



Mwarandu & 2 others v Doshi & 2 others (Environmental and Land Originating Summons 183 of 2009) [2024] KEELC 6925 (KLR) (9 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6925 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 183 OF 2009**

LL NAIKUNI, J

OCTOBER 9, 2024

IN THE MATTER OF: REGISTRATION OF TITLES ACT (CAP 281, LAWS OF KENYA) AND THE LIMITATION OF ACTIONS ACT (CAP 22, LAWS OF KENYA)

AND

IN THE MATTER OF: CIVIL PROCEDURE ACT AND RULES ENACTED THERETO

AND

IN THE MATTER OF: LAND REFERENCE

BETWEEN

FESTUS MWARANDU 1ST PLAINTIFF

SAMSON OMOLO 2ND PLAINTIFF

JULIUS OKOTH (SUING ON THEIR BEHALF AND OF ALL THE RESIDENTS OF MIRITINI MAJENGO MAPYA ESTATE ALL OCCUPYING OWN PORTIONS OF LANDS/PLOTS ON LR MN/IV/3640) 3RD PLAINTIFF

AND

ASHOK LABSHANKER DOSHI 1ST DEFENDANT

MANESHKUMAR KISHORKUMAR DOSHI 2ND DEFENDANT

BUTLER ESTATES LIMITED 3RD DEFENDANT

RULING

I. Introduction

1. This Honorable Court is tasked with the determination of the Notice of Motion application dated 15th April, 2024. The application was instituted by Ashok Labshanker Doshi, Maneshkumar Kishorkumar



Doshi and Butler Estates Limited, the Defendants herein. At the same time, there was filed a Notice of Preliminary objection dated 26th April, 2024 by Festus Mwarandu, Samson Omolo and Julius Okoth (Suing on their own behalf and behalf of all the Residents of Miritini Majengo Mapya Estate all occupying own portions of Lands/ Plots on L.R. MN/VI/3640 the 1st, 2nd and 3rd Plaintiffs herein.

2. Upon service of the Notice of Motion application, the Plaintiffs responded through a Replying Affidavit sworn on 26th April, 2024.

II. The Defendants/Applicants' case

3. The Defendants brought the Notice of Motion application under dint of Sections 1A, 1B, 3A & 63 (e) and 80 of the Civil Procedure Act Cap. 21 and Order 45 (1) of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.
4. The Defendants/Applicants sought the following orders:-
 - a. Spent.
 - b. Spent.
 - c. That this Honorable Court be pleased to review and/or set aside its Judgment/Orders of 5th March, 2024 and direct that this suit be struck out.
 - d. That this Honorable Court do issue any other orders that it may deem fit.
 - e. That the costs of this Application be in the cause.
5. The Application was supported by the grounds, testimonial facts on the face of it and the averments made out under the 20th paragraphed affidavit in support sworn by Ashok Labshanker Doshi, the 1st Defendant and a director of the 3rd Defendant herein on 15th April, 2024 where he averred that:
 - a. The 3rd Defendant/Applicant was the current registered proprietor of the suit property, L.R. No. 3640/VI/MN. Annexed in the affidavit and marked as 'ALD - 1' was a copy of the lease.
 - b. On or about 1998, the Plaintiffs/Respondents invaded the 3rd Defendant's/Applicant's property and illegally took possession giving rise to the current suit.
 - c. Judgment was delivered on 5th March, 2024 by Hon. L.L. NAIKUNI, J. in favor of the Plaintiffs/Respondents herein and directing the Land Registrar to register LR. NO. MN/VI/3640 in their favor as Plaintiffs/Respondents as Trustees. (annexed in the affidavit and marked 'ALD 2' a copy of the judgment).
 - d. By the judgment of 5th March, 2024 this Honourable Court allowed the claim of adverse possession in the following terms:-
 - a. That Judgment be and is hereby entered in favour of the Plaintiffs as against the 1st, 2nd and 3rd Defendants as pleaded in the originating summons dated 9th June, 2009.
 - b. That an order made herein directing the Land Registrar forthwith have the Plaintiffs herein be registered as Proprietors of all the leasehold Interest comprised in all that parcel of Land known as L.R. No.MN/VI/3640 as Trustees for themselves and for all of the parties who are named in the List annexed to the "Authority and Consent to Act" filed in this Matter in the stead of M/S Butler Estates Limited for reasons that the Plaintiffs and the said Parties have since become Proprietors thereof jointly and severally by virtue of cumulative Adverse Possession.



- c. That the Costs of this Suit be borne by the 1st, 2nd and 3rd Defendants jointly and severally.
- e. Upon perusal of the court record by the advocates for the Defendants/Applicants, it was apparent that this Honorable Court made errors/mistakes on the face of the record in finding as such in the following manner;
- f. At para 61 of the Judgment, the Honorable Court noted that the Plaintiffs through PW 1 told the court that he had authority to act to represent 142 people. Be that as it may, the court noted that there was no express authority to plead as required by the provisions of Order 1 Rule 13 (1) & (2) yet goes ahead in its judgment and grants the claim in favor of all the 142 Plaintiffs.
- g. The error apparent herein was that the 142 Plaintiffs who were in the list annexed to the 'Authority and Consent to Act' by this Honorable Courts suo moto admission, were legally never represented, never gave evidence and hence a grave mistake of awarding them judgment.
- h. At paragraph 61 this Honorable Court stated 'In their own admission in chief, DW - 1 admitted that at the time the 1st Defendant acquired ownership of the property, the Plaintiffs, whom he referred to as squatters, were already in occupation of the same'.
- i. The above was an apparent error on the face of the record as at paragraph 17 (0) of the Judgment where DW - 1 evidence is noted, this Honorable Court observed 'In or about the year 2000, the Plaintiffs and other squatters invaded the suit property and took possession thereof. They set up settlement without any colour of right, which constituted trespass on the subject property'.
- j. At paragraph 19 this Honorable Court noted '.....They started the construction of the perimeter wall in the year 2009. By the time they constructed the wall the land was vacant'.
- k. At paragraph 20, this Honorable Court noted 'However, he Informed the court that it was later on that they discovered the squatters had broken the boundary wall with the help of the local chief. They got in the suit land and started building semi-permanent structures therein. They wrote a letter dated 9th January, 2006 marked and produced as Exhibit 9 to the District Commissioner'.
- l. From the above, it was apparent that this Honourable Court made an error in its finding that DW 1 in examination in chief admitted that the Plaintiff's were in occupation.
 - m. Furthermore, it was a mistake for this Honourable Court to find at Paragraph 62, ' There being nothing that stopped time from running, this Honourable Court finds that the Plaintiffs as at the time of filing suit had been in occupation of the suit property for a period of 21 years'.
- n. Unless the Orders for stay of execution are granted pending hearing inter parties of this Application, the review will be rendered nugatory.
- o. The urgency in this matter was that the Plaintiffs/ Respondents herein could at anymore in the immediate future proceed and process title in their favor in execution of the Honorable Courts judgment as they have already commenced the process of execution. Annexed in the affidavit and marked 'ALD - 3' was evidence of the same.
- p. The Plaintiffs/Respondents would not suffer any prejudice if the orders sought were granted temporarily pending the hearing inter parties of the application for stay of execution as they



were currently in occupation of the suit property but on the other hand, the Defendants/ Applicants would be greatly prejudiced as the lease would change ownership and may be further alienated to the Defendants' detriment.

- q. The 3rd Defendant/ Applicant committed enormous resources for the purchase of the suit property which they have been deprived since the Plaintiffs/ Respondents trespassed therein.
- r. Further prejudice was that if the suit property was to change ownership into the names of the Plaintiffs/ Respondents and then further alienated to the third parties, they would not be in a position to adequately compensate the 3rd Defendant/ Applicant as they stated in their pleadings they were paupers.

III. The response by the Plaintiffs/ Respondents

- 6. The Plaintiffs/ Respondents responded and opposed the Application through a 20 paragraphed Replying Affidavit sworn by Festus Mwarandu, the 1st Plaintiff on 26th April, 2024 who averred that:-
 - a. In response to paragraph 2 of the supporting affidavit he stated that the 3rd Defendant/ Applicant was not the current registered proprietor of the suit property LR NO 3640/VI/ MN as his proprietorship ceased on 5th March 2024 when Judgment was given in favor of the Plaintiffs and the Court directed the Land Registrar to register the same in the name of the Plaintiff and on behalf of the 142 Plaintiffs of Miritini Majengo Mapya Development Group.
 - b. In response to paragraph 3 of the supporting affidavit, the Deponent averred that it was not true that the invasion of the suit property was done on or about 1998 as most of the Plaintiffs were there by 1987 and 1988 and had been there living quietly until 2007 when they were served with Court documents through the newspaper. This averment by the 1st Defendant/ Applicant was seriously dealt with during the time of hearing of the main suit and cannot be brought as new evidence.
 - c. He concurred with the sentiments of the 1st Defendant at paragraphs 4 and 5 (a), (b) and (c) of the supporting affidavit.
 - d. Regarding paragraph erroneously written as paragraph 8 of the supporting affidavit, if there were errors/mistakes on the face of the record, which was denied, the Defendants/ Applicants could have filed a memorandum of appearance and itemize the errors/mistakes that were done by the judge.
 - e. In response to paragraph erroneously written as paragraph 6 of the supporting affidavit, he stated that he was the Chairman of Miritini Majengo Mapya Development Group a duly registered group under the relevant laws of this country and therefore has authority and/or consent from all his members who signed the consent and/or authority to act on their behalf and the judge at the foot of paragraph 61 of the Judgment the judge observed that he had authority to act and/or plead on behalf of the 142 members of the Miritini Majengo Mapya Development Group who signed and gave him authority as per their By-Laws of their Group. Annexed in the affidavit was a copy of the certificate issued by the Ministry Gender and Social Development and marked as 'FM - I'.
 - f. In response to paragraph erroneously written as paragraph 7, he stated that the Defendants at the hearing of the main suit did not object to me acting on behalf of the 142 people of Miritini Majengo Mapya Development Group neither did they put a Preliminary Objection to that effect either during the hearing or even in their submissions. They are raising this point too late in the day and afterthought. Ignorance was not an excuse in the Law.



- g. In response to paragraph 8 erroneously repeated stated that the 1st Defendant who admitted that when he acquired the suit premises in the year 1987, as per the title, the Plaintiffs, whom he referred as squatters were already in occupation of the same, that is 21 years before he filed his suit No 267 of 2007, so he agreed with him that we were already on the suit premises when he acquired the suit premises.
- h. In response to paragraph 9 of the supporting affidavit that adverse possession come by way of evading a plot and therefore the 1st Defendant sentiments concur with their prayers for adverse possession.
- i. In response to paragraph 10 of the supporting affidavit he stated that it was not true that a perimeter wall was built in 2009 as the suit was already in existence as the same was filed in 2007 and there was no perimeter wall built by the Defendants in 2009 because the Plaintiffs were already in the suit property.
- j. In response to paragraph 11 the Deponent averred that there was no letter or notice written or copied to them by the Defendants and there was no boundary to be broken in 2009.
- k. In response to paragraph 12 of the supporting affidavit they stated that it was true that what “DW – 1” said that in the year 2006 they were already in occupation.
- l. In response to Paragraph 13 of the supporting affidavit, the Deponent averred that it was true that time did not stop running when the Plaintiffs settled on the suit premises; the court decision on this issue therefore was right.
- m. In response to Paragraph 14 of the supporting affidavit the same was already spent.
- n. In response to Paragraph 15 of the supporting affidavit, the deponent argued that there was a Notice of Appeal by the Defendants dated 12th March, 2024 and therefore the decree could not be executed unless the Defendants withdrew their Notice of Appeal.
- o. In response to Paragraph 16 of the supporting affidavit, he deponed that justice delayed was justice denied and the Defendant should allow the Plaintiffs to enjoy their fruits of their judgment. This was because the Defendant had been absent on the suit property for over 36 years and could not claim that they would be greatly prejudiced by the occupation of the Plaintiff.
- p. In response to Paragraph 17 of the supporting affidavit, the deponent stated that during the pendency of the main suit the 1st and 2nd Defendants transferred the suit premises to the 3rd Defendant which is a company owned by the 1st and 2nd Defendant just to beat the limitation of time of adverse possession. The sale agreement and the transfer annexed as new evidence in the 1st Defendant's supporting affidavit was already there during the hearing of the main suit.
- q. In response to Paragraph 18 of the supporting affidavit, he deponed that they were not paupers as they were able to hire different lawyers since year 2007 for the cases and paid them therefore if the Defendants won the application they would be able to quantify their claim and they were paid.
- r. The Defendants application had no new evidence just intended to delay and deny the Plaintiffs their fruit of their judgment as the Defendants application was frivolous, vexatious and waste of courts time because it was defective, bad in law and abuse of the Court Process and ought to be dismissed with costs



IV. The Notice of Preliminary objection by the Plaintiffs

7. As indicated, during the pendency of this proceedings, while opposing the application by the Defendants herein, the Plaintiffs filed a four (4) paragraphed Notice of Preliminary objection dated 26th April, 2024. The objection was brought under the provision of Sections 80, 1A, 1B, 3A & 63 (e) of the Civil Procedure Act, Cap. 21, Order 45 (1) of the Civil Procedure Rules 2010 and all other enabling Provisions of the Law on the following grounds:-
 - a. That the Defendants/Applicants application was frivolous, vexatious and waste of courts time as it is defective, bad in law and abuse of the Court Process and ought to be dismissed with costs.
 - b. That the Defendant/Applicants filed a Notice of Appeal on the 12th March 2024 and had not prosecuted the same and now has filed an application for review dated 15th April 2024 without withdrawing the notice of appeal.
 - c. That the Defendants/Applicants application contravenes the provision of Section 80 of the Civil Procedure Act.
 - d. The Defendant/Applicants application was 'non functus officio' and ought to be dismissed with costs.

IV. Submissions

8. On 15th May, 2024 while the Parties were present in Court, they were directed to have the Notice of Motion application dated 15th April, 2024 and Notice of Preliminary objection dated 26th April, 2024 be disposed of by way of written submissions. Pursuant to that on 4th July, 2024 a ruling date was reserved on 23rd September, 2024 by Court accordingly.

A. The Written Submissions by the 1st, 2nd, & 3rd Defendants/ Applicants

9. The Defendants/Applicants through the Law Firm of Kadima & Company Advocates filed their written submissions dated 3rd July, 2024. Mr. Amadi Advocate commenced his submissions by providing a brief background of the matter. He stated that the Defendant/Applicant filed an Application for review dated 15th April, 2024. In response the Plaintiff/Respondent filed a Preliminary Objection and a Replying Affidavit both dated 26th April, 2024. When the parties appeared before this Honorable Court on 15th May, 2024 directions were given that the Application and the Preliminary Objection be canvassed simultaneously by way of written submissions.
10. The Learned Counsel submitted on two issues. Firstly, whether the Defendant's/Applicant's Application contravened the provision of Section 80 of the Civil Procedure Rules, 2010. The Learned Counsel referred Court to the provisions of Section 80 of the Civil Procedure Act, Cap. 21 and Order 45 (1), (2) & (3) of the Civil Procedure Rules, 2010. It was the Defendant's/Applicant's submission that they had only filed an application for Review and refuted having preferred an Appeal before the Court of Appeal. He argued that it was noteworthy to point out that an Appeal arising from this Honorable Court would be filed at the Court of Appeal which prescribed the procedure as follows:
 11. Rule 75 is couched in mandatory terms as follows:-

“75(1) Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.”



This position was eloquently captured in “Civil appeal no. (application) 228 of 2013, Nicholas Kiptoo Arap Korir Salat – Versus - Independent Electoral and Boundaries Commission & Others” where the court held.

12. The Counsel on both sides cited a number of authorities. It seems clear to him that a notice of appeal was a critical document which signified a party's or a person's intention to appeal from a decision of a court from which an appeal lies to this Court. Rule 75 is couched in mandatory terms as follows:-

“75(1) Any person who desires to appeal to the court shall give notice in writing which shall be lodged in duplicate with the registrar of the superior court.”

13. The filing of a Notice of Appeal only indicates and/or relays ones intention to file an Appeal but to file an Appeal, a party has to comply with the mandatory provisions of Rule 82 of the Court of Appeal Rules. This was capture in the case of:- “Civil application E008 of 2021, Peterkeen Mwiu Kimweli & 47 others - Versus - National Social Security Fund Board Trustees” by holding as follows:-

“It is safe to say, therefore, that a notice of appeal dies a natural death after the expiry of 60 days unless its life should be sooner extended by lodgment of the appeal within 60 literal days, or such longer time as may still amount to 60 days by operation of the proviso to Rule 82(1) on exclusion. It may also be resuscitated or vivified by an order extending time for the lodging of the appeal properly made by a single Judge on a Rule 4 application. Absent those supervening circumstances, the notice of appeal dies in the eyes of the law. Its interment may then take the form of an order of the court suo moto, on its own motion and at its sole discretion, presumably with neither notice having been deemed as withdrawn. It is a power meant to unclog our system and rid it of trifling notices of appeal lodged with no intention to lodge appeals. And it is a power that the Court ought to use vigilantly and more robustly as a regular house-cleaning measure. Under the same Rule 83, and assuming that the Court will not have sooner made the deeming order, a party may move the court to make it. We think that it is a simple application that is required to show only that the 60 days appointed have elapsed without an appeal having been-lodged. Once those two facts are established, we do not see why the Court should not, unless persuaded by some compelling reason in the interests of justice, simply made the order deeming the notice of appeal as withdrawn.”

14. Rule 83 on the other hand provides as follows:-

“(83) If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the Court may on its own motion or on application by any party, make such order. The party in default shall be liable to pay the costs arising therefrom on any persons on whom the notice of appeal was served”.

15. Secondly, whether the Defendant's/Applicant's had demonstrated sufficient grounds to grant the Order of review. The Learned Counsel cited the provision of Order 45 Rule 1(b) of the Civil Procedure Rules, 2010. To buttress on this point, the Counsel referred Court to the case of “ELC Case No. 21 of 2021, Hosea Nyandika Mosagwe v The County Government of Nyamira” the Honorable Court quoted with authority the scope of this Honorable Courts powers of review as hereunder.



16. Further, the Counsel cited 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.”

17. Additionally, the Counsel referred Court to the case of “Pancras T. Swai v Kenva Breweries Limited [2014] eKLR the Court of Appeal” held:-

“Order 44 Rule 1 (now Order 45 Rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limbs therein stated or “for any sufficient reason.....”

18. In the case of “Sarder Mohamed v 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.

19. The Supreme Court of India in the case of “Ajit Kumar Rath v State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608.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.”

20. In the case of: “Tokesi Mambili and others v 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.

21. In the case of “Republic v 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.Matavo 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 un-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 of CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1”.

22. According to the Learned Counsel, there were glaring errors apparent as captured in the Defendant's/ Applicant's Supporting Affidavit as hereunder:-

23. At Paragraph 61 of the Judgment, the Honorable Court noted that “.....”the Plaintiffs through PW - 1 told the court that he had authority to act to represent 142 people. Be that as it may, the court noted that there was no express authority to plead as required by the provisions of Order 1 Rule 13 (1) & (2)” it went on ahead in its Judgment to grant the claim in favor of all the 142 Plaintiffs. The error apparent herein was that the 142 Plaintiffs who were in the list annexed to the 'Authority and Consent to Act' by this Honorable Courts suo moto admission, were legally never represented, never gave evidence and hence a grave mistake of awarding them Judgment.



24. At Paragraph 61 this Honorable Court stated that: “In their own admission in chief, DW – 1 admitted that at the time the 1st Defendant acquired ownership of the property, the Plaintiffs, whom he referred to as squatters, were already in occupation of the same”.

The apparent error on the face of the record as at para 17 (f) of the Judgment where DW - 1 evidence was noted, this Honorable Court observed thus:- “In or about the year 2000, the Plaintiffs and other squatters invaded the suit property and took possession thereof. They set up settlement without any colour of right, which constituted trespass on the subject property.’

25. At Paragraph 19 this Honorable Court noted:- “...They stated that the construction of the perimeter wall in the year 2009. By the time they constructed the wall the land was vacant’.

At Paragraph 20, this Honorable Court noted:- “However, he informed the court that it was later on that they discovered the squatters had broken the boundary wall with the help of the local chief. They got in the suit land and started building semi permanent structures therein. They wrote a letter dated 9th January, 2006 marked and produced as exhibit 9 to the District Commissioner”. From the above, it was apparent that this Honorable Court made an error in its finding that DW - 1 in examination in chief admitted that the Plaintiffs were in occupation.

26. Furthermore, it was a mistake for this Honorable Court to find at Paragraph 62, that:- “There being nothing that stopped time from running, this Honorable Court finds that the Plaintiffs as at the time of filing suit had been in occupation of the suit property for period of 21 years”.

In conclusion, the Learned Counsel submitted that the Defendant/Applicant had met the threshold for granting the prayers sought in their Application dated 15th April, 2024.

B. The Written Submission by the Plaintiffs/Respondents.

27. The Learned Counsels for the Plaintiffs/Respondents the Law firm of Messrs. J.K Mwarandu & Company Advocates filed their written submissions dated 18th June, 2024. Mr. Mwarandu Advocate commenced the submissions by stating that before this Honourable Court was the Defendant/Applicant Notice of Motion Application brought under certificate of urgency dated 15th April, 2024. The Application sought to set aside and/or review, vary and discharge this Honourable court Judgment delivered on the 5th day of March, 2024.

28. Simultaneously, the Learned Counsel informed Court that, the Defendant/Applicant preferred an Appeal against the same Judgment on the 13th March, 2024. The Plaintiff/Respondent filed a Notice of Preliminary objection dated 26th April, 2024 as a response to the Application. Through the Notice of Preliminary Objection, the Plaintiff/Respondent raised the following issues:

- a) The Defendant/Applicant could not prefer an appeal and seek review of the same Judgment at the same time by dint of the provisions of section 80 of the *Civil Procedure Act* and Order 45 Rule (1)(b) of the Civil Procedure Rules.
- b) That the grounds for review could not be sustained in view of the Appeal.
- c) This Honourable Court was functus officio; the Defendant/Applicant having approached the Court of Appeal.
- d) The Application was an abuse of the court process.

29. From this background and brief parties position stated above, the Plaintiff/Respondent submitted the following three (3) issues for the Court’s determination. Firstly, whether the Defendant/Applicant



could prefer an appeal and seek review of the same Judgment at the same time by dint of the provisions of Section 80 of the *Civil Procedure Act* Chapter 21 Laws of Kenya and Order 45 Rule 1 (b) of the Civil Procedure Rules and rulings of this Honourable court. The relevant provisions of the law is section 80 of the *Civil Procedure Act* and Order 45 Rule 1(b) of the Civil Procedure Rules. It was clear from the foregoing provisions that review remedy is only available to a party who, though has a right to challenge the decision in question by an appeal, was not appealing or to whom there was no right of appeal. In other words, a person could not exercise both the right of appeal and review at the same time. Orero v Seko [1984] KLR 238.

30. The Respondent appreciate that there are two contradictory decisions from the Court of appeal in this matter. In the case of “Kisya Investments Limited v Attorney General and Another Civil Appeal No. 31 of 1995 the Court held that a party who has filed a notice of appeal cannot apply for review but if application for review is filed first, the party is not prevented from filing appeal subsequently even if a review was pending. However, in the case of:- Yani Haryanto v E. D. & F. Man. (Sugar) Limited Civil Appeal No.122of 1992 the Court of Appeal was of the following view:
31. This Honorable Court in “Environment and Land Court Case Number 16 of 2022 Mohamed Ahmed Abdallah & 6 others - Versus - Khansa Development Limited & 3 others” it its ruling delivered on the 30th April, 2024 deeply analyzed the two school of thoughts on preferring review and Appeal of a decision at the same time and the substratum of the ruling was that the court has unfettered discretion which must be exercised judiciously based on the grounds which so far should not sound as an appeal. The Respondent shall revisit the issue on its submissions.
32. Secondly, whether the reliefs sought were tenable in light of this Honourable Court Pronouncements in ”Environment and Land Court Case Number 16 of 2022 Mohamed Ahmed Abdallah & 6 others (Supra)”. This Honourable in the above cited case drew a demarcation line on the exceptional circumstances where both an appeal and a review can be entertained. This Honourable court appreciated that though this Honourable court has unfettered jurisdiction to entertain review on the existence of an appeal, but this discretion ought to be exercise judiciously and a review was not an Appeal. This Honourable court over emphasized that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of the provision of Order 45, Rule 1 of the Civil Procedure Rules, 2010. Any other attempt, except on grounds falling within the ambit of the above rule, would amount to an abuse of the judicial discretion given to this Court under section 80 of the *Civil Procedure Act* and Order 45 Rule 1 (b) of the Civil Procedure Rules to review its judgement or order.
33. To accommodate this Honourable court position on the above, the Respondent humbly submit that the grounds of review in the Application constitutes an Appeal. The Applicant has not confined himself to the grounds provided for under order 45.

From the stated provisions, it is quite clear that they 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.
34. Closely reading the Application, the Applicant is simply submitting to this Honourable court that the Judgment delivered by this Honourable court ought to have been in his favour. The Applicant has not guided himself with the provisions of the section 45 on the grounds of review and its application simply state his grievances against the judgment which in the humble view of the Respondent should be a subject of appeal.
35. Thirdly, whether this Honourable court was *functus officio*; the Defendant/Applicant having approached the Court of Appeal and the Application is an abuse of the court process. closely related to the above, it is the humble submission of the Respondent that this Honorable court is *functus officio* considering the grounds of review and the subsequent Appeal by the Applicant. The Applicant grounds of review are grievances based on the spectrum that this Honorable court erred and delivered its judgment in favour of the Respondents and not the Applicants. This Honourable court is therefore invited to sit on an appeal of its own decision by overturning a decision in favour of the Respondents to the Applicant. The above was not a review but an appeal and such this Honourable court is “*functus officio*” and the entire process is simply an abuse of the court process.
36. Finally, who shall bear the cost. The Learned Counsel argued that costs were awarded at the discretion of the Court. This was subject to such conditions and limitations as may be prescribed by any provision of the law for the time being in force. Costs followed the event.

V. Analysis and Determination

37. The Honourable Court has considered the application by the Plaintiffs and Defendants, the written submissions and the cited authorities, relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
38. In order for the Honourable Court to reach an informed, just and fair decision, there has been three (3) issues that fall for determination: -
- a. Whether the Objection by the Plaintiffs raises pure points of law based on the Law and precedents.
 - b. Whether the Preliminary objection dated 26th April, 2024 is merited and as a result of which whether the Application is non *functus officio* being an application for review where there had been an Appeal already preferred?
 - c. Who bears the Costs of the Notice of Motion application dated 15th April, 2024 and Notice of Preliminary objection dated 26th April, 2024?



IssueNo. a). Whether the Objection by the Plaintiffs raises pure points of law based on Law and Precedents.

39. Under this sub – heading the Court shall determine whether the Notice of Preliminary objection was raised on pure points of law and what amounts a preliminary objection. Subsequently, it will then Juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description.
40. According to the Black Law Dictionary a Preliminary Objection is defined as being:
“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
41. The above legal preposition has been made graphically clear in the now famous case of “Mukisa Biscuits v Westend Distributor Limited [1969] EA 696”, the court observed that: -
“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. ”.
42. The same position was held in the case of “Nitin Properties Limited v Jagjit S. Kalsi & another Court of Appeal No. 132 of 1989[1995-1998] 2EA 257” where the Court held that;
“ A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion.”
43. Similarly in the case of “United Insurance Company Limited v Scholastica A Odera Kisumu HCC Appeal No. 6 of 2005[2005] LLR 7396”, the Court held that;
“ A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed .”
44. Therefore, from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of “In the matter of Siaya Resident Magistrate Court Kisumu HCCMisc. App No. 247 of 2003” where the Court held that;
“ A Preliminary Objection cannot be raised if any facts has to be ascertained.”
45. I have further relied on the decision of “Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR”: - as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-
(i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.



- (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
46. Taking into account the above findings and holdings of various Courts on what amounts to a preliminary Objection, the Court now turns to the grounds raised by the Plaintiffs which were that the Defendant/Applicants filed a Notice of Appeal on the 12th March 2024. It prosecuted the same by stating that while the Defendants have filed an application for review dated 15th April 2024, they have not withdrawn the notice of appeal. To the Counsel, the application contravenes the provisions of Section 80 of the *Civil Procedure Act*, Cap. 21; Rules 68 and 82 of Appellate Jurisdiction, Cap. 9. Accordingly, the application was non functus officio. Therefore, in this case, I am fully satisfied that the objection raises pure points of law in that the preliminary objection is on the doctrine of constitutional avoidance.

IssueNo. b). Whether the Preliminary objection is merited and as a result of which whether the Application is non functus officio being an application for review where there had been an Appeal already preferred

47. Under this sub – heading the Honourable Court shall examine the merits of the Preliminary objection by the Plaintiffs. Considering the nature of a Preliminary Objection, I will start by analyzing its merits first. For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit. I have already determined that the Preliminary objection was raised on pure points of law. The next thing to determine is the merits of the same.
48. As stated above grounds raised by the Plaintiffs which were that the Defendant/Applicants filed a Notice of Appeal on the 12th March 2024 and had not prosecuted the same and now has filed an application for review dated 15th April 2024 without withdrawing the notice of appeal, the application contravenes Section 80 of the *Civil Procedure Act*, Cap. 21 and according that the application was non functus officio.
49. The provision of Order 45, Rule 1(b) of the Civil Procedure Rules, 2010 is clear that for the court to review its decision, certain requirements should be met. This Order provides as follows:
- “(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.

- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

50. The aforesaid Rule is based on Section 80 of the [Civil Procedure Act](#); Cap. 21 Laws of Kenya (CPA) which states 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.”

51. Under Section 80 of the [Civil Procedure Act](#), the court has unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. This discretion should however be exercised judiciously and not capriciously.

52. Further to this, it is important to appreciate the meaning and nature that is what constitutes an appeal and its scope. According to the provision of Rule 82 (1) of the [Appellate Jurisdiction Act](#) Cap. 9 defines what constitutes an Appeal as follows:-

82(1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged:-

- a. a Memorandum of Appeal, in quadruplicate;
- b. the Record of Appeal, in quadruplicate;
- c. the prescribed fee; and
- d. security for the costs of the appeal:

53. Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the Registrar of the Superior Court as having been required for the preparation and delivery to the appellant of such copy”

54. The Defendants’ case was that the 3rd Defendant/ Applicant was the current registered proprietor of the suit property, L.R. No. 3640/VI/MN. On or about the year 1998, the Plaintiffs/Respondents invaded the 3rd Defendant’s/Applicant’s property and illegally took possession giving rise to the current suit. Judgment was delivered on 5th March, 2024 by Hon. L.L. Naikuni, J. in favor of the Plaintiffs/ Respondents herein and directing the Land Registrar to register LR. No. MN/VI/3640 in their favor as Plaintiffs/Respondents as Trustees. Upon perusal of the court record by the advocates for the Defendants/Applicants, it was apparent that this Honorable Court made errors/mistakes on the face of the record.



55. On their part, the Plaintiffs maintained that the application is fatally defective, does not meet the mandatory requirements for the granting of orders of review and that the court lacks the jurisdiction to entertain the application. It was not disputed that on 12th March 2024, being aggrieved by this decision, the Defendants filed a Notice of Appeal against the same judgment they were asking the court to review. The issue at hand is – does a Notice of appeal constitute an appeal?.

56. The Honourable Courts have taken the position that it is not permissible to pursue an appeal and an application for review concurrently. I am guided by the decisions in the case of :-“Serephen Nyasani Menge v Risphah Onsare [2018] eKLR” wherein Mutungi J. discussed the provisions of Order 45 Rule 1(a) and (b) and Section 80(a) and (b) and held: -

“Order 45 rule I(a) and (b) in addition to setting out the conditions that an applicant for review must satisfy in order to get the application granted, reiterates the proviso of section 80 (a) and (b) which in my view makes it plainly clear that the options of a review and an appeal are not simultaneously available to an aggrieved party. Once a party has opted for a review the option of an appeal cannot at the same time be available to the party.”

“In my view a proper reading of section 80 of the Act and order 45 rules 1 and 2 makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order. In the present case, the applicant exhausted the process of review up to appeal and wishes to go back to the same order she sought review of and failed and to try her luck with an appeal. The applicant wants a second bite at the cherry. She cannot be permitted to do so. Her instant application constitutes an abuse of the court process and the same must surely fail. The applicant had her day in court when she chose to seek review of the order that she now wishes to appeal against. Litigation somehow must come to an end and for the applicant, the end came when she applied for review and appealed the decision made in the review application. Litigation cannot be conducted on the basis of trial and error.”

57. Similarly, in the case of:- “V. Chokaa & Co. Advocates v County Government of Mombasa as Successor of Municipal Council of Mombasa [2017] eKLR” it was held: -

“for purposes of an appeal of the Court of Appeal is instituted by filing a Notice of Appeal. It is not denied that Advocate prior to filing the application for review had filed and served a Notice of Appeal. He had thus opted to appeal and therefore relinquished his option to seek review. That to me is to clear and undeniable interpretation I give to Order 45 Rule 1(2). Therefore, even beyond the merits as stated above, this application would not lie for being barred by the rule.”

58. Further in the case of in “Karani & 47 Other v Kiiiana & 2 Others [1987] KLR 557” where the court held that:

“Once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal.”

Taking a cue from the above cited decisions and having regard to the fact that the Defendants opted to file an appeal against the impugned judgment, I find that it is not open for the Defendants to concurrently file the application for review.

59. My above findings would have been sufficient to determine the application for review but I am still minded to determine if the review application would have been granted had the Defendants not filed a Notice of Appeal. In other words, does the Defendants’ application meet the conditions set under



Order 45 Rule 1 for the granting of orders for review? The Defendants' argument was that there was an error of omission apparent on the face of the record being that judgment was entered for the 142 Plaintiffs who were listed when there was no authority and consent to act by this Honourable Court "suo moto" admission were never legally represented, never gave evidence and hence a grave mistake of awarding them Judgment. It was apparent that this Honourable Court made an error in its finding that DW - 1 in examination in chief admitted that the Plaintiff's were in occupation. I find that in the circumstances of this case, the proper cause of action available to the Plaintiff is to appeal against the said decision.

60. The legal remedy to this lacuna by the Appellant to withdraw the said appeal. This avenue is founded under the provision of Rules 68 (1) , (2) & (3) of the Appellate Jurisdiction Cap. 9 holds thus:-

“ An appeal may be withdrawn at any time before hearing by notice in writing to the Registrar signed by the Appellant and upon such notice being given the appeal shall be deemed to have been dismissed”.

61. Certainly, from the surrounding facts of this, no such empirical documentary evidence on the withdrawal of the appeal was never place before this Honourable Court. Thus, as far as I am concerned, while this application is being placed before me for its determination, the appeal is still in existence and simmering pending before the Court of Appeal. In the given circumstances, my take is that this court will be sitting on an appeal in its own decision if it revisits the Judgment. Based on the above provisions of law, which have been out rightly breached, it's clear and I fully concur with the Learned Counsel for the Plaintiff that the Defendants did institute a notice of appeal with all intentions to prefer an appeal. For these reason their right on being granted reliefs of review cannot be available to the Appellant. Hence, the application must fail.

IssueNo. c). Who bears the Costs of the Notice of Motion application dated 15th April, 2024 and Notice of Preliminary objection dated 26th April, 2024

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

63. In the present case, the Honourable Court reserves the discretion to award the Plaintiffs the costs of the Preliminary objection and the Notice of Motion application.

V. Conclusion and Disposition.

64. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, the Court arrives at the following decision and make below orders: -

a. That the Notice of Preliminary Objection dated 26th April, 2024 be and is hereby found to have merit and thus allowed as it is upheld with costs.



- b. That the Notice of Motion application dated 15th April, 2024 be and is hereby found to have contravened provisions of Section 80 of the Civil Procedure Act, (CPA) 21; Order 45 (1), (2) & (3) of the Civil Procedure Rules, 2010; Rules 68 & 82 of the Appellate Jurisdiction Act. Cap. 9 thus it is dismissed with costs.
- c. That the costs of the Notice of Motion application dated 15th April, 2024 and Notice of Preliminary Objection dated 26th April, 2024 shall be in favour of the Plaintiffs/Respondents.

It is so Ordered Accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 9TH DAY OF OCTOBER 2024.

.....
HON. MR. JUSTICE L. L. NAIKUNI
ENVIRONMENT AND LAND COURT AT
MOMBASA

_Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. No appearance for the Plaintiffs/Respondents.
- c. No appearance for the Defendants/Applicants

