



**Jiwa t/a Jiwa Properties v Jiwa & another (Miscellaneous Civil Application E038 of 2023) [2024] KEELC 6017 (KLR) (17 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6017 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
MISCELLANEOUS CIVIL APPLICATION E038 OF 2023  
LL NAIKUNI, J  
SEPTEMBER 17, 2024**

**BETWEEN**

**YUSUF MN JIWA T/A JIWA PROPERTIES ..... APPLICANT**

**AND**

**ROSEMIN NAZERALI JIWA & AUN JIWA ..... RESPONDENT**

**RULING**

**I. Introduction**

1. This Honourable Court has been tasked to make a determination onto the Notice of Motion application dated 21<sup>st</sup> June, 2024. It was filed by Yusuf M.N. Jiwa T/A Jiwa Properties, the Applicant herein and brought under the provision of Sections 1A, 1B, 3A of the Civil Procedure Act, Cap.21, Order 45 Rule 1 of the Civil Procedure Rules, 2010 & all Enabling Provisions of the Law.

**II. The Applicant's case**

2. The Applicant sought out for the following orders:
  - a. Spent
  - b. That this Honourable Court be pleased to review, vary and/or set aside the orders of this a decretal sum as a condition for stay in a joint escrow account pending the hearing and determination of the intended appeal
  - c. That this Honourable Court be pleased to find and order as sufficient the continued payment of hitherto and currently payable rent;
  - d. That this Honourable Court be pleased to make any other order as may be necessary in the circumstances
  - e. That the costs of this Application be provided for.



3. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 9<sup>th</sup> Paragraphed Supporting Affidavit of Yusuf M.N. Jiwa sworn and dated 21<sup>st</sup> June, 2024 with two (2) annexure marked as ‘YJ - 1 & 2’ annexed hereto. The Applicant averred that:
- a. In its ruling dated 20<sup>th</sup> February 2024 the Court granted him leave to file appeal out time. Further, this Honourable Court also made an order that he deposits the decretal sum in an Escrow interesting earning joint account to be held by the parties advocates.
  - b. The decision of the BPRT that he was now appealing from, being “BPRT No.151 of 2021 Rosemin Nazerali Jiwa &Aun Jiwa v Yusuf M.N. Jiwa T/A Jiwa Properties” which was delivered by the Tribunal on 20<sup>th</sup> May, 2022 never made a finding on the rent due and owing but reviewed the rent payable by increasing and backdating the same to 1<sup>st</sup> August 2019. Thus, he was appealing against that decision. Annexed in the affidavit a copy of the orders made marked as “YJ - 1”.
  - c. The orders as given by the BPRT did not amount to a finding on the rent due and owing that was capable of recovery as a decretal sum hence the order for the deposit of the decretal sum could not apply in the circumstances.
  - d. He was a continuing tenant paying rent and not in default and that in the circumstances it was only fair and just that the order for deposit of a decretal sum be reviewed and/or the same be set aside.
  - e. An Appeal had been duly filed against the decision of the BPRT being ELCLA/E014/2024 and the same was pending filing of the Record of Appeal. Annexed in the affidavit were copies of the duly filed Memorandum of Appeal and the request for certified copies of proceedings marked as “YJ - 2”.
  - f. The BPRT proceedings had not yet been availed and that in the circumstances there was need to extend the period for filing of the Record of Appeal.
  - g. The Affidavit was made in support of the Application for review.

### III. Submissions

4. On 2<sup>nd</sup> July, 2024 in the presence of both parties in Court, the Honourable Court directed that the Notice of Motion application dated 21<sup>st</sup> June, 2024 be canvassed by way of written submission. Pursuant to that on 10<sup>th</sup> July, 2024 the Honourable Court reserved a ruling date on 17<sup>th</sup> September, 2024.

### IV. Analysis and Determination

5. I have carefully read and considered the pleadings herein being the application dated 21<sup>st</sup> June, 2024 by the Applicant, the myriad of cases cited herein by parties, the relevant provisions of [the Constitution of Kenya, 2010](#) and statutes.
6. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has two (2) framed issues for its determination. These are:-:
- a. Whether the Notice of Motion application date 21<sup>st</sup> June, 2024 by the Applicant has made out a case of the review and setting aside of the orders of a decretal sum as a condition for stay in a joint escrow account pending the hearing and determination of the intended appeal?



- b. Who meets the costs of the Notice of Motion application dated 21<sup>st</sup> June, 2024?

**Issue No. a) Whether the Notice of Motion application date 21<sup>st</sup> June, 2024 by the Applicant has made out a case of the review and setting aside of the orders of a decretal sum as a condition for stay in a joint escrow account pending the hearing and determination of the intended appeal.**

7. Under this Sub – heading, the main substratum is on causing the Honourable Court to consider review, setting aside, varying and/or discharging orders of a decretal sum as a condition for stay in a joint escrow account pending the hearing and determination of the intended appeal. The application by the Applicant was brought under the provisions of Sections 1A,1B, 3A of the *Civil Procedure Act*, Cap.21, Order 45 Rule 1 of the Civil Procedure Rules & all Enabling Provisions of the Law. A clear reading of these provisions indicates that Section 80 is on the power to do so while Order 45 sets out the rules on doing it.

8. The provision of Section 80 of the *Civil Procedure Act* Cap 21 provides as follows: -

“Any person who considers himself aggrieved—’

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

9. While the provision of Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -

“1.

(1) Any person considering himself aggrieved—

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



10. Briefly, and prior to proceeding further, the Honourable Court wishes to extrapolate on a few case law on this subject matter. In the case of:- “Republic v 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.”

11. Additionally, 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.

12. Broadly speaking, in the case of “Republic v Public Procurement Administrative Review Board & 2 others [2018] e KLR” it was held: -

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

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

- a. There should be a person who considers himself aggrieved by a Decree or order;
- b. The Decree or Order from which an appeal is allowed but from which no appeal has been preferred;
- c. A decree or order from which no appeal is allowed by this Act;
- d. There is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made; or
- e. On account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order.
- f. The review is by the Court which passed the decree or made the order without unreasonable delay.



14. I have previously stated in this Honourable Court in the case of “Sese (Suing as the *Administrator of the Estate of the Late Shali Sese*) v *Karezi & 8 others (Environment and Land Constitutional Petition 32 of 2020)* [2023] KEELC 17427 (KLR)” held that:-

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

15. It is on record that the Applicant argues that in its ruling dated 20<sup>th</sup> February 2024 that granted him leave to file appeal out time this Honourable Court also made an order that him to deposit the decretal sum in an escrow interesting earning joint account to be held by the parties advocates. The decision of the BPRT that he was now appealing from, “BPRT No.151 of 2021 Rosemin Nazerali Jiwa & Aun Jiwa - Versus- Yusuf M.N. Jiwa T/A Jiwa Properties”, delivered by the Tribunal on 20<sup>th</sup> May, 2022 did not make a finding on the rent due and owing but reviewed the rent payable by increasing and backdating the same to 1<sup>st</sup> August 2019 and he was appealing against that decision. Annexed in the affidavit a copy of the orders made marked as “YJ - 1”. The orders as given by the BPRT did not amount to a finding on the rent due and owing that was capable of recovery as a decretal sum hence the order for the deposit of the decretal sum could not apply in the circumstances.

16. It is important to underscore that as a condition for staying the decision by the tribunal under the provision of Order 42 Rule 6 of the Civil Procedure Rules, the Court opined that;

- a. That the Notice of Motion application dated 26<sup>th</sup> June, 2023 be and is hereby found to have merit hence allowed in the as follows:
  - i. Leave be and is hereby granted to the Applicant to file appeal out of time against the Judgment delivered in the case of: - “Business Premises Rent Tribunal Case No. 151 of 2021 Rosemin Nazerali Jiwa &A un Jiwa-versus - Yusuf M.N.Jiwa T/A Jiwa Properties.
  - ii. The Appellant granted 30 days leave to have fully compiled, filed and served the Records of Appeal from the BPRT
  - iii. The execution of the Judgment/decree in the case of “Business Premises Rent Tribunal Case No. 151 of 2021 Rosemin Nazerali Jiwa &A un Jiwa - Versus- Yusuf M.N. Jiwa T/A Jiwa Properties be and is hereby stayed pending the hearing and determination of the appeal.
- b. That the Applicant shall deposit the decretal sum in an Escrow Interesting earning joint bank account to be held by the law firms of Messrs. Mburu Kariuki & Company Advocates and Messrs. A. O Hamza & Company Advocates within the next sixty (60) days of the delivery of this Ruling hereof.
- c. That there be a mention on 17<sup>th</sup> April, 2024 for purposes of ascertaining compliance of these orders and taking directions on the Appeal pursuant to the provisions of Section 79B of the Civil Procedure Rules, 2010 and Orders 42 Rules, 11, 13 and 16 of the Civil Procedure Rules, 2010.
- d. That in default of complying with any of these the orders staying execution shall automatically lapse and the Respondents shall be at liberty to execute.



- e. That there shall be no orders as to Costs.
17. The brief facts to the case were that the Respondents/Land - Lords, by virtue of being trustees of the suit property, filed a notice for increment of rent. Soon thereafter and before the Applicant could file any objection, the High Court pronounced its decision in Commercial High Court Case No.45 of 2014 (OS) ideally dissolving the trustee and consequently doing away with the Respondents' trusteeship and/or position as the Landlord, a fact that was well within the Respondents. All along the Applicants who were also beneficiaries of the trust had been under the impression that the Respondents were looking forward to execute the said High Court Judgment by collecting the assets of the trust, selling them and distributing them to the beneficiaries. To wit, the Applicant was looking forward to negotiate new rental terms with a new owner/purchaser/landlord of the suit property. To his surprise, the Respondents shunned the judgment of the High Court and continued to hold themselves as trustees and landlords of the demised premises. The Applicant has not pin pointed the errors that are apparent on the face of the record. Review can also be allowed for any other sufficient reason. The expression sufficient reason means a reason sufficiently analogous to those specified in the rule.
18. For the Applicant to satisfy the security of costs, it follows that the Applicant must offer such security for the due performance of the orders as may ultimately be binding on the Applicant. This position was well founded in the case of "Focin Motorcycle Co. Limited v Ann Wambui Wangui & Anor [2018] eKLR" it was held that:-
- "When an applicant proposes to provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgement. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security."
19. In the Application for stay of execution, the Applicant had not proposed any security at all which is contrary to the provisions of law. The correct legal position is that it's the Honorable Court which determines the security upon ordering stay to ensure that due performance of the obligations by the Applicant as to costs and to satisfy the decree which the court did in its ruling on 20<sup>th</sup> February, 2024.
20. The Applicant has not demonstrated any sufficient reason to warrant a review of the ruling of this Court. Finally, the Applicant must demonstrate that the application has been made without unreasonable delay.
21. The Applicant averred that there was no delay in presenting the application, as the ruling that the Applicant intends to review was delivered on 20<sup>th</sup> February, 2024 and the application was filed on 21<sup>st</sup> June, 2024. The duration is reasonable. Be that as it may, I find that the application dated 21<sup>st</sup> June, 2024 is devoid of merit and the same is dismissed.

**Issue No. b). Who meets the costs of the Notice of Motion application dated 21<sup>st</sup> June, 2024**

22. It is now well established that the issue of costs is at the discretion of the Court. Costs mean all that award that is granted to a party at the conclusion of any legal action or proceedings in any litigation. The proviso to Section 27 of the *Civil Procedure Act* (Cap. 21) hold that costs follow the event. By the event it means the result or outcome of the said legal action or proceedings.



23. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See “Hussein Janmohamed & Sons – Versus - Twentsche Overseas Trading Co. Limited [1967] EA 28”.
24. In this instant case, the Court elects not to award any costs.

#### **V. Conclusion and Disposal**

25. The upshot of the foregoing is that after conducting such an intensive and elaborate analysis to the framed issues, the court is satisfied that the Applicant in the Notice of Motion application dated 21<sup>st</sup> June, 2024 has not on balance and preponderance of probability established its claim for review of the ruling delivered on 20<sup>th</sup> February, 2024. Therefore, for avoidance of any doubts, I proceed to specifically order: -
  - a. That the Notice of Motion application dated 21<sup>st</sup> June, 2024 be and is hereby found to be devoid of merit thus it is disallowed in entirety without costs.
  - b. That there shall be no orders as to costs.

It Is So Ordered Accordingly.

**RULING DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF SEPTEMBER 2024.**

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

Ruling delivered in the presence of:-

- a. M/s. Firdaus – the Court Assistant
- b. M/s. Nduku Advocate for the Applicant.
- c. M/s. Otewa Advocate for the Respondents

