appeal No. 147 of 2006" cited fin the case of "Stephen Githua Kimani – Versus - Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR" the Court of Appeal held as follows:

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

55. Consequently, it is clear by now that the alleged mistake or error apparent on the face of the record does not exist.This plea that the mistakes of counsel ought not be visited upon the client is a common one and any advocate who fails to perform a duty due to his client will invariably seek relief on the basis that the mistakes or errors of the Advocate ought not to be visited upon the client. In espousing this position counsel for the Respondent relied on the case of "Belinda Muras & 6 Others – Versus - Amos Wainaina [1978] KLR" in which Hon Madan JIA (as) he then was defined what constitutes a mistake as follows:

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

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

> " Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit". [own emphasis]

57. Thus, without appearing to be splitting hairs here or reading too much onto the interpretation of the law, I discern that there is need to critically appreciate that "the Mistake" envisaged under the provisions of Section 80 of the *Civil Procedure Act*, Cap. 21 and Order 45 of the Civil Procedure, 2010 is rather distinct from the "Mistake cause by an Advocate". In the cause of executing their professional duties or obligations. I find that there was no mistake and error apparent on the face of the record or by this Honourable Court but merely what is evident was a mistake by the advocate of the Appellant/ Applicant. In no way did the said mistake affect the legality and efficacy of the ruling delivered on 8th March, 2023 by this Honourable Court. For these reasons, therefore, the stated reasons do not meet the threshold for the grant of the review orders sought by the Appellant and therefore the prayer for review of the ruling delivered by this Honourable Court dated 8th March, 2023 fails.

Issue No. c). Who will bear the Costs of Notice of Motion application dated 29th May, 2023.

58. It is now well established that the issue of costs is at the discretion of the Honourable Court. The Black Law Dictionary defines cost to means:-

> " the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other"

59. The proviso of Section 27 of the *Civil Procedure Act*, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the *Civil Procedure Act* provides as follows:-

> "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order."

60. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book The Code of Civil Procedure, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.

61. Additionally, the provision provides for 'costs of and incidental to all suit or application' which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book Judicial Hints on Civil Procedure, 2nd Edition, 2005 at 95 notes that the words 'the event' means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.

62. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In "Morgan Air Cargo Limited – Versus - Everest Enterprises Limited [2014] eKLR" the court noted that;

> " The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Cost follow the event'' was driven by the fact that there could be no ''one-size-fit-all'' situation on the matter. That is why Section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

63. In this case, this Honourable holds that although the Appellant/ Applicant has made out a case for an order for a site visit but failed on persuading the Court to cause the review of the ruling by this

Honourable Court delivered on 8th March, 2023. For this very fundamental reason, therefore, each party will bear their own costs of the application.

VI. Conclusion & Disposition

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

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

    a. That the Notice of Motion application dated 29th May, 2023 be and is hereby partially allowed to the following extent:-

        i. An order to have the Deputy Registrar conduct a Site Visit (Locus in Quo) on the suit property parcel of land known as Kilifi/Mtwapa/1765 within 14 days from the date of this Ruling to confirm the current status of the suit land in respect to the issue of occupation and prepare a report pending the hearing and determination of this application Inter - Partes be allowed. Mention before the DR on 29th February, 2024 for direction on site visit

        ii. The Honourable Court declines to review, vary or set aside Order Number (b) of the Ruling delivered by this Honourable Court on the 8th day of March, 2023 requiring the based on "the Doctrine of Lis Pendens" under the provisions of Section 52 of the Transfer of Property Act.

    b. That for expediency sake, pursuant to the directions granted on 8th March, 2023 through this Court's Ruling, the matter be mentioned on 14th March, 2024 for purposes of taking directions for purposes of disposing off the pending the appeal through a 261 Pages Record of Appeal dated 20th May, 2021 and a Memorandum of Appeal dated 4th November, 2019 in accordance with the provision of Section 79B of the *Civil Procedure Act*, 2010 and Order 42 Rules 11, 13 and 16 of the Civil Procedure Rules, 2010.

    c. That each party to bear their own costs.

    It is so ordered accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 8TH DAY OF FEBRUARY 2024.

.....

HON. JUSTICE MR. L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

a. M/s. Yumna, the Court Assistant.

b. Mr. Gikandi Advocate for the Appellant/Applicant.

c. No appearance for the Respondent.