



REPUBLIC OF KENYA



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Mwanthi (Suing On Behalf of Himself and on Behalf of the 850 Members of the Mtongwe Beach Management Unit Members) v Kenya Ports Authority & 3 others (Environment and Land Petition E011 of 2024) [2025] KEELC 5650 (KLR) (28 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5650 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND PETITION E011 OF 2024

LL NAIKUNI, J

JULY 28, 2025

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF ENFORCEMENT OF
FUNDAMENTAL RIGHTS & FREEDOMS UNDER ARTICLES 22,23,27,28,35,36, 40 (3) (B)
OF THE INDIVIDUAL AS ENSHRINED UNDER THE CONSTITUTION OF KENYA (2010)**

=AND=

**IN THE MATTER OF: ARTICLES 10(1) (B), 19(2), 20,21 OF THE
CONSTITUTION THE REPUBLIC OF KENYA 2010 & RULES 2,4,8, 11
OF THE CONSTITUION OF KENYA (PROTECTON OF RIGHTS AND
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES,2013**

=AND=

**IN THE MATTER OF: ARTICLES 1, 7, 8 AND 25 (1) OF THE
UNIVERSAL DCLARATION OF HUMAN RIGHTS (1948)**

=AND=

**IN THE MATTER OF: ARTICLES 6, 7(A) (II) & 11 OF THE INTERNATIONAL
CONVENTION ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (1978)**

=AND=

**IN THE MATTER OF: INFRINGEMENT OF THE PETITIONERS'
RIGHT OF FREEDOM FROM DISCRIMINATION AS
ENSHRINED UNDER ARTICLE 27 OF THE CONSTITUTION**

=AND=

**IN THE MATTER OF: INTERNATIONAL LABOUR
ORGANIZATION WORK IN FISHING CONVENTION (2007)**

=AND=

**IN THE MATTER OF: ARTICLES 1, 10, 14, 15, 35 AND 36 OF THE
BANGKOK STATEMENT ON SMALL SCALE FISHERIES (2008)**



=AND=

IN THE MATTER OF: SECTIONS 3, 12 (2) (A), (B), 12 (3) AND 62 OF THE
KENYA PORTS AUTHORITY ACT CAP 391 OF THE LAWS OF KENYA

=AND=

IN THE MATTER OF: SECTIONS 3, 12 (2) (A), (B), 12 (3) AND 62 OF THE
KENYA PORTS AUTHORITY ACT CAP 391 OF THE LAWS OF KENYA

=AND=

IN THE MATTER OF: SECTION 4 OF THE
FISHERIES ACT CAP 378 OF THE LAW OF KENYA

BETWEEN

FREDRICK KIOKO MWANTHI (Suing ON BEHALF OF HIMSELF AND
ON BEHALF OF THE 850 MEMBERS OF THE MTONGWE BEACH
MANAGEMENT UNIT MEMBERS) APPLICANT

AND

KENYA PORTS AUTHORITY 1ST RESPONDENT

MINISTRY OF AGRICULTURE, LIVESTOCK AND FISHERIES 2ND
RESPONDENT

DEPARTMENT OF FISHERIES, COUNTY GOVERNMENT OF
MOMBASA 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

RULING

I. Introduction

1. This Honorable Court is tasked to make a final determination onto the Notice of Motion application dated 28th November, 2024 by the Fredrick Kioko Mwanthi (Suing on behalf of himself and on behalf of the 850 members of the Mtongwe Beach Management Unit Members), the Petitioners/Applicants. The Application was brought under the dint of Order 45 Rule 1, Order 51 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3, 3A, 63(e), and 80 of the *Civil Procedure Act*, Cap. 21, Article 159 (2) (d) of *the Constitution* of Kenya, 2010 and all other enabling provisions of the law.

II. The Applicant's case

2. The Applicant sought for the following orders:-
 - a. The Honourable Court be pleased to review its ruling and set aside the orders issued by the court (Honourable Justice L. L. NAIKUNI) on 24th October, 2024 based on the apparent errors on the face of the record.
 - b. The Honourable Court be pleased to reinstate interim orders issued on 29th April, 2024.



- c. The Honourable Court be pleased to set down the Petition herein for inter parties hearing expeditiously.
 - d. Court be pleased any further reliefs in the interest of justice.
 - e. The costs of this Application be provided for.
3. The application herein was premised on the grounds, testimonial facts and averments made out under the 23 Paragraphed Supporting Affidavit of – Fredrick Kioko Mwanthi, the Petitioner/ Applicant herein. He averred that:-
- a. The 3rd Respondent herein filed a notice of Preliminary objection to this suit dated 3rd June, 2024. Attached in the affidavit was a copy of the preliminary objection and marked as annexure “FK – 1”.
 - b. On 24th October, 2024, the Honourable Court delivered a ruling staying the suit herein in its entirety and by extension discharged the interim reliefs that were stopping the Respondents from disbursing funds to selected few members affected by the Dongo Kundu project which had left out the Petitioners herein, and yet they were equally affected. Attached in the affidavit was a copy of the Ruling and marked as annexure “FK – 2”.
 - c. The Honourable Court erred in its ruling by stating that there were no any responses to counter the Preliminary objection raised by the 3rd Respondent. The Ruling read in part, inter alia:-
 - “2. Upon service of the objection to the Petitioner, there was no response filed to counter the Notice of preliminary objection.”
 - d. The Honourable Court’s finding was in error because their Advocates filed their submissions in opposition to the Preliminary Objection raised by the 3rd Respondent way before the 3rd Respondent filed its submissions in support of the objection.
 - e. The Court misdirected itself on the matter noting that the responses were required to counter the objection, yet preliminary objections were normally preserved for question of law which were argued through submissions, either oral or written.
 - f. The submissions by the Petitioners were available on the Judiciary CTS dated 28th June, 2024 filed on 1st July, 2024 at 06:07:48 Attached in the affidavit was a copy of the Petitioner’s submissions filed online and mark as annexure “FK – 3”.
 - g. The Court had ordered that the Applicants to the objection to file its submissions to the objection before the rest of the parties, but the 3rd Respondent delayed so much in filing its submissions in support of its objection. It only filed the said submissions on 3rd July, 2024 at 04:07:59 after the Petitioner had filed its submissions in opposition. Attached on the affidavit was a copy of the 3rd Respondent’s submissions filed online and marked as annexure “FK – 4”.
 - h. The rest of the parties never filed their written submissions either in support or opposition of the objection as ordered by court.
 - i. This was a genuine oversight on the part of the court which merits to be reviewed.
 - j. Indeed, the Honourable Court went on to rule that the current Petition was “sub judice”: - to the suit “HCC NO. E013 OF 2024; Mwacheti Suleiman Sumuni & Others (suing on behalf



of themselves and on behalf of the 850 members of the Mtongwe Beach Management Unit Members Mombasa); without having any material being placed before it to indicate whether the suit really existed or not. As such the court did not take time to appreciate the veracity of the assertions in the Preliminary Objection and to what extent were the two suits similar if at all.

- k. The Objection raised by the 3rd Respondent was a matter that required cogent evidence to support the allegations and an analysis be done by comparing the two suits which would require a full hearing and as such the court erred by dismissing the whole Petition in limine through a preliminary Objection which did not accord parties an opportunity to adduce evidence but restrict them to points of law.
- l. Without any evidence to prove the allegations raised in the objection and a clear distinction drawn for the court, it was erroneous for the court to proceed to find the suit sub - judice.
- m. The Honourable Court was a neutral arbiter which never descends in the arena and should only consider evidence availed before it.
- n. The immediate consequences of the stay of the Petition and lifting of the interim reliefs had left the Deponent and the rest of the parties affected by the Dongo Kundu project exposed and vulnerable risking to lose their rights to compensation as other parties affected by the project.
- o. The 3rd Respondent acted in bad faith because even after attending court for the Ruling in the absence of the rest of the parties, it never notified the rest of the parties of the ruling. It was his Advocates who only came to learn about its existence through the updated from CTC calendar hence the delay in filing of this Application.
- p. The Applicant and the people the Applicant represented were a disappointed lot who were now at the brink of losing hope after their Petition was stayed as a result of an oversight on the part of the Court.
- q. The provision of Order 45 Rule 1 of the Civil Procedure Rules, 2010 envisages a scenario where a party aggrieved with an order of the Court to review the ruling and give the Petition a chance to be heard on its merits.
- r. No prejudice would be suffered by the Respondents in this suit since the compensations ought to be made to all the parties affected by the Dongo Kundu project and not just the selected few.
- s. Allowing this Application would help resolve the issues between the Parties herein in its entirety since parties would be accorded an opportunity to adduce evidence before a determination reached on merits.
- t. The orders issued on 24th October, 2024 had left this suit in limbo with their fate left uncertain and they were by extension exposed to imminent loss of their share of the compensation of the Dongo Kundu Project.
- u. The Applicant had faith and hope that the Honourable Court would favour and reason to review its ruling so that their Petition was not left to die prematurely.
- v. The Application was instituted in good faith in the best interest of justice.

III. Submissions

- 4. While all the parties were present in Court, they were directed to have the Notice of Motion application 28th November, 2024 be disposed of by way of written submissions. Unfortunately, by the time of penning down the Ruling the Honourable had not been able access the submission from the Judiciary



CTS nor the Court file. Pursuant to that the Honourable Court delivery the ruling on 28th July, 2025 by the Honourable Court accordingly.

IV. Analysis & Determination.

5. I have carefully read and considered the pleadings herein by the Applicant, the filed written submissions together with 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 dated 28th November, 2024 seeking to set aside/ review orders issued on 24th October, 2024 by this Honourable Court is merited?
 - b. Who will bear the Costs of Notice of Motion application dated 28th November, 2024.

ISSUE No. a). Whether the Notice of Motion application dated 28th November, 2024 seeking to set aside/ review orders issued on 24th October, 2024 by this Honourable Court is merited.

7. Under this sub – heading, the main substratum of this application is for the review, setting aside and/ or varying of this Court’s ruling delivered on 24th October, 2024. The application by the Applicant was brought under the provisions of Section 80 (a) of the Civil Procedure Act, Cap. 21 and Order 45 (1) of Civil Procedure Rules, 2010. A clear reading of these provisions indicates that the provision of 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: -
 - 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 – 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.”

11. 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. 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.”

12. 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.
13. 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.”
14. Now turning to the instant case. The Applicant argues that on 24th October, 2024, the Honourable Court delivered a ruling staying the suit herein in its entirety. Further, that in essence it discharged the interim reliefs that were stopping the Respondents from disbursing funds to selected few members affected by the Dongo Kundu project. Ideally, he averred that the said orders by this Court, had left out the Petitioners herein yet they were equally affected. Primarily, the Learned Counsel submission was based on one single issue – to wit that the Honourable Court erred in its ruling in noting that there were no responses to counter the Preliminary objection raised by the 3rd Respondent. He held that, the Ruling read in part by stating that upon service of the objection to the Petitioner, there was no response filed to counter the Notice of Preliminary Objection. According to the Counsel, this was an error apparent on the face of it.
15. On the contrary, the Petitioner contended that the Honourable Court’s finding was in error because the Petitioner filed his submissions in opposition to the Preliminary objection raised by the 3rd Respondent way before the 3rd Respondent filed its submissions in support of the objection.
16. Towards this assertion, the Honourable Court wish to address the issue as follows:- Firstly, the Preliminary Notice by the 3rd Respondent read verbatim:-
- a. The entire suit offends Section 6 of the *Civil Procedure Act*, 2010 as it is sub judice to HCCC No. E013 of 2024 Mwacheti Suleiman Sumumi and 3 Others (suing on behalf of themselves and on behalf of the 850 members of the Mtongwe Beach Management Unit Members.
17. Thus, the Court acknowledges that there was a preliminary objection raised against the entire suit filed by the Petitioner. Pursuant to that, the Court is left with the task of examining whether there is a mistake or error on the face of the record or any sufficient reason to justify review of the Ruling herein. As already discussed in this Ruling, under the provision Section 80 of the *Civil Procedure Act*, Cap. 21 and Order 45 Rule 1 of the Civil Procedure Rules of 2010 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.
18. Accordingly, an error or mistake apparent on the face of the record is one that is self-evident and does not require elaborate arguments to be established as was established in the case of:- “Paul Mwaniki – Versus – NHIF Board of Management [2020] eKLR”. Is there any such mistake or error on the face of the record? The ruling containing the order in question was delivered on 24th October, 2024. The specific order subject of review application was on allowing the 3rd Respondent’s Preliminary Objection dated 3rd June 2024 and staying the Petitioners suit for being “sub – judice” and reads as follows:-



- a. That the Notice of Preliminary Objection dated 3rd June, 2024 be and is hereby found to be meritorious thus allowed in its entirety.
 - b. That this matter is found to be sub judice hence an order be and is hereby issued staying the Petition pending the hearing and determination of “the Civil Suit HCCC No. E013 OF 2024 Mwacheti Suleiman Sumuni & 3 Others (suing On Behalf Of Themselves And On Behalf Of The 850 Members Of The Mtongwe Beach Management Unit Members) Mombasa” whereby the parties can move the Court appropriately thereafter.
 - c. That this Honourable Court do hereby issues an order vacating Order No. 5 issued on 29th April, 2024.
 - d. That the matter to be mentioned on 30th November, 2024 for attaining progress report and further directions by the Honourable Court.
 - e. That the 3rd Respondent shall have the costs of the Notice of Preliminary Objection dated 3rd June, 2024 to be borne by the Petitioners.
19. This is akin to asking the court to sit on appeal of its decision and reverse it. The fact that a party believes that the court should have reached a different conclusion or that the decision was erroneous are matters fit for appeal rather than review which is limited in scope. Notably also, courts have held that:- “the process of reasoning cannot be treated as an error apparent on the face of the record justifying the exercise of the power of review.” And that:- “an erroneous order/decision cannot be corrected in the guise of exercise of the power of review.” (“Republic – Versus - Advocates Disciplinary Tribunal Ex Parte Apollo Mboya [2019] eKLR”).
 20. Similarly, the request herein entails a re - appraisal of the evidence and re-analyzing its decision to establish whether or not the Preliminary Objection dated 3rd June, 2024 is merited which is beyond the scope of review jurisdiction. Accordingly, the supposedly ‘error and/ misapprehension apparent on the face of the record’ is a misstate and error in the sense of the law for which review may be granted. The foregoing analysis points to only one thing; that the application herein does meet the legal threshold for review under the provision of Section 80 of the Civil Procedure Act, Cap. 21 and Order 45 of the Civil Procedure Rules, 2010.
 21. Therefore, I proceed to allocate a ruling date for the reviewed Ruling which was delivered on 24th October, 2024.

Issue No. b). Who will bear the Costs of Notice of Motion application dated 28th November, 2024.

22. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).
23. 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. I find this to be an appropriate case where the Court shall reserve the onus of not awarding costs.



V. Conclusion & Disposition

24. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Ultimately in view of the foregoing detailed analysis, this court arrives at the following decision and specifically makes the orders below:-
- a. That the Notice of Motion application dated 28th November, 2024 be and is hereby found to have merit and the same is allowed with regards to prayer (a) while all the other prayers will be subject to the reviewed ruling in due course.
 - b. That the Honourable Court be and is hereby pleased to review its ruling and set aside the orders issued by the court (Honourable Justice L. L. Naikuni) on 24th October, 2024 based on the apparent errors on the face of the record.
 - c. That all other prayers in the Notice of Motion application dated 28th November, 2024 are subject to the review of the Ruling delivered on 24th October, 2024.
 - d. That there are no orders as to costs.

IT is so ordered accordingly.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 28TH DAY OF JULY .2025.

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

Judgment delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. M/s. Njuguna Advocate holding brief Mr. Yose Advocate for the Applicant.
- c. Mr. Randiek Advocate for the 1st Defendant/Respondent

