Barnabas East Africa v County Government of Mombasa & 2 others (Constitutional Petition 29 of 2022) [2025] KEELC 42 (KLR) (17 January 2025) (Ruling)

Neutral citation: [2025] KEELC 42 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CONSTITUTIONAL PETITION 29 OF 2022

LL NAIKUNI, J

JANUARY 17, 2025

IN THE MATTER OF: THE JURISDICTION OF THE SUPERIOR COURT UNDER ARTICLE 23(1), ARTICLE 162 (1), (2) (B), ARTICLE 165 (2) (D) (II) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: CONTRAVENTION, BREACH AND VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA,2010

AND

IN THE MATTER OF: ARTICLE 2 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

BARNABAS EAST AFRICA .... PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA .... 1ST RESPONDENT

NATIONAL LAND COMMISSION .... 2ND RESPONDENT

NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT FUNDS .... 3RD RESPONDENT

RULING

I. Introduction

1. This Honourable Court is called to make a determination of two (2) applications - the Notices of Motion application dated 2nd April, 2024 by "the County Attorney" and the other is the Notice of Motion application dated 30th April, 2024 by the State Counsel.

2. Upon service of the Notice of Motion application, the Chairman and the Pastor to the Petitioner/ Applicant responded through a Replying affidavit dated 15th June, 2024. Thus, the Honourable Court shall be dealing with them simultaneously but in a distinct and separately on its own merit accordingly.

II. The Notice of Motion application dated 2nd April, 2024

3. This application was brought under the dint of the provision of Sections 80 and 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21 Order 42 Rule 8 and 45 of the Civil Procedure Rules, 2010.

4. The Applicant sought for the following orders.

   a. Spent.

   b. Spent.

   c. That this Honourable Court be pleased to vary, review and vacate its orders given in the ruling delivered on 5th March, 2024 after full hearing and determination of this Application.

   d. That Costs be in the cause.

5. The application by the County Attorney herein was premised on the grounds, testimonial facts and averments made out under the 12th Paragraphed Supporting Affidavit of ELIZABETH KISINGO, the Deputy Director – In charge of Litigation of the Applicant sworn and dated 2nd April, 2024. She averred that:-

   a. This Honourable Court delivered a ruling on 5th March, 2024, whereby it found the Applicant's Notice of Motion application dated 14th November, 2023 with merit.

   b. The Court allowed it subject to the fulfilment of the pre – condition that the Applicant deposit a sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs 5,500,000/-) as security deposit for the performance of the decree from the Judgment of the Honourable Court in a joint escrow bank account of a reputable commercial bank to be held in the names of Messrs. Bennette Nzamba & Co. Advocates and the County Government of Mombasa within the next thirty days (30) days from the delivery of the ruling failure of which the Notice of Motion application dated 14th November, 2023 shall automatically stand dismissed thereof and execution of the decree shall ensue procedurally as provided for by the law. Attached and marked as "EK – 1" as a copy of the ruling dated 5th March, 2024.

   c. There was an error apparent on the face of the record whereby this Honourable Court inadvertently made a mistake contrary to the provision of Order 42 Rule 8 of the Civil Procedure Rules 2010 which stated as follows:-

      > "No such security as is mentioned in Rule 6 and 7 shall be required from the Government or where the Government has undertaken the defense of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity."

   d. It was not practically possible for the Applicant to deposit a sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs 5,500,000/-) as security deposit for the performance of the decree from the Judgment of the Honourable Court in a joint escrow bank account of a reputable commercial bank to be held in the names of Messrs. Benedict Nzamba & Co. Advocates and the County Government of Mombasa within the next thirty days (30) days from the delivery of the ruling because the Applicant who is a government official relied

majorly on funding from the National Government and did not have an approved budget for the same.

e. For any monies to be paid by the Applicant they must have factored in the main or supplementary budget and as such payment of the surety without budgetary allocation will cause audit queries and will be against the *Public Finance Management Act* 2012.

f. The Applicant had already filed an Appeal in the Court of Appeal and was currently awaiting directions on the same being Appeal No. COACA E204 of 2023 filed on 5th December, 2023 a fact which was not in Courts knowledge as at the time of delivering the Ruling dated 5th March, 2024. Attached and Marked as "EK - 2" was a Photostat of the 1st to 3rd pages of the Record of Appeal.

g. The Applicant was the Government and as such the 1st Respondent in the event that the Appeal was dismissed could be compensated by way of damages.

h. The provision of Section 80 of the *Civil Procedure Act*. Cap. 21 allowed the Applicant herein to review the ruling as they were aggrieved by the same.

i. She referred Court to the Order 45 Rule 1 (1) of the Civil Procedure Rules, 2010.

j. The Application had been made without unreasonable delay and it was in the interest of just the need for the same to be varied and reviewed to protect public interest as opposed to the 1st Respondent's interests which were private in nature.

k. It was in the interest of justice that the Notice of Motion application dated 5th March, 2024 be reviewed to allow the Applicant stay of execution with no order as to security.

III. The Notice of Motion application dated 30th April, 2024

6. The above application was brought under the dint of the provision of Section 5 (d)(1), 15 (1) Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice And Procedure Rules, 2013 and Order 40 rule 1, 4 (1), Order 10, Order 7 Rule 1, Order 51, 22 Rule 8, Sections 3A, 1A and 1B of the *Civil Procedure Act* Cap.21 of the Laws of Kenya, Article 50 of *the Constitution* of Kenya, 2010.

7. The Applicant sought for the following orders:-

   a. Spent.

   b. That the Ex - Parte proceedings as against the 3rd Respondent, Ex-Parte Judgement dated 12th October 2023 entering Judgement against the 3rd Respondent/Applicant in the sum of Kshs. 27,150,000/- jointly with the other Respondents be set aside and the court does proceed to strike out the 3rd Respondent/Applicant from the proceedings.

   c. That the Ex - Parte proceedings as against the 3rd Respondent, Ex -Parte Judgement dated 12th October 2023 entering Judgement against the 3rd Respondent/ Applicant in the sum of Kshs. 27,150,000/- jointly with the other Respondents be varied and/or set aside and; the proceedings do re -open, the 3rd Respondent be granted leave participate in the proceedings and the Reply to the Petition attached herewith be deemed as duly filed.

   d. Spent.

e. That a temporary injunction do hereby issue restraining the Petitioner/ Respondent from commencing execution proceedings in whatever form arising from the Ex - Parte proceedings and Judgment dated 12th October 2023 and or any other consequential decrees or orders made thereto pending the hearing and final determination of this suit.

f. That the Petitioners to bear the costs of the application and the suit.

8. The application by the County Attorney herein was premised on the grounds, testimonial facts and averments made out under the 15th Paragraphed Supporting Affidavit of ABDULHAKIM ALI, a Fund Account Manager at the National Government Constituency Development Fund Office at Changamwe Constituency sworn and dated 30th April, 2024 averred that:-

a. The 3rd Respondent was established vide section 4 of the National Government Constituencies Development Fund to implement the provision of Article 206 (2)(C) and 218 *Constitution of Kenya, 2010*.

b. The 3rd Respondent was a national government fund consisting of monies of an amount of not less than 2.5% (two and half per centum) of all the national government's share of revenue as divided by the annual Division of Revenue Act enacted pursuant to the provision of Article 218 of *the Constitution*;

c. The 3rd Respondent disbursed funds for the specific projects as submitted by the constituencies to the respective constituencies' bank accounts. With regard to the subject matter herein he could attest that:

i. As a Fund Manager, he was one of the signatories of the Changamwe constituency account.

ii. He held the authority to incur expenditure of the funds at the constituency account.

iii. He was aware that funds from Changamwe Constituency account were withdrawn as disbursements for particular project only in accordance with the provisions of section 5 of the National Government *Constituencies Development Fund Act* Cap 414A.

iv. He was aware that constituencies submitted project proposals for funding to the Board of the National Government Constituencies Development Funds.

v. The Act was operationalized by the Board vide section 14 which plays several role inter alia:

Board reviews the project proposals submitted from various constituencies in accordance with the Act, approved funding for those projects proposals that are consistent with this Act and, send (s) funds to the respective constituency operations account of the approved projects.

d. He could confirm that the subject matter. access road was not one of the project proposals which were submitted by Changamwe Constituency for the financial years 2017/2018.

e. The suit against the 3rd Respondent was null and void ab initio and it was his prayer that the 3rd Defendant be struck out from the proceedings for reason that;

a. It was trite law that one could not sue a fund, the proper party ought to have been the Board of the National Government Constituencies Development Funds.

b. That the Petition herein against the 3rd Respondent was incompetent, bad in law and unsustainable as provisions of *the Constitution* of Kenya 2010 and Order 1 Rule 9 of the Civil Procedure Rules did not apply herein.

c. That courts could not enforce illegalities or nullities hence rules of natural justice would only demand for the setting aside of the proceedings as well as the orders of court issued on 12th October 2023 and any other order which may have arisen from the aforementioned Judgement, as provided under Order 51 Rule 15 of the Civil Procedure Rules, 2010.

d. That upon setting aside the orders that this Honourable Court did exercises its discretion under the provision of Order 10 Rules 2 & 4 and order the 3rd Respondent be struck out from the proceedings

f. Service upon the 3rd Respondent was not properly effected:

i. That the Petitioner willingly and knowingly failed to execute service of pleadings, mention notices, Notice of Judgment date upon the Board of the National Government Constituencies Development Fund.

ii. That the Judgment issued on 12th October 2023 was therefore irregular.

iii. That the Petitioner/Respondent willingly and knowingly failed to serve the pleadings filed, the mention notices and ruling dates to the Changamwe National Government Constituency Development Fund Manager contrary to the mandatory provisions of Order 21 Rule 8 of the Civil Procedure Rules, 2010.

g. The Petition was fatally defective for non - adherence to the procedure for dispute settlement as provided under the Act and its regulations:

i. Regulation 31 of the subsidiary legislation provides the Complaint and dispute resolution process under the Act and provides that Constituency Committee shall:

ii. establish and maintain a complaints register in respect of all complaints received with regard to the operations of the Fund in the Constituency, and shall forward a status report of the complaints to the Board at the end of each quarter in a financial year.

iii. A Constituency Committee shall establish and maintain a complaints register in respect of all complaints received with regard to the operations of the Fund in the Constituency, and shall forward a status report of the complaints to the Board at the end of each quarter in a financial year. A Constituency Committee shall address all complaints made to it before forwarding the complaints to the Board.

iv. A Constituency Committee shall, as much as possible, ensure and demonstrate the effort made towards resolving a complaint at the Constituency level.

v. A Constituency Committee shall maintain a clearly marked and secured complaints submission box in accordance with guidelines issued by the Board.

vi. The Board shall issue guidelines to a Constituency Committee on mechanisms and procedures for handling complaints and litigation.

vii. Dispute settlement as provided under for the provision Section 56 of the National Government Constituency Development Fund Act provides that complaints and civil

disputes by persons arising due to the administration of the Act shall be forwarded to the Board in the first instance. In particular, Section 56 (3) stipulates:

> " Disputes of a civil nature shall be referred to the Board in the first instance and where necessary an arbitration panel whose costs shall be borne by the parties to the dispute, shall be appointed by the consensus of the parties to consider and determine the matter before the same is referred to court."

h. The Petition was devoid of merit and unenforceable as against Applicant/3rd Respondent with the orders sought since:

   a. That the 3rd Respondent is not involved in the provision or creation of access roads,

   b. or lands management and or compensation for trespassed land or anything of the nature pleaded particularly Paragraphs *16*, *17*,*18* and *19*.

   c. Restoration of alleged suit property CR 2283/1 plot No VI MN/809 to its original state was not one of the proposed development projects by the constituency of Changamwe.

i. The Petition was fatally defective for non - joinder of the office of the Hon Attorney General:-

   a. Petitioner willingly failed to serve the office of the Attorney General with the pleadings, notices and or even the Judgment notice.

   b. That it is trite law that inclusion of the Attorney General is mandated vide Article 156 (2) (b) of *the Constitution* of the Kenya 2010 which provides that:

   > " the Attorney General shall represent the national Government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings" read together Section 5 (1) (i) of the Office of the Attorney General Act which clearly provides for the functions of the office of the Attorney General among them representing the national government in all civil and constitutional matters in accordance with the *Government Proceedings Act*."

   c. That he prayed the court does find that failure to join the Attorney General as a party in the suit is contrary to the provision of Article 156 of *the Constitution* which rendered the suit fatally defective as held in case of "Maina Gitonga – Versus - Catherine Nyawira Maina & Another [2015] eKLR", where the Honourable Judge held that:-

   > " The other issue is whether failure to enjoin the Attorney General renders this application fatally defective. Wendoh J in the already cited case of Republic – Versus - Attorney General & Another was of the view that failure to make the Attorney General one of the Respondents in an application like the one before me would be fatally defective." I find that it was necessary for the Petitioner to name the Attorney General in these proceedings (in addition to naming the public body in question). In any event, in view of my findings above, I find that the Petition as drawn is defective."

j. Despite the fact that the provision of Section 21 (4) of the *Government Proceedings Act* provided immunity against execution to the Government in the normal manner, he was apprehensive that the Respondent may at any time commence execution nonetheless against the 3rd Respondent.

k. He had filed this Application without delay and it was in the interest of justice, that the application should be allowed as prayed since the 3rd Respondent; Defendant/Applicant had an arguable Defence (Reply to the Petition) and the Petitioner/ Respondent would have an opportunity to be heard on merit. Attached herewith was the Memorandum of Appearance and draft reply.

l. This application was made in the interest of justice to avoid undue hardship being occasioned upon the 3rd Respondent/ Applicant who would be condemned unheard and denied their Constitutional right to Reply to the Petition as provided the provision of Rule 15 Rule 1 Mutunga Rules as well as Article 47 of *the Constitution* of Kenya; if the orders sought herein were not granted, hence it was only fair, just and in the interest of realizing the overriding objective that this Honorable court exercises its discretion and grants the orders sought herein.

m. The affidavit was sworn in support of the application herein while relying on the attachments herein marked as a bundle in support of the orders sought.

n. This Honourable Court had jurisdiction to determine this application and a duty to see that justice is done and he prayed that the application be allowed as prayed.

IV. The Response by the Petitioner

9. The Petitioner responded to the Applications through a 10 Paragraphed Replying Affidavit sworn by Macmillan Peter Kioko, a Chairman and Pastor of the Petitioners/Applicant herein with authority on behalf of the Petitioner/Applicant on 15th June, 2024. The Deponent averred that:-

    a. On 5th March 2024 the Honorable court delivered a Ruling, whereby it found the Applicants Notice of Motion Application dated 14th November 2023 with merit and allowed it subject to the fulfillment of the pre-condition that the Applicant deposit a sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs.5,500,000/-) as security deposit for the performance of the decree from Judgment of the Honorable court in a joint Bank account of a reputable commercial bank,(copies of the ruling dated 5th March 2024 were annexed in the affidavit and produced as "MPK - 1").

    b. Under the provision of Article 202 (1) of *the Constitution*, revenue raised nationally is allocated equitably among the national and county governments. The legal instruments that elaborated how revenue was to be shared between the two levels of government is the Division of Revenue Act which is enacted yearly by parliament. Therefore, the Applicant/1st Respondent has the capacity to pay without any major issues.

    c. Further, the 1st Respondent/ Applicant under Article 202(2) of *the Constitution* is at liberty to request and be allocated from the national government's share of revenue, either conditionally or unconditionally.

    d. The Applicant was trying to mislead this Honourable court by indicating that they did not have monies to be paid as security for cost on the stay of application, the same having been allocated the same.

e. It was in the interest of justice and fairness that the orders issued on 5th March 2024 be honored.

f. The Respondent would not suffer any loss which could not be compensated by way of costs if the orders sought were granted whereas the Petitioner would be occasioned or subjected to extreme prejudice and injustice.

g. Unless the Orders sought was granted, the Petitioner would suffer irreparable damage and loss.

h. The affidavit was sworn in support of the Petitioner's application filed herewith.

V. Submissions

10. On 21st June, 2024 while all the parties were present in Court, they were directed to have the Notices of Motion applications dated 2nd April, 2024 and another dated 30th April, 2024 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and a ruling date was reserved on notice by Court accordingly.

A. The Written Submissions by the 1st Respondent/Applicant

11. The 1st Respondent/ Applicant through the County Attorney's office filed their written submissions dated 20th June, 2024. M/s. Kizingo Advocate commenced her submission by stating that the Applicant filed an Application dated 2nd April 2024 seeking this Honourable court to be pleased to vary, review and vacate its orders given in the ruling delivered on 5th March 2024 after full hearing and determination of this Application.

12. On whether the Government should deposit security for costs, the Learned Counsel sought to be allowed to digress a little bit and discuss a ruling delivered on 15th March 2024 by Justice Nixon Sifuna in the case of: "Commercial Case No. E411 OF 2023 Absa Bank Kenya Plc – Versus - Kenya Deposit Insurance Corporation". The Learned Judge note the following on his ruling:-

    27. : I find Section 13A and even Section 21 of the Act discriminatory in the sense of discriminating against ordinary litigants and giving preferential treatment to the government in Litigation. This is juridically unsupportable, as in litigation every party is equal before the law and should be treated equally. In litigation there should be neither a Goliath nor a David.

    28. To the extent its provisions make parties and equal litigation, uneven the plain field, pulls a rug under the feet of the pensively less a litigants in favour of Government entities, discriminate against non – governmental litigants, make them and equal before the law and oust them from the seat of justice, this Act is a misnomer in law.....

    31. The Acts clearly skewed to give the government, unconscionable and discriminatory comparative advantage in suits against it. Right from the filing of the suit to the execution process. It is untenable under the 2010 Constitution. Hence the Act is among the laws that were supposed to be repelled or otherwise amended but escaped the watchful eyes of parliament and law reform commission."

13. In a ruling that was delivered by Justice Oguttu Mboya on 5th April, 2024 in the case of:- "ELC Misc Appl. E138 of 2021 Prof. Tom Ojienda & Associates – Versus – Nairobi City Council and Co - Operative Bank", the Learned Judge observed the following regard to the Ruling in the case of "Commercial Case No. E411 of 2023 Absa Bank Kenya Plc – Versus - Kenya Deposit Insurance Corporation", the Court held that:-

42. The foregoing excerpts, constitutes the closest that the learned Judge in the Absa case came to making a declaration. However, there is no gainsaying that no precipitate declaration of invalidity and unconstitutionality as envisaged under Articles 2 [4] and 23 of *the Constitution* 2010; was made, proclaimed and/or decreed, whatsoever.

44. For coherence, the matter relates to the decision rendered by a two-Judge bench of the High court in the case of Kisya Investments Limited - Versus - Attorney General & another [2005] eKLR, wherein the constitutionality of Section 21 of the *Government Proceedings Act*, Chapter 40, Laws of Kenya, was considered and dealt with.

45. For good measure, the Learned Judges of the High court in their wisdom stated and held thus;

> 'If execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and Judgments and it will be inundated with executions and attachments of its assets day in, day out. Its buildings will be attached, its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ship and boats will be attached.There will be no end to the list of likely assets to be attached and auctioned by the auctioneer's hammer. No Government can possibly survive such an onslaught. The Government and therefore, the state operations will ground to a halt and paralyzed and soon the Government will not only be bankrupt, but it's Constitutional and Statutory duties will not be capable of performance. This will lead to a chaos, anarchy and the breakdown of the Rule of Law. The two - Judge bench declined to declare the said provisions invalid and unconstitutional.

Justice Oguttu Mboya also wondered whether the import and tenor of the decision on Kisya Invetsment Limited – Versus - Attorney General & Another was brought to the attention of the Judge who rendered the decision in the ABSA bank Case and that if it had been done it would have shed some light and illuminated the legal thinking of the Learned Judge.

Finally the Learned Judge Oguttu Mboya in conclusion of the issue of unconstitutionality and invalidity of Section 21 of the *Government Proceedings Act* stated that it was erroneous on the part of the learned senior counsel to contend that the Section was declared unconstitutional vide the Ruling of the High court in the Absa Bank Case. Secondly he also stated that it is instructive to state and underscore that a declaration of unconstitutionality and invalidity must be explicit and unequivocal in line with the Provisions of Articles 2 (4) and 23 of *the Constitution* of Kenya 2010 and should not be left for anticipation, speculation and inference by all and sundry. Thirdly and for good measure, it would be prudent and just for the sake of posterity and observance of Article 10 (2) of *the Constitution* of Kenya 2010 for court (superior courts) vested with the mandate of interrogating the constitutionality or otherwise of statutes or provisions thereof to endeavor and afford the Honorable Attorney General an opportunity to address Court, whenever the question of constitutionality of an act of parliament is being considered."

14. According to the Learned Counsel back to the provision of Order 42 Rule 8 of the Civil Procedure Rules, 2010 which provides that no security to be required from the government. No security as was mentioned in Rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit of from any public officer sued in respect of an act alleged to be done by him in his official capacity.

15. The Learned Counsel submitted that the County Government was a government which relies majorly on funding from the National Government and does not have an approved budget to pay security for costs every now and then when such incidences come up in court as the same has to have been

prior budgeted for which was next to impossible. For any monies to be paid by the Applicant therefore they must have been factored in the main or supplementary budget because such payment of the surety without budgetary allocation will cause audit queries and will be against the *Public Finance Management Act* 2012.

16. The provision of Order 42 Rule 8 of the Civil Procedure Rules 2010 is clear in terms of security on the part of the government and ordering the Government to pay security will bring the same effects as discussed in the case of "Kisya Investments Ltd – Versus - Attorney General &Another (2005) eKLR" above. In the case of "Njiru Micheni Nthiga – Versus - Governor, Tharaka Nithi County Government & 5 Others (2021) eKLR", Learned Justice Yano while delivering the ruling noted that no security should be required from the government.

17. The Learned Counsel submitted that the Applicant being government should therefore not be ordered to deposit security for costs.

B. The Written Submissions by the Petitioner/Respondent

18. The Petitioner/Respondent through the Law firm of Messrs. Bennette Nzamba & Company Advocates filed their written submissions dated 20th June, 2024. M/s. Nzamba Advocate submitted that before the Honourable Court for determination was the 1st Respondent/ Applicant's Notice of Motion application dated 2nd April, 2024 seeking orders that there be stay of execution of the Ruling delivered by this Honorable Court on 5th March 2024 against the 1st Respondent/Applicant. The aforementioned application has been brought inter alia under the provisions of Order 42 Rule 8 of the Civil Procedure Rules.

19. The aforementioned Application was opposed by the Petitioner/ Respondent herein and the Petitioner/Respondent further proceeded to swear, file and serve their Replying Affidavit dated 15th June 2024 and their Submissions dated 20th June 2024 whose contents they relied on. They urged the Honourable Court to consider the same and further be persuaded by these submissions.

20. The Learned Counsel opted to rely on the issue of whether the 1st Respondent/Applicant should deposit security for costs.

21. According to the Learned Counsel, the 1st Respondent/Applicant in this suit had put in an application for stay of execution of the Ruling delivered by this Honorable Court. Rule 107(3) provide for Security for costs in civil appeal which states that the Court may at any time if it thinks fit, direct that further security for costs be given and may direct that security be green for the payment of past costs relating to the matters in question in the appeal.

22. The Learned Counsel submitted that on 5th March 2024 the Honorable Court delivered a Ruling, whereby it found the Applicants Notice of Motion Application dated 14th November 2023 with merit and allowed it subject to the fulfillment of the pre-condition that the Applicant deposit a sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs.5,500,000/-) as security deposit for the performance of the decree from Judgment of the Honorable court in a Joint Escrow Bank account of a reputable commercial bank to be held in the names of Messrs. Bennette Nzamba & Co. Advocate and the County Government of Mombasa within the next thirty days (30 days) from the delivery of the ruling failure of which the Notice of Motion application dated 14th November 2023 shall automatically stand dismissed thereof and execution of the decree shall ensue procedurally as provided for by law.

23. In the case of "ABSA Bank Kenya PLC – Versus - Kenya Deposit Insurance Corporation High Court Commercial Case No E411 of 2023" through a ruling made on 15th March 2024, Justice (Prof) Nixon Sifuna dismissed the application by KDIC, and in the same vein, pronounced the provision of Sections

13A and 21 of the Act and Order 10 Rule 8 of the Civil Procedure Rules, 2010 as unconstitutional as they impede access to justice by Claimants against the Government. Justice (Prof) Sifuna observed:-

> 'To the extent that they offend the letter and spirit of *the Constitution*, Sections 13A and 21 of the *Government Proceedings Act* are hereby declared unconstitutional. They shall henceforth remain suspended until otherwise vindicated by a higher court or resurrected by Parliament in a re - acted (sic) in a form compliant with this Constitution. This shall apply mutatis mutandis to Order 10 Rule 8 of the Civil Procedure Rules.'

24. The Learned Counsel submitted that the same Ruling Justice (Prof) Sifuna observed that the provision of Section 21 prohibits execution against the Government, However, the provision of Section 22 allows the Government to execute against individuals who lose claims against it the Honorable Justice Sifuna observed, this to be discriminatory, which the court did not hesitate to point out. In paragraph 46 of his ruling.

25. The provision of Section 21 of the *Government Proceedings Act* mandated one to obtain a certificate before executing decrees against the government. In his Judgment, Justice Sifuna held that this section did not apply to statutory corporations, like KDIC. Justice Sifuna cited, with approval the case of:- "Bob Thompson Dickens Ngobi – Versus - Kenya Ports Authority and others" which held that statutory institutions were not governmental departments as envisaged under the *Government Proceedings Act*. The effect of this is that statutory institutions were not exempt from interlocutory Judgments and execution of decrees.The provision ofSection 22 of the *Government Proceedings Act* allows the government to execute against persons who lose claims against it. This is different from Section 21 which mandates one to obtain a certificate before executing decrees against the government. Justice Sifuna termed Section 21 as discriminatory towards the regular litigant by affording the government 'preferential' treatment. In this Judgment, Justice Sifuna, notably, underscored the need to equally protect all litigants, noting that in litigation there was neither a 'David' nor 'Goliath'. This reference to the biblical David and Goliath implied that everyone was equal before the law; there was no bigger person than the other. The holding under the provision of Section 21, among others, as unconstitutional, Justice Sifuna concluded that the provision obstructs the constitutional right of access to justice and is a derailment to Kenya's constitutional achievements.

26. According to the Learned Counsel in the same Ruling in the case of "Absa Bank Kenya PLC (Supra)", the Court brought to bear the import of *the Constitution* of Kenya, 2010, in Paragraph *33* the Honorable Judge observed that:-

> 'I refuse to imagine that Kenya was unripe or unready for the ambitious reformative and transformative agenda of this Constitution. Now it is in force, its wind must blow through Kenya's entire legal system, its law, and every institution the entire Government, and every sector of the Kenyan life.'

27. The Counsel further cited the contents of Paragraphs 35 and 36 of the said Judgement, where the Court continued:-

> " This Constitution unlike its predecessor, has introduced the values and principles that should govern us as a nation. For instance, transparency and accountability. Under these two values for instance, the entire Government, Government entities and Government officers should in performing their functions and legal obligations be transparent, accountable and open to scrutiny. Government like the citizenry should obey court orders, dutifully as well as

promptly satisfy the decrees as passed by courts subject themselves uniform court processes, promote equality before the law (sic). This is the irreducible minimum."

28. The Learned Counsel contended that the Court in the case of:- "Absa Bank Kenya PLC (Supra)" was rightly concerned with holding the Government to account, the same should be done to this case. Article 202 (1) of *the Constitution* provides that revenue raised nationally shall be shared equitably among the national and county governments. The legal instruments that elaborate how revenue is and was to be shared between the two levels of government was the Division of Revenue Act which was enacted yearly by parliament; the same Article 202(2) of *the Constitution* which states that County Government may be given additional allocation from the national government's share of revenue, either conditionally or unconditionally.

29. The 1st Respondent/Applicant was trying to mislead the Honorable court by indicating that they did not have monies to be paid by the Applicant yet they must have been factored in the main supplementary budget and such payment of the surety without budgetary allocation yet the county Government was allocated for money. According to the Learned Counsel, the application dated 2nd April, 2024 lacked merit and the same was merely intended to deny the Petitioner immediate access to the fruits of their Judgment. The 1st Respondent/Applicant had failed to demonstrate the manner and nature of loss that they stand to suffer.

30. The Learned Counsel herein submitted that the Ruling delivered by this Honorable Court herein was valid and lawful and the same should be allowed to stand. The Learned Counsel indicated that the Applicant Application sought to defeat the Courts principal objective which was to facilitate the just and expeditious and proportionate resolution of disputes and further it was intent on delaying it from enjoying the fruits of its judgment.

31. In conclusion the Learned Counsel averred that the Applicant sought to defeat the Courts principal objective which was to facilitate the just and expeditious and proportionate resolution of disputes and further it was intent on delaying Petitioner/Respondent from enjoying the fruits of their Judgment.

C. The Written Submissions by the 3rd Respondent

32. The 3rd Respondent through the Senior State Counsel filed their written submissions dated 2nd July, 2024. M/s. Mwanaszumbah Advocate submitted that the Applicant herein filed a Notice of Motion Application dated 30th April, 2024 and supported by the Affidavit of Mr. Abdulhakim Ali, the Fund Account Manager at the National Government Constituency Development Fund Office at Changamwe Constituency, seeking the setting aside of the Judgment dated 12th October, 2023.

33. The application had been brought under the provision of Article 50 of *the Constitution*, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, and Orders 10 Rule 11, 12 Rule 7 and 51 Rule 15 of the Civil Procedure Rules, which vest this Honourable court with jurisdiction to set aside or vary a judgment and any consequential decree or order upon such terms as are just. The grounds upon which the application was based were as follows:-

    i. That the 3rd Respondent/Applicant was never served with the summons in this suit or notice of institution of petition, neither was it served with any hearing notices or mention dates nor any interlocutory Judgment that was entered against it or the Judgment notice to enable it appear and defend the suit contrary to the mandatory provisions of Rule 14(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013;

ii. That the suit against the 3rd Respondent/Applicant was a non-starter and a nullity in law as the proper party to be sued was the Board of the National Government Constituency Development Fund; and

iii. That the 3rd Respondent/Applicant was willing and able to defend this suit and should be granted an opportunity to have its case heard before this Honourable Court. The Learned Counsel referred Court to the decision of the Supreme Court in where it stated:-

34. In my humble view, those rules of engagement that prompt the hearing and disposal of a suit cannot be mere procedural technicalities contemplated by Article 159 (2) (d) of *the Constitution* of Kenya, 2010 and or the overriding objectives espoused in sections 1A and 1B of the *Civil Procedure Act*.

35. As was held in the case of Nicholas Kiptoo Arap Korir Salat – Versus - IEBC & 6 Others [2013] eKLR by Kiage JA, Courts must never provide succor and cover to parties who exhibit scant respect for rules and timelines which make the process of judicial adjudication and determination fair, just, certain and even - handed...." The Supreme Court in the case of Raila Odinga & 5 Others – Versus - IEBC & 3 Others Petition 5/2013 SC [2013] eKLR, also held that Article 159 (2) (d) of *the Constitution* is not a panacea for all procedural shortfalls, ...it is plain to us that Article 159 (2) (d) is applicable on a case to case basis."

38. A summons is a judicial document calling upon the defendant to submit to the jurisdiction of the court and if the party is not given that opportunity to so appear and either defend or admit the claim, how else would that party submit to the jurisdiction of the court."

34. It was the humble view of the Learned Counsel that there was no proper service of the summons or any other court process with regards to this case on the National Government Constituencies Development Fund Board.

35. The right to a fair hearing which is guaranteed under the provision of Article 50 (1) of *the Constitution* encompasses several aspects. These include, a party being informed of the case against them; being given an opportunity to present their side of the story or challenge the case against them; and the party having the benefit of a public hearing before a court or other independent and impartial body. In this case, the National Government Constituencies Development Fund Board was denied a right to a fair hearing by not being served with the summons or any other court process to be able to present its side of the story or challenge the case against it.

36. The Learned Counsel referred Court to the provision of Order 10 rule 11 of the Civil Procedure Rules, the court has unfettered discretion to set aside Judgment on such terms as it deems fit and just. The court in the case of: "Agigreen Consulting Corp Limited – Versus - National Irrigation Board [2020] eKLR" referred to the case of "James Kanyiita Nderitu & Another – Versus - Marios Philotas Ghikas & Another [2016] eKLR", where the Court of Appeal explained the nature and effect of an irregular judgment as follows:-

> "In an irregular default Judgment, on the other hand, Judgment will have been entered against a Ddefendant who has not been served or properly served with summons to enter appearance. In such a situation, the default Judgment is set aside ex - debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the Judgment is irregular; it can set aside the default

c) The National Government Constituencies Development Fund Board is willing to defend the suit against it”

37. It was the Learned Counsel’s assertion that should this Honourable Court find in favour of the Petitioner, the National Government Constituencies Development Fund Board was willing to defend the suit against it. The Petition as is, was devoid of merit against the Applicant with regards to the National Government Constituencies Development Fund Board on grounds that:

    a. The National Government Constituencies Development Fund Board was not involved in the provision or creation of access roads;

    b. The National Government Constituencies Development Fund Board was not involved in land management or compensation for trespassed land or anything in the nature pleaded particularly in Paragraphs 16-19;

    c. The National Government Constituencies Development Fund Board never collected land rates;

    d. Restoration of alleged suit property to its original state was not one of the proposed development projects by Changamwe Constituency.

38. Therefore, according to the Learned Counsel, it was in the interest of justice and in fulfilment of the overriding objective for the suit against the 3rd Respondent/ Applicant to be struck out with costs.

VI. Analysis and Determination

39. I have carefully read and considered the pleadings herein, the written submissions and the myriad of authorities by the Learned Counsels, the relevant provisions by *the Constitution* of Kenya, 2010 and the statures. In order to arrive at an informed, fair and reasonable decision, the Honorable Court has framed five (5) following issues for its determination. These were:-

    a. Whether the Notice of Motion dated 2nd April, 2024 seeking orders to vary, review and vacate its orders given in the ruling delivered on 5th March, 2024 is merited.

    b. Whether the ex – parte proceedings and Judgment entered against the 3rd Respondent herein on 12th October, 2023 be varied and set aside and the proceedings re-opened to grant the 3rd Respondent leave to participate in the proceedings and Reply to the Petition attached in the Notice of Motion application dated 30th April, 2024 be deemed as duly filed.

        c. Whether the 3rd Respondent/ Applicant through its Notice of Motion application dated 30th April, 2024 has met the threshold for a grant of temporary injunction against the Petitioner/ Respondent under Order 40 Rule 1 of the Civil Procedure Rules, 2010.

    d. Whether the 3rd Respondent should be struck out as a party in this suit for wrongfully being joined.

    e. Who will bear the Costs of Notice of Motion applications dated 2nd April, 2024 and 30th April, 2024.

Issue No. a). Whether the Notice of Motion dated 2nd April, 2024 seeking orders to vary, review and vacate its orders given in the ruling delivered on 5th March, 2024 is merited.

40. Under this sub – title, the main substratum whether the Honourable Court may grant the orders for the is review and/or vary its own Judgement. To respond to this squarely, the Honourable Court will

discuss and examine the rules for review and the orders the Applicant seeks to review. The provision of the law that govern tgis aspect are founded under the provision of Section 80 of the *Civil Procedure Act*, Cap. 21 and Order 45 Rule 1 of the Civil Procedure Rules, 2010. Under these provisions of the Law, the court may review its decision, inter alia: - on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

41. Specifically, 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."

42. Further, 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."

43. It presupposes that the aggrieved party has not preferred any appeal from the decision they wished to have a review on. Briefly, and prior to proceeding further, the Honourable Court wishes to extrapolate on a few case law on this subject matter. In the "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."

44. Additionally, in the case of "Sarder Mohamed – Versus - Charan Singh Nand Sing and Another (1959) EA 793" where the High Court held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.

45. Broadly speaking, in the case of "Republic – Versus - Public Procurement Administrative Review Board & 2 others [2018] e KLR" it was held: -

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

46. 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.

47. 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) – Versus - 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."

48. It is on record that the Applicant argues the Honourable Court delivered a ruling on 5th March, 2024, whereby it found the Applicant's Notice of Motion application dated 14th November, 2023 with merit and allowed it subject to the fulfilment of the pre – condition that the Applicant deposit a sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs 5,500,000/-) as security deposit for the performance of the decree from the Judgment of the Honourable Court in a joint escrow bank account of a reputable commercial bank to be held in the names of Messrs. Benette Nzamba & Co. Advocates and the County Government of Mombasa within the next thirty days (30) days from the delivery of the ruling failure of which the Notice of Motion application dated 14th November, 2023 shall automatically stand dismissed thereof and execution of the decree shall ensue procedurally as provided for by the law.

49. According to the Applicant there was an error apparent on the face of the record whereby the Honourable Court inadvertently made mistake contrary to Order 42 Rule 8 of the Civil Procedure Rules 2010 which stated that:-

> " No such security as is mentioned in Rule 6 and 7 shall be required from the Government or where the Government has undertaken the defense of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity."

50. According to the Applicant it was not practically possible for the Applicant to deposit a sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs 5,500,000/-) as security deposit for the performance of the decree from the Judgment of the Honourable Court in a joint escrow bank account of a reputable commercial bank to be held in the names of Messrs. Bennette Nzamba & Co. Advocates and the County Government of Mombasa within the next thirty days (30) days from the delivery of the ruling because the Applicant who is a government official relied majorly on funding from the National Government and did not have an approved budget for the same.

51. Further in its submissions, the Applicant averred that the County Government was a government which relies majorly on funding from the National Government and does not have an approved budget to pay security for costs every now and then when such incidences come up in court as the same has to have been prior budgeted for which was next to impossible. For any monies to be paid by the Applicant therefore they must have been factored in the main or supplementary budget because such payment of the surety without budgetary allocation will cause audit queries and will be against the *Public Finance Management Act* 2012.

52. The Petitioner/ Respondent on the other hand told the court that section 21 prohibits execution against the Government, however, section 22 allows the Government to execute against individuals who lose claims against it the Honorable Justice Sifuna observed, this to be discriminatory, which the court did not hesitate to point out. In paragraph 46 of his ruling. The 1st Respondent/Applicant was trying to mislead the Honorable court by indicating that they did not have monies to be paid by the Applicant yet they must have been factored in the main supplementary budget and such payment of the surety without budgetary allocation yet the county Government was allocated for money. According to the Learned Counsel, the Application date 2nd April, 2024 lacked merit and the same was merely intended to deny the Petitioner immediate access to the fruits of his judgment. The 1st Respondent/Applicant had failed to demonstrate the manner and nature of loss that they stand to suffer.

53. In the case of: "Mombasa County Government – Versus - Pauline Wanjiku Kageni [2017] eKLR" the court held;

20. The last point of argument was on the requirement for the applicant to deposit security in this matter. Counsel for the respondent referred the court to the supporting affidavit of the applicant's deponent, Mr. Jimmy Waliaula in paragraph 10 where he states the applicant is ready and willing to furnish security as shall be directed by the Honourable court pending the hearing of this appeal. As such, Mr. Gikandi sought the deposit of the entire decretal amount either in court or in a joint bank account opened in the names of the law firms on record. The provisions of Order 42 rule 8 of the Civil Procedure Rules states: -

"No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to have been done by him in his official capacity."

54. In the case of:- "County Government of Kilifi – Versus - Robinson Onyango Malombo t/a O.M. Robinson Advocates [2018] eKLR" the court held;

9. This brings into question whether, therefore, a County Government is protected from the requirements of Order 42 Rules 6 and 7 of the Civil Procedure Rules thereof. Order 42 rule 8 of the Civil Procedure Rules provides as follows;

"No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity".

The upshot of the discussion is that the requirement for the deposit of security does not apply to County Government.

55. It is evident from the various authorities that the position in law is that no orders for deposit of security shall issue against the government and this includes the county government. I do agree with the applicant that the error is an error of law, capable of ascertainment. It is ascertainable that the error on record is that of requiring the government deposit security.

56. Nonetheless, I have taken Judicial notice that the Applicant seem to have instituted both the appeal and tat the same time sought for review. Indeed, the averments by the Learned Counsel M/s. Elizabeth Kisingo, dated 2nd April, 2024 deponed as follows:-

"The Applicant had already filed an Appeal in the Court of Appeal and was currently awaiting directions on the same being Appeal No. COACA E204 of 2023 filed on 5th December, 2023 a fact which was not in Courts knowledge as at the time of delivering the Ruling dated 5th March, 2024. Attached and Marked as "EK - 2" was a Photostat of the 1st to 3rd pages of the Record of Appeal.

57. This is not a procedural technicalities under the provision of Article, 159 (2) (e) of *the Constitution* of Kenya, 2010. It is a case of "Eating the cake and having it!". One can never have both whatsoever. Clearly, their legal remedy lies before the Court of Appeal where they submitted themselves to and no longer before this Court which has become "functus officio" on this regard. In the premises the Notice of Motion application dated 2nd April, 2024 be and is hereby found to lack merit and thus dismissed with no order as to costs.

ISSUE No. b). Whether the ex – parte proceedings and judgment entered against the 3rd Respondent herein on 12th October, 2023 be varied and set aside and the proceedings re-opened to grant

the 3rd Respondent leave to participate in the proceedings and Reply to the Petition attached in the Notice of Motion application dated 30th April, 2024 be deemed as duly filed.

58. Under this sub – title the court shall examine whether the Applicant has made out a case for the setting aside of the ex – parte proceedings and ex - Parte Judgment delivered on 12th October, 2023. The jurisdiction of the court to review and set aside its decisions is wide and unfettered. In "Shah – Versus - Mbogo and Another [1967] EA 116" the Court of Appeal of East Africa held that:-

> " This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

59. The provisions of law with regards to setting aside ex parte orders are to be found under Order 12 Rule 7 of the Civil Procedure Rules provides:-

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

60. Further the provision is buttressed by Order 51 Rule 15 of the Civil Procedure Rules which provides:-

> " The court may set aside an order made ex parte."

61. The Court has discretion to set aside or not to set aside an ex parte judgment. Such discretion must be exercised judiciously. In deciding whether to set aside or not, the Court is guided by the decision of the Court of Appeal in the case of "James Kanyiita Nderitu & Another [2016] eKLR", where the court of Appeal stated thus: -

> " From the outset, it cannot be gainsaid that a distinction has always existed between a default Judgement that is regularly entered and one which is irregularly entered. In a regular default Judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default Judgment. Such a Defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default Judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default Judgment, and will take into account such factors as the reason for failure of the defendant to file his Memorandum of Appearance or defence, as the case may be; the length of time that has elapsed since the default Judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See Mbogo & Another –Versus - Shah (1968) EA 98, Patel –vs- E.A. Cargo Handling services Ltd (1975) E.A. 75, Chemwolo & Another – Versus - Kubende (1986) KLR 492 and CMC Holdings –Versus - Nzioka [2004] I KLR 173.
>
> In an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default Judgment is set aside ex debito justiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the Judgment is irregular; it can set aside the default Judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the

> irregular Judgment. The reason why such Judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."

62. However, before the court can set aside its ex-parte decision or proceedings, it is trite law that it must consider a few issues. Firstly, whether the applicant has any Defence which raises triable issues. In the case of "Patel – Versus - East Africa Cargo Handling Services Ltd (1974) EA 75" Duffus P. held that:-

> " The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular Judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as SHERIDAN J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

63. Secondly, the Honourable Court will consider whether there was proper service of the pleadings upon the Respondents by the Applicant as provided for under the provision of Order 5 of the Civil Procedure Rules or Rule……….of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. These processes entail either personal or through substituted means with the leave of Court. In all these there has to be an affidavit of service proving the said the service and by a duly appointed and Licensed Process Server. With the above in mind, the Court will proceed to make a determination on whether there is sufficient cause to set aside the Ex parte Judgment herein.

64. The 3rd Respondent/Applicant herein contended that service upon the 3rd Respondent was not properly effected with the Petitioner willingly and knowingly failing to execute service of pleadings, mention notices, notice of Judgment date upon the Board of the National Government Constituencies Development Fund; which the Court has confirmed to the fact that indeed the Board was not served as there is no Affidavit of Service to that effect. There are affidavits of service which however do not indicate how the Process server was able to Identify the person they served.

65. According to the 3rd Respondent it was never served with the summons in this suit or notice of institution of petition, neither was it served with any hearing notices or mention dates nor any interlocutory judgment that was entered against it or the Judgment notice to enable it appear and defend the suit contrary to the mandatory provisions of Rule 14 (1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. In the absence of proper service, the Court finds and holds that there is no regular Judgment on record.

66. Assuming there was a regular Judgment on record, the Court would still be called upon to determine whether there was sufficient cause, whether the Application is brought without undue delay and whether there is a triable Response on record. The application dated and filed on 30th April, 2024. However the 3rd Respondent has not stated the exact date that it became aware of the Judgment. The Court has perused the Replying Affidavit/Response to the Petition and finds the same raises triable issue as the same will shade more light to the dispute at hand and the correct position when it comes to the suit property. Therefore, this Court finds and holds that the 3rd Respondent/Applicant has met the threshold for setting aside of the Ex - Parte Judgement, that was delivered by this Court on 12th March, 2023.

ISSUE No. c). Whether the 3rd Respondent/ Applicant through its Notice of Motion application dated 30th April, 2024 has met the threshold for a grant of temporary injunction against the Petitioner/ Respondent under Order 40 Rule 1 of the Civil Procedure Rules, 2010.

67. The main substrata of the application here is rather straight forward. It is on whether to grant interim injunction orders or not. The application herein is premised under Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows:

Order 40, Rule 1

Where in any suit it is proved by affidavit or otherwise—

a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

68. The principles applicable in an application for an injunction were laid out in the celebrated case of "Giella – Versus - Cassman Brown Company Limited 1973 EA 358", where it was stated:-

> " First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

69. The three conditions set out in "Giella (supra)", need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- "Nguruman Limited – Versus - Jan Bonde Nielsen &2 Others *CA No. 77 of 2012* (eKLR 2014)",

> " These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between".

70. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in MRAO Limited – Versus - First American Bank of Kenya Ltd & 2 others (2003) KLR 125,

> " So what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

71. As the Court previously observed in this ruling, the 3rd Respondent/ Applicant averred that the Honourable Court should issue an order restraining the Petitioner/Respondent from commencing execution proceedings in whatever form arising from the ex-parte proceedings and judgment dated 12th October 2023 and or any other consequential decrees or orders made thereto pending the hearing and final determination of this suit. According to the Applicant, courts cannot enforce illegalities or a nullities hence rules of natural justice would only demand for the setting aside of the proceedings as well as the orders of court issued on 12th October 2023 and any other order which may have arisen from the aforementioned judgement, as provided under Order 51 rule 15.

72. In the case of "Mbuthia – Versus - Jimba credit Corporation Ltd 988 KLR 1", the court held that;

> " In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party's cases."

73. Similarly, in the case of "Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Limited" the court held that:-

> " In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria."

74. In the present case, the execution of the orders issued on 12th March, 2023 may be commenced therefore threatening the rights of the Applicant for stay of proceedings and any other further action pending hearing and determination of the Petition. This first condition though, the Applicant has demonstrated a prima facie case with a probability of success at the trial as enunciated in the case of "Giella -Versus - Cassman Brown & Co. Ltd (Supra)".

75. The court has further considered the evidence on record against the second principle for the grant of an injunction, that is, whether the Applicant might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. With regards to the second limb of the Court of Appeal in "Nguruman Limited (supra)", held that,

> " On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by

which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

76. On the issue whether the Applicant will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. A Court had to ensure justice is seen to be done and the Court processes are not abused. The judicial decision of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR" provides an explanation for what is meant by irreparable injury and it states;

> " Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

77. Quite clearly, the Applicant would not be able to be compensated through damages as it has shown the court that their rights would be done away with if the Petitioner proceeds with the execution of the judgment and subsequent orders issued on 12th March, 2023. The Applicant has therefore satisfied the second condition as laid down in "Giella's case".

78. Thirdly, the Applicant has to demonstrate that the balance of convenience tilts in their favour. In the case of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (Supra)" which defined the concept of balance of convenience as:

> " The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.
>
> In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

79. In the case of "Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR", the court dealing with the issue of balance of convenience expressed itself thus:-

> " Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an

injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

80. The balance of convenience tilts in the favour of the 2nd Respondent/ Applicant. The decision of "Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR" where the learned judge offered further elaboration on what is meant by "balance of convenience" and stated;-

> " The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice."

81. In this case, the balance of convenience tilts to the Applicants as the legal proprietors of the suit property. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the claim of the Applicant.

82. In the case of:- "Robert Mugo wa Karanja – Versus - Ecobank (Kenya) Limited & Another [2019] eKLR" where the court in deciding on an injunction application stated;

> " circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts…"

83. I am convinced that if orders of temporary injunction are not granted herein, the resultant effects of the same might be catastrophic. In view of the foregoing, I find that the Applicants have met the criteria for grant of orders of temporary injunction.

84. Therefore, I discern that the Application by the Applicants dated 30th April, 2024 by the 3rd Respondent herein is meritorious and hereby allows it entirely.

Issue No. d). Whether the 3rd Respondent should be struck out as a party in this suit for wrongfully being joined.

85. Under this sub – title the 3rd Respondent has invited me to strike it out of the suit for having been wrongfully enjoined to this suit. With regard to joinder of parties. The fundamental issue here is what are the legal effect of a Misjoinder or Non – Joinder of parties in a suit? The provision of Order 1 Rule 9 of the Civil Procedure Rules, 2010 states as follows"

> " No suit shall be defeated for misjoinder or non-joinder of parties and requires that the court deals with the matter in controversy, so far as regards the rights and interests of the parties actually before it.
>
> On the other hand, the provision of Order 1 Rule 10 (2) of the Civil Procedure Rules also provides that: -
>
> "The court may at any stage of the proceedings, either upon or without the application of either part, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendants, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or

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

86. From the legal passages above, it is clear that the court may on its own motion or on application of any party to the proceedings order the striking out of a party, who the court finds was improperly joined. In the exercise of that discretion, the court must as a matter of cause, act according to judicious reason and fairness and not according to its whims and caprice. The power to strike out a party from a suit should be approached with caution. This court has to assess whether or not there is a prima face case against the 3rd Respondent.

87. Thus, I am of the considered view that whether or not the 3rd Respondent is integral in this matter is a question that cannot be determined at this juncture. The appropriate stage would be during a full trial. In other words, I think that to ascertain this at this stage the court would be required to go into the rigorous exercise of trying to determine whether the Plaintiff has a proper case against the 3rd Respondent by assessing the evidence in place. Thus, in my view it is premature to make such a decision at this stage as evidence can only be tendered at the trial. I am of the view that the merits and demerits of the claims against the 3rd Respondent cannot be summarily decided through this application.

88. In so holding, I am guided by the wise words of Madan. J.A in the case of "DT Dobie and Company (K) Ltd – Versus - Joseph Mbaria Muchina & Another (1982) KLR 1" wherein he stated that-;

> " The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case."

89. Further I am of the opinion that whether or not the 3rd Respondent is liable for the purported action that it is being accused of should essentially be controverted by way of a response which the 3rd Respondent has already attached in the Notice of Motion application dated 30th May, 2024. For this reason, therefore, I decline the 3rd Respondent's prayer 2 to strike them out of the Petition.

Issue No. d). Who will bear the Costs of Notice of motion applications dated 2nd April, 2024 and 30th April, 2024

90. 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 Laws of Kenya 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 – Versus - Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers – Versus - 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.

91. In the case of "Hussein Muhumed Sirat – Versus - 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.

In the present case, the Honourable Court elects to have the costs in the cause.

VII. Conclusion and Disposition

92. In the long run, having intensively and thoroughly deliberated on all the framed issues herein, this Honorable Court arrives at the finding that the Petitioner has not succeeded and the Court therefore pronounces itself as follows:-

    a. THAT the Notice of Motion application dated 2nd April, 2024 be and is hereby found to lack merit and thus it is dismissed in its entirety.

    b. THAT the Notice of Motion application dated 30th April, 2024 be and is hereby found to have merit and the same is allowed save for prayer 2 of the Application.

    c. THAT the ex-parte proceedings as against the 3rd Respondent, ex - Parte Judgement dated 12th October 2023 entering Judgement against the 3rd Respondent/ Applicant in the sum of a sum of Kenya Shillings Twenty Seven Million One Hundred and Fifty Thousand (Kshs. 27,150,000/-) jointly with the other Respondents be varied and/or set aside and; the proceedings do re-open, the 3rd Respondent be granted leave participate in the proceedings and the Reply to the Petition attached herewith be deemed as duly filed.

    d. THAT the 3rd Respondent herein to have 14 days leave to file and serve further responses to the Petition while the Petitioners shall have 14 days corresponding leave to file and serve any further documents responding to any new issues raised if necessary.

    e. THAT for expediency sake, the hearing of the Petition as regards the 3rd Respondent to be heard on 6th May, 2025.

    f. THAT each party to bear their own costs.

    IT IS SO ORDERED ACCORDINGLY.

RULING DELIVERED THROUGH THE MISCROFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 17TH DAY OF JANUARY 2025.

HON. MR. JUSTICE L.L NAIKUNI

ENVIRONMENT AND LAND COURT

AT

MOMBASA

Ruling delivered in the presence of:-

M/s. Firdaus Mbula – the Court Assistant

No appearance for the Petitioner/Respondent.

M/s. Kuria Advocate for the 1st Respondent.

No appearance for the 2nd and 3rd Respondents.