Republic v Mathira West Subcounty Liqour Control Committee Mwangi & another; Wachira (Exparte) (Judicial Review Application E001 of 2024) [2025] KEHC 5724 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5724 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

JUDICIAL REVIEW APPLICATION E001 OF 2024

DKN MAGARE, J

MAY 8, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

MATHIRA WEST SUBCOUNTY LIQOUR CONTROL COMMITTEE
MWANGI ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF NYERI ..... 2ND RESPONDENT

AND

ERNEST GATIMU WACHIRA & 17 OTHERS ..... EXPARTE

RULING

1. This matter brings forth the concept of reciprocity in dealing with human affairs. The ex parte Applicants (bar owners) moved the court seeking to be heard. They considered that the Respondents (liquor committee) herein did not hear them when arriving at the decision regarding licensing. The bar owners lamented that they were not heard or given formal notice. It was their case that they had a legitimate expectation that their licences were to be renewed. They condemned the liquor committee's actions as oppressive, arbitrary, and violating the rules of natural justice and the Fair Administrative Actions Act. They filed a judicial Review application through the learned advocate P M Kahiga, alleging harassment.

2. The shoe is now on the other side. The liquor committee has filed an application stating they were condemned for allowing the bar owner's application on 11. 4. 2024. The applicant filed an application dated 12.4.2024, which the court certified as urgent. The application sought the following prayers:

    i. spent

ii. spent

iii. The Honourable Court be pleased to set aside the ruling/orders issued on 11.4.2024, allowing the exparte applicant's application dated 26.02.2024

iv. The court is pleased to reinstate the exparte applicant's application dated 26.02.2024 and hear it on merit.

v. N/a

vi. costs

3. The background of this matter is that the bar owners applied for leave to institute judicial review, which was heard on 12.2.2024. The court granting leave made the following orders:

a. The application is certified as urgent.

b. Leave for orders of certiorari, mandamus, and prohibition granted as prayed.

c. The application by way of notice of motion be filed within 21 days from today

d. To be served to all respondents within eight clear days from the date of service and hearing.

e. Mention on 13.3.2024

4. The substantive motion dated 26.02.2024 was filed on 1.03.2024. The substantive motion has never been listed for hearing or mention. It is the application dated 20.2.2024 that was fixed, on 22.02. 2024 for hearing on 13.03.2024. This application has four prayers as follows:

a. spent

b. Pending determination of prayer c below, this honourable court be pleased to issue interim orders allowing the applicants to continue operating their alcoholic drinks outlets using their licences for the financial year 2022/2023.

c. Pending determination hearing and determination of the substantive notice of motion for orders of judicial review, this honourable court be pleased to issue interim orders allowing the applicants to continue operating their alcoholic drinks outlets using their licences for the financial year 2022/2023.

d. costs be provided for.

5. Though fixed for mention, there was no order given in respect of this application at all. Instead, the bar owners sought to allow an application with five prayers, which is the substantive motion. It was never for hearing or mention on the said date.

6. When the motion was dated 20.2.2024 was placed before the court (Muya J) on 22.2.2024, he made the following orders:

a. The matter is certified as urgent

b. to be served on the Respondent

c. Inter Partes hearing on 13.3.2024.

7. The matter came before Honourable Gaituma, the deputy registrar of this court, on 13.3.2024, who fixed the same for mention on 11.4.2024. On the mention date both parties were represented. Mr P

M. Kahiga, learned advocate for the Respondent in this application, appeared on the date of mention and submitted to the court as follows:

> This is a judicial review application. They have not filed any responses to our case. The respondent did attend on 13.3.2024 before the deputy registrar. We pray that the notice of motion be allowed as it is unopposed. Kindly grant prayers a to (e).

8. The court allowed the application as there were no responses and it was unopposed. It was allowed in terms of prayers a-e. No formal ruling was made on the matter. Of importance, the application that was fixed for mention was the one dated 20.2.2024 but the bar owners submitted on the motion dated 26.2.2024. The said application had not been filed by 22.02.2024 when the impugned date was given. Ipso facto, there is no stretch of imagination that the court could grant a mention date in futuro.

9. On 16.4.2024, the court Muya J stayed the orders he had issued on 11.4.2024. The matter was given an inter partes hearing date of 12.6.2024. As fate would have it, I was transferred to Nyeri, and this file was offloaded to me. I have mentioned the matter since then, with both parties playing a cat-and-mouse game. The matter last came before me on 30.4.2025. The parties sought an adjournment on the grounds that they had drafted their submissions and were filing shortly.

10. Mr Kahiga indicated that he was waiting for the Applicant to file before he filed them. I directed that since the written submissions were also 'almost ready', there was no harm for the parties to highlight them before me at 11 a.m. orally. As it turned out, the postulations of submissions being ready were part of Aesop's Fables. One with an eye for literature can read the Wolf and the Lamb and fathom the extent of subterfuge that has persisted for over one year.

11. The parties argued the application before me. Mr Lumumba, learned counsel for the Applicants, posited that the Applicants were condemned unheard. He stated that the decision departed from and acted as a repeal of statutory provisions. He stated that if the court had considered the evidence, it could not have reached the decision it did. They relied on three authorities that I will address shortly.

12. The Respondent opposed the application, stating that the Applicants are the authors of their misfortune. They were served but did not respond a month later. He noted that the matter was coming for directions, and the court allowed the same. On being pressed by the court, he indicated that the matter had not been fixed for hearing. They prayed that the application be dismissed with costs.

Analysis.

13. The irony in this matter was not lost to me. The applicant, who is the respondent in the main suit, is coming to the court to be heard. On the other hand, the Respondents, who are the Applicants in the main motion, had run to the court after reportedly not being heard. The respondent found nothing wrong in proceeding ex parte on a mention date. He also did not see anything untoward in condemning the applicants unheard. To the Respondents, the applicant does not deserve a hearing. If he had anything to say, he would have said so before the said mention date.

14. The matter raises three fundamental questions. These will determine the matter as raised in the application. the issues are:

    a. Jurisdiction to deal with the orders sought.

    b. Merit of the application

    c. Reliefs.

15. By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of issues presented in a formal way for its decision. Therefore, jurisdiction is everything. Without it the court has to down their tools. In the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR, Nyarangi JA, as he then was stated as doth:

> "With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what
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> I have already said is consistent with authority: "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.

16. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, THE supreme court stated as doth: -

> "This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

17. The court will not deal with the general question of setting aside judicial review orders. This is in line with the doctrine of avoidance where the court can only decide matters it must. In the case of Anthony Miano & others v Attorney General & others [2021] eKLR, A.C Mrima J had this to say:

> 31. The Court further considered the operation of Constitutional Avoidance doctrine and in so doing made reference to Supreme Court decision in Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others Pet. 14A, 14B & 14C of 2014 of [2014] eKLR and observed thus: -
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> [105]. We shall now turn to the Constitutional-Avoidance Doctrine. The doctrine is at times referred to as the Constitutional-Avoidance Rule. Black's Law Dictionary, 10th Edition at page 377 defines it as:

"The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion"

[106]. The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition. The Supreme Court in Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others Pet. 14A, 14B & 14C of 2014 of [2014] eKLR held:

[256]. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.

18. The jurisdiction to set aside these particular proceedings flows from the fundamental principle of natural justice that no man (woman or entity) may be condemned unheard. No man should ever be condemned unheard, as expressed in the truism that the audi alteram partem principle. In Rex v Deferral 1937 AD 370 and 373, the court posited that:

> " The audi alteram partem principle literally means, "hear the other side. This means that no ruling of any importance, either on the merits or on procedural points, should be made without giving both parties the opportunity to express their views. The audi alteram partem principle is followed in judicial proceedings, in our country, along with the rights such as legal representation, the right to adduce and challenge evidence in cross examination and the right to present one's evidence to the dispute or claim."

19. If a decision is made without an opportunity to be heard, such a decision is anathema to every sense of justice and is thus null and void. In Macfoy v United Africa Co. Ltd [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

20. The matter was fixed for hearing. The court was misled to proceed. It is an error on the face of the record, it cannot be allowed to stand. How is it that the orders were null and void whereas they were issued by this court? The matter was for mention. The respondent deliberately misled the court to issue substantive orders on a mention date. As held in Paul Mwaniki v National Hospital Insurance Fund Board of Management [2020] eKLR an error or mistake apparent on the face of the record is one that is self-evident and does not require elaborate arguments to be established. The court stated as follows:

> 35. The Indian Supreme Court[8] made a pertinent observation that is it has to be kept in view that an error apparent on the face of record must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. In Attorney General & O'rs v Boniface Byanyima,[9] the court citing Levi Outa v Uganda Transport Company[10] held that the expression "mistake or error apparent on the face of record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment."

36. There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.[11]

37. The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.

21. apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be determined judicially on the facts of each case. in the case of Nyamogo & Nyamogo v Kogo{2001} EA 170, the court indicated as follows in respect of the question of what an error on the face of the record is, as follows:-

> " An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the 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 be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court 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 view is certainly no ground for review though it may be one for appeal."

22. The question the court will deal with is the effect of the order given and the manner in which it was given. The matter was not listed for hearing but for a mention. The mention was given because the court was not sitting previously. The court had hitherto ordered service to be effected eight clear days before the hearing date. The matter was not for hearing. If it were, then the question would have arisen. The respondent misled the court that the matter was for hearing when it was not. Such a misleading made the court issue substantive orders on a mention date. in the case of Paul Odhiambo Ogunde v Maersk Kenya Limited [2016] eKLR, the court held as doth:

> A related issue is whether it is in order to enter default judgment on a mention date. It is settled in law that substantive orders are not to be granted on the date a matter comes up for mention ((see Rahab Wanjiru Evans v Esso Kenya Limited (Civil Appeal No 13 of 1999) and Kenya Commercial Bank Limited v Naphtaly J.B. Hawala (Civil Application No 240 of 1997)). In light of this jurisprudence, it seems to me that it is not open for the Court to make substantive orders on a mention date. This is mainly because parties do not have

an opportunity to make substantive submissions on a mention date and orders thus made could well occasion an injustice."

23. A court properly informed on the status of a case cannot issue a substantive order on a mention date. In the case of Anthony Milimu Lubulellah, Advocates v Patrick Mukiri Kabundu & 3 others [2019] eKLR the court posited as follows:

.....In Rahab Wanjiku v Esso Kenya Limited [1995-1998 EA 332 this court stated:

> " We have no doubt that where a matter is fixed for mention, as it was in this case, the learned judge had no business determining on the date, the substantive issues in the matter. He can only do so, which was not the case here, if the parties so agree and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties, which he did not do and moreover, gave no good reasons for adopting such a procedure which is repugnant to the administration of justice. As regards whether the learned judge erred in invoking his inherent jurisdiction under section 3A of the *Civil Procedure Act*, which has been described by Hancox, JA as he then was, in Wanguku v Kani [1982-1988] 1 KAR 780 at 785 as "residual jurisdiction which should only be exercised in special circumstances... in order to put right that which would otherwise be a clear injustice" the learned judge gave the following reason for taking this course:
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> "This is because business premises which (sic) are closed awaiting the hearing of the application and the case." With respect, there is nothing special about this state of affairs, neither does it entitle the learned judge to ignore basic requirements such as those demand by the principles of natural justice, in determining substantive issues in contention between opposing parties without their consent on a mention date. Having regard to the wording of section 3A, the unsolicited action taken by the learned judge could, ironically, be seen to have been the type of injustice which section 3A itself, was intended to avoid or prevent."

24. It is apparent from the record that it was not drawn to the court's attention that the matter was fixed for hearing. It is irrelevant that the Applicant had not responded or even attended court. The matter was for mention, and the only order to be given related to directions regarding the hearing. The Court of Appeal in the case of Wanjiku v Esso Kenya Ltd [1995-1998] 1 EA 332 CAK when faced with the issue of substantive orders issued on a mention date, had this to say:

> Where a matter is fixed for mention, the court has no business determining the substantive issues therein on that date, and it can only do so, if the parties so agree and of course after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties. There must be good reasons for adopting contrary procedure repugnant to the administration of justice."

25. While handling a similar question in the case of M/S Master Power Systems Limited v Public Procurement Administrative Review Board & 2 others [2021] eKLR, the court pronounced itself as follows:

> " With respect, I am persuaded by the appellant's argument that no substantive orders should be made during a mention. In this case the parties appeared before this court and proceeded to make submissions on whether or not the appeal should be dismissed. The record shows that the parties had not consented to allow the court make substantive orders during a mention. It would appear that this court was made to believe that the parties had given their consents to enable this court make substantive orders. It is apparent that no such consent

was given. I am convinced that there being no consent order is an error apparent on the face of record. In the circumstances this court is obliged to set aside such an order."

26. The same question was dealt with in the case of Republic v Anti-Counterfeit Agency & 2 others Ex-Parte Surgippharm Limited [2014] eKLR as follows:

> 33. First and foremost, it is clear that the matter was coming up for mention for directions rather than for hearing. It is trite that on a day when a matter is fixed for mention the same ought not to be heard unless the parties consent to the hearing. In Central Bank of Kenya v Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998 the Court of Appeal held that where a matter is fixed for mention the Judge has no business determining on that date, the substantive issues in the matter unless the parties so agree, and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties. In Mrs. Rahab Wanjiru Evans v Esso (K) Ltd. Civil Appeal No. 13 of 1995 [1995-1998] 1 EA 332, it was held that when the matter is fixed for mention it cannot be heard unless by consent of the parties and that orders cannot be made before hearing submissions of the parties. Dealing with the same issue the Court of Appeal in AG v Simon Ogila Civil Appeal No. 242 of 2000 (supra) held that substantive matters cannot be determined on a date when the matter is coming up for mention only. Similarly, in Peter Nzioki & Another v Aron Kuvuva Kitusa Civil Appeal No. 54 of 1982; [1984] KLR 487, it was held that when the matter is fixed for mention and not hearing it cannot be lawfully dismissed. A similar view was taken by the Court of Appeal in Kenya Commercial Bank v N J B Hawala Civil Application No. 240 of 1997.
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> 34. What emerges from the foregoing jurisprudence is that the Court, without the consent of the parties could not lawfully dismiss the application. However, if the Court was minded to proceed, it was obliged to hear the submissions of the parties. In this case, it is clear from the record that the advocate for the applicant was not ready to proceed on the day the application was dismissed hence there was no consent. Again even if the Court was minded to proceed, the proper procedure would have been to disallow the adjournment of the matter and the ordering of the matter to be heard before dismissing the same. In Dr. Samson Auma v Jared Shikuku & Another Civil Appeal No. 191 of 2002 the Court of Appeal expressed itself as follows:
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> "Where an application for adjournment was made, it needed to be dealt with on its merit first and either be allowed or rejected and whichever way the Judge was minded to decide it, it was his duty to dispose of it first. It was a matter that called for his discretionary powers.....To avoid deciding on an unopposed application for adjournment which was not frivolous as the appellant's counsel was before the Court of Appeal, the other counsel bereaved and the case was not yet ready for hearing as certain procedures were yet to be finalised before it could be heard, and dismissing the entire case on another ground not canvassed before it was a serious misdirection. The correct procedure that the Superior court should have adopted was first to decide on whether or not to allow the adjournment application, then the suit would proceed to hearing and then it would be up to the appellant's counsel to decide on how to prosecute his client's case in the absence of the plaintiff..... The action taken by the court in this matter of failing to decide the application for adjournment on its merits and proceeding to dismiss the entire case on grounds that were not before him namely the absence of the parties at a time before the hearing proper could begin involved an incorrect exercise of the learned Judge's discretion and did result in grave injustice as the appellant's case was terminated before the appellant could be heard on its merits and therefore the Court of Appeal is entitled to interfere."

27. The Court of Appeal has been very firm in this aspect on not giving substantive orders on a mention date. The next question is whether the questions raised were for setting aside or for Appeal. Since the decision was made on a mention date and ex parte, then it remains amenable to setting aside like all other ex parte orders. setting aside is not an appeal but exercise of discretion to avoid both hardship and injustice. In the case of Mureithi Charles & another v Jacob Atina Nyagesuka [2022] eKLR, G V ODUNGA J, as he then was, posited as follows regarding setting aside:

> " In considering whether or not to set aside a judgement, a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge. It is, as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail. Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex parte. Moreover, the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error. The substance of his judgement would be that in view of the defence, there is prima facie defence. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate, but nevertheless he may hold that it would be just to set aside the ex parte judgement. See Bouchard International (Services) Ltd v M'mwereria [1987] KLR 193; Evans v Bartlam [1937] 2 All ER 647."

28. One disturbing aspect of the proceedings is the fidelity to the rule of law and the compliance with tenets of judicial review. order 53 rule 1(4) provides as follows:

> " The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:
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> Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days."

29. Ipso facto, it is the judge granting leave, who directs that the leave act as a stay or postpone deciding. There is no room for filing an interlocutory application before the substantive application is filed for stay. The stay must first relate to the leave and be dealt with at the leave stage. The conduct of the parties herein reminds me of the famous words in the case of Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] KESC 32 (KLR):

(394) It is also our view that the greatness of a nation lies not in the might of its armies important as that is, not in the largeness of its economy, important as that is also. The greatness of a nation lies in its fidelity to *the Constitution* and strict adherence to the rule of law, and above all, the fear of God. The Rule of law ensures that society is governed on the basis of rules and not the might of force. It provides a framework for orderly and objective relationships between citizens in a country. In the Kenyan context, this is underpinned by *the Constitution*. [395] And as Soli J Sorabjee, a former Attorney General of India once wrote, the rule of law ——is the heritage of all mankind‖ and ——a salutary reminder that #wherever law ends, tyranny begins [as posited by] Soli J Sorabjee, Rule of Law A Moral Imperative for South Asia and the World, Soli Sorabjee Lecture, Brandeis University Massachusetts, Cast the rule of law to the dogs, Lutisone Salevao once observed ——and government becomes a euphemistic government of men...He adds: ——History has shown (sadly, I might add) that even the best rulers have fallen prey to the cruel desires of naked power, and that reliance on the goodwill of politicians is often a risky act of good faith.... The moment we ignore our Constitution the Kenyans fought for decades, we lose it."

30. Filing one application and arguing another exparte is anathema to the rule of law and is an affront to good practice. It's conduct that cannot be countenanced or tolerated. The effect of the proceedings of 11.4.2024 was to steal a match on the liquor committee. It does not bring confidence to the administration of justice.

31. The net effect is that the proceedings of 11.4.2024 resulted in a nullity. The proceedings were conducted on a date that mentions the decision as a nullity. The same is hereby set aside. The application dated 12.4.2024 was made without undue delay. The same is merited and for allowing.

32. The next question is who is to bear the costs? The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which 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.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

33. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law if that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown."

34. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases."

35. The Applicant has shown that the proceedings as initiated on 11.4.2024 by the Applicant were a nullity. The consequence of the foregoing is that the Applicants are entitled to costs.

Determination.

36. In the circumstances, I make the following orders:

    a. The application dated 12.4.2024 is merited and is accordingly allowed.

    b. The orders issued on 11.4.2024 are hereby set aside. The application dated 26.2.2024 will be set down for directions forthwith.

    c. For avoidance of doubt, the orders subsisting as at 11.4.2024 are vacated in line with Order 53 rule (1)(4) of the Civil Procedure Rules.

    d. The Respondents to the Application (substantive applicant will pay costs of Ksh 20,000/= to the Applicant (substantive Respondents within 21 days, failing which they shall not have audience in the court.

    e. Directions to be given shortly.

DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 8TH DAY OF MAY, 2025.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

Represented by: -

Mr Kahiga for the Ex Parte Applicant

Mr Lumumba for the Respondent/Applicant

Court Assistant – Michael/Munguti