Rimberia (Suing through her Attorney) & another v Bashan & 19 others (Environment & Land Case 61 of 2006) [2025] KEELC 290 (KLR) (31 January 2025) (Ruling)

Neutral citation: [2025] KEELC 290 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 61 OF 2006

LL NAIKUNI, J

JANUARY 31, 2025

BETWEEN

SUSAN GACHERI RIMBERIA (SUING THROUGH HER ATTORNEY) .... 1ST PLAINTIFF

SAMUEL MWENDA .... 2ND PLAINTIFF

AND

AMINA BASHAN .... 1ST DEFENDANT

AMINA CYTHU .... 2ND DEFENDANT

ABDULRAHMAN HASSAN ALI .... 3RD DEFENDANT

ABDULLAHI MOHAMMED AWALE .... 4TH DEFENDANT

IBRAHIM MEDIDADI ABDALLAH .... 5TH DEFENDANT

HAMAD MOHAMMED NYANGASI .... 6TH DEFENDANT

SIASA SALIM .... 7TH DEFENDANT

ABEID MWERO CHIMAKO MKALA .... 8TH DEFENDANT

RAPHAEL CHIWAYA .... 9TH DEFENDANT

MWINYI KOMBO .... 10TH DEFENDANT

TANO WAGUTA .... 11TH DEFENDANT

EDWARD MATHAYO .... 12TH DEFENDANT

HAMMERTON ASIMA NOWA .... 13TH DEFENDANT

LEILA BARAK MZEE .... 14TH DEFENDANT

BEN MUUNGAMIA .... 15TH DEFENDANT

JUMA RAMADHAN MWAMASEMA .... 16TH DEFENDANT

SEIFU BENDERA .... 17TH DEFENDANT

FATMA M. NGOTO .... 18TH DEFENDANT

MARYANNE DUALE .... 19TH DEFENDANT

SARAFINA WANGAI .... 20TH DEFENDANT

RULING

I. Introduction

1. The Ruling before this Honourable Court for its determination regards two (2) applications – one being Notice of Motion dated 15th March, 2024 filed by Susan Gacheri Rimberia (Suing through her Attorney) Samuel Mwenda the Plaintiffs herein and the other dated 28th August, 2024 by the Defendants herein respectively.

2. It is instructive to note that each of the parties responded to the said applications accordingly. Subsequently, for ease of reference and flow, the Honourable Court shall be dealing with these two applications distinctly and separately but simultaneously in this omnibus Ruling.

II. The Plaintiffs/Applicants case – The Notice of Motion Application dated 15th March, 2024

3. The Plaintiffs/Applicants brought their application under the provision of Section 3A of the *Civil Procedure Act* Cap. 21, Order 22 Rules 29 (1) Civil Procedure rules, 2010; Article 40 of the *Constitution* of Kenya, 2010 and all other enabling provisions. It sought for the following orders:-

    a. Spent.

    b. That this Honourable court be pleased to grant orders of eviction and demolition against the Defendants herein from the Plaintiff's land parcel No. Mombasa MS/Block1/237.

    c. That the Officer Commanding Likoni Police station (OCS) be and is hereby ordered to offer security to the auctioneers appointed by the Applicant in carrying out the eviction and demolition exercise and maintain law and order.

    d. That the costs of the application be awarded to the Plaintiff.

4. The application was premised on the grounds, testimonial facts and the averments made out under the eight (8) Paragraphed affidavit of SAMUEL MWENDA and the five (5) annextures annexed hereto and marked as "SM -1 to 5". He averred as follows:-

    a. The Plaintiff was his biological mother and by a Power of Attorney dated 22nd June 2000. Attached in the affidavit and marked as "SM - 1".

    b. She gave him the Power of Attorney to act on her behalf with respect to LR. No. Mombasa/ MS/Block1/237 and therefore he was competent to swear this Affidavit.

    c. Vide a decree issued by the court on 8th October 2013 attached in the affidavit and marked as "SM – 2" the Honourable Court ordered among other things the eviction of the Defendants from the suit property within 90 days and by a further Ruling dated 6th November 2014 the Honourable Court rejected the Defendants Appeal to set aside the said Judgment.

d. His efforts and that of his Advocates on record to evict the Defendants from the property since then had been futile on many occasions. In the meantime, the Lease of the said property expired in the year 2003.

e. His Advocates wrote to the Ministry of Lands and Planning for the purpose of the renewal of the Lease who responded as per attached copy of Letter dated 28th November 2018 marked as "SM - 3"

f. The matter had been pending because of lack of funds and with the assistance of his Advocates, he did file an Application to the National Land Commission Mombasa Branch for the renewal of the Lease in February 2024 attached in the affidavit and marked as "SM - 4".

g. As per the attached Rates Statement from the County Government of Mombasa, marked as "SM – 5" the amount outstanding was a sum of Kenya Shillings Eight Ninety-One Thousand Five Eighty Hundred (Kshs.891,580/-) and which was to be paid before the application for the renewal of Lease could be reviewed in addition to other expenses.

h. It would be a futile exercise to proceed with Lease renewal process if the Defendants were not evicted beforehand and that an application requesting assistance of the police as per order No. 3 of the Decree was necessary in the first instance hence this Application.

i. The Defendants/Respondents case – The Notice of Motion Application dated 28th August, 2024

5. The Defendants/Respondents brought their application under the provision of Sections 1(A), 1(B), 3(A), Order 22 Rule 22, Section 80 and Order 45 of the *Civil Procedure Act*, Cap. 21 and Rules respectively and all other enabling provisions of the law. The Applicants herein sought for the following reliefs:-

    a. Spent.

    b. That there be a stay of proceedings, Judgement delivered on 23rd August 2013 and the decree issued on 8th October 2013 and all subsequent orders arising therefrom in HCC NO. 61 of 2006 pending the hearing and determination of this application.

    c. That the Honourable Court be pleased to review Judgement of 23rd August, 2013 and decree issued on 8th October 2013 pending the hearing and determination of this application.

    d. That costs of this application be provided for.

6. The application was based on the grounds, testimonial facts and the averments made out under the nine (9) Paragraphed supporting affidavit of Abeid Mwero Chimako Mkala and four (4) annextures marked as "A – 1 to 4" annexed hereto. He averred as follows:-

    a. He was one of the Respondents herein and competent to swear this Affidavit in support of this application.

    b. He had the authority from his Co - Respondents to sign court document in relation to this matter annexed and marked as "A-1" was the said authority.

    c. There was new issue which had arisen which the Applicants wanted to bring to court for redress.

d. The Government lease of all that parcel of land known as MSA/MS/BLOCK 237 registered and issued to SUSAN GACERI RIMBERIA the Plaintiff herein had expired in the year 2013 by the time the Plaintiff gotten the Judgement and Decree to evict the Respondents.

e. The said lease was for a term of 99 years starting from the 1st January, 1914 and annexed and marked as "A - 2" was a copy of the said title deed.

f. The Applicants were the occupants on the said plot. They only came to know that the said lease had expired when the Plaintiff/Respondent's Advocate wrote to the Counsel for the Applicants that her client wanted to renew/extend the Lease. Annexed and marked as "A - 3" was the letter from the Plaintiff's Advocates confirming that the lease had expired.

g. The Applicants were against the renewal/extension of the said Lease since the said Susan Gaceri Rimberia had never taken possession of this property since she was issued with a lease in the year 2005. On the contrary, it was the Defendants/Applicants herein who were the ones who had been in occupation.

h. The Plaintiff/Respondent through her Advocate had gotten a Judgement and she now intended to evict the Applicants who were occupiers on the said land and who had their families living there as well as having their residential houses on the said property. Annexed and marked as "A - 4" were copies of the Judgement and the Decree.

i. There was a danger that the execution of the Order and or decree of 8th October 2013 would affect the Applicants largely together with their families if they were evicted from the said land.

j. In the interest of justice, it required that this court considers this application positively and allowed the interim prayers sought, to allow hearing and determination of this application and subsequently grant a stay pending hearing and determination of the suit.

k. It was also important that the court considers granting the Applicants interim stay pending the determination of this application, as this would give the applicants protection in the period preceding the hearing and finalization of the Application.

l. The Applicants would suffer prejudice if the orders sought herein were not granted.

m. All that was stated herein above was true to the best of his knowledge, information and belief save where the matters had been passed to him and sources disclosed.

n. The responses by the Plaintiff/ Respondent to the Notice of Motion application dated 28th August, 2024

7. The Plaintiff, Samwuel Mwenda, responded to the Notice of Motion application Application by the Plaintiff/Respondent dated 28th August, 2024 through a 14 Paragraphed Replying Affidavit sworn on 8th October, 2024 where he deponed that:-

i. He was the biological son to the Plaintiff and by a Power of Attorney dated 22nd June 2000 attached herewith and marked as "SM - 1".

ii. She gave him the Power of Attorney to act on her behalf with respect to LR. No. Mombasa/ MS/Block1/237 and therefore he was competent to swear this Affidavit.

iii. He was advised by his Advocate which advise he believed to be true that pursuant to the provision of Section 26 of the *Land Registration Act*, a Certificate of title was a "Prima facie" evidence of absolute and indefeasible ownership of land.

iv. The Plaintiff filed an Application dated 1st March 2024 which sought among other things orders allowing demolition of the Defendants structures, eviction and police assistance, which Application was pending hearing.

v. The Honourable Court on 30th April 2024 ordered that the parties do attempt an out of Court negotiation and by a letter dated 8th May 2024, attached in the and marked as "SM – 3" the Defendants offered to buy 'the spaces where their homes stand' at an amount of a sum of Kenya Shillings Four Hundred Thousand (Kshs. 400,000/-) each making a total sum of Kenya Shillings Eight Million (Kshs. 8,000,000/-).

vi. In response to the said offer, his Advocates, in good faith, sent the latest valuation report dated 1st March 2024, attached in the affidavit and marked as "SM – 4" valuing the property at a sum of Kenya Shillings Seventeen Million Two Hundred Thousand (Kshs. 17,200,000/-).

vii. However, upon the Defendants realizing that the lease had expired, the Defendant's Advocates wrote a letter dated 5th June 2024 attached in the affidavit and marked as "SM – 5" suspending already on – going out of Court negotiations, on the allegations that the Plaintiff never had a good title hence negotiations fell through and the Defendants proceeded to file their Application herein.

viii. Any legitimate transfer of the property at the said value or thereabout would had included the extension of the said lease hence the allegations that the Plaintiff dis not have title had no basis since she was the undisputed beneficial owner of the property.

ix. The Defendants application was only meant to delay this matter and deny the Plaintiff from enjoying the fruits of the Judgement entered on 23rd August, 2013. From the said Judgement, the Honourable Court ordered among other orders that there be eviction of the Defendants from the suit property. Further, vide a Ruling dated 6th November, 2014, the Honourable Court rejected the application by the Defendants to set aside the said Judgement.

x. Further, the Applicants' Application had been brought with extreme undue delay of over 11 years and as such did not fulfill the pre - requisites for review under the provision of Order 45 Rule 1 of the Civil Procedure Rules and ought to be dismissed with costs as it is an abuse of court process.

xi. The delay in the conclusion and determination of the matter was wholly due to the conduct of the Defendants and as was noted by the Court in its Judgment delivered on 23rd August 2013 attached in the affidavit and marked as "SM – 6" and as such the Defendants should be allowed benefit from their own acts of omission.

xii. The Plaintiff instituted the suit in the year 2006 at which time the Lease was yet to expire-and-since-2013 but the Defendants had thwarted all the efforts by himself, his - Advocates and the Likoni Police Station to evict them and on several occasions had turned violent.

xiii. The issue of limitation never arose.

xiv. In a bid to renew the expired lease his Advocates wrote to the Ministry of Lands and Planning and who responded as per attached copy of Letter dated 28th November 2018 and marked as "SM – 7".

xv. He filed an Application to the National Land Commission Mombasa Branch for the renewal of the Lease in February 2024 attached in the affidavit and marked as "SM – 8". The said Application was pending approval due to payment of land rates to Mombasa County

amounting to a sum of Kenya Shillings Eight Ninety-One Thousand Five Eighty (Kshs. 891,580/-) as attached which-continue to accrue to date since the Defendants had continued to deprive the Plaintiff of the property.

xvi. Thus, it would be a futile exercise to proceed with Lease renewal process if the Defendants were not evicted beforehand in addition to the fact that they live on the property rent free and it was untrue that the property had reverted back to government.

xvii. It was only fair and just that the Defendant's Application dated 25th August 2024 be dismissed with costs to the Plaintiff since they had no locus or claim to the property imagined or otherwise and they were trespassers.

V. Submissions

8. On 24th September, 2024 and 22nd October, 2024 while in the presence of all the parties, the Honourable Court directed that the two applications dated 15t March,2024 and 28th August, 2024 be disposed off by way of written submissions. By the time of penning down this Ruling, though the Plaintiffs had complied, the Honourable Court unfortunately had failed to access the one by the Defendants/Respondents herein. The Honourable Court reserved the 21st November, 2024 as the time to deliver the Ruling. Unfortunately, due to unavoidable circumstances, the Ruling was thus delivered on 24th January, 2025.

A. The Written Submissions by Plaintiffs/Applicants

9. In support of the application dated 15th March, 2024, the Plaintiffs/Applicants through the Law firm of Messrs. Mereka & Company Advocates filed their written Submissions dated 18th October, 2024. Mr. Mereka Advocate commenced by providing a brief background of the matter. He stated that the Plaintiff, Samuel Mwenda was prosecuting this matter on behalf of his mother, Susan Gacheri Rimberia by virtue of Power of Attorney dated 22nd June 2000 and with respect to all that parcel of land known as LR. No. Mombasa/MS/Block/237 (hereinafter referred to as "the suit Property") registered and issued in the name of Susan Gacheri Rimberia. The Defendants who were now totaling to 25 in number had occupied the said property which was situated near Likoni Ferry of Likoni - Ukunda road in Kwale County.

10. By a Notice of Motion application dated 15th March 2024 the Plaintiff sought for the above set out orders. The said Application was based on the following grounds;

    i. That by an order issued by the court on 8th October 2013 the Plaintiffs were granted 90 days to vacate from the suit property land reference Mombasa MS/1/237 failure to which that the Defendants be evicted from the set suit property at their own costs.

    ii. That such eviction being sanctioned by the court be with the help of the court Bailiff and/or the police and/or administration upon application by the Plaintiff.

    iii. That in violation of the said orders the Defendant had refused and/or declined vacate the suit property and continued to cause immeasurable loss and unnecessary delay to the plans to renew the lease to the said property which has expired.

11. The Application was supported by the Affidavit of Samuel Mwenda and sworn on 15th March 2024. He averred among other things, that the court issued a decree dated 8th October 2013 ordering the eviction of the Defendants from the subject property.

12. In the process of the hearing, the lease of the property expired in the year 2013. The Plaintiff was in the process of renewing the lease through an Application to the Mombasa County Government dated 2nd April 2024 subject to payment of a sum of Kenya Shillings Eight Ninety-Nine Thousand Five Eighty Hundred (Kshs. 891,580/-) among other charges. The Application dated 15th March 2024 came up for "inter partes" hearing on 3rd April 2024. The Counsel for the Defendant Mr. Odiagga requested for 60 days to attempt and have an out of Court settlement of the matter. However, the Honourable Court granted them 45 days and requested the parties to attempt and settle the dispute under the provision of Article 159 2 (c) of the *Constitution* of Kenya, 2010 and Sections 20 (1) & (2) of the Environment & *Land Act*, No. 19 of 2011 and having the matter be mentioned on 10th July 2024 to ascertain progress made and further directions. The Defendants Advocates also confirmed that the Defendants were now totaling to 25.

13. By a letter dated 8th May 2024, the Defendants offered to pay the amount of Kenya Shillings Four Hundred Thousand (Kshs 400,000/-) each to purchase the space where their houses stood making a total sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-). The Plaintiff, acting in good faith, sent a valuation report dated 1st March 2024 giving the current market value of the property at a sum of Kenya Shillings Seventeen Million Two Hundred Thousand (Kshs. 17,200,000/-) and the Defendant therefore suspended negotiations.

14. When the matter came up for mention on 10th July 2024, the Defendant's Advocate indicated that he was not proceeding with negotiations any more. His reasons were on the allegation that the lease of the property had expired 10 years earlier. Hence, the Plaintiff had no right to the property and could therefore not pass the title. Pursuant to that, the Defendants proceeded to file a Notice of Motion application dated 28th August 2024 seeking stay of proceedings against the decree dated 8th October 2013 and all subsequent orders in the suit , a review of the Judgement dated 23rd August 2013 and the decree issued on 8th October 2013. The Application was supported by the Affidavit of Abeid Mwero Chimako Mkala stating among other things:-

    a. There was a new issue which has arisen which the Applicant want to bring to court for redress.

    b. The government lease of MSA/MS/Block 237 to Susan Gaceri Rimberia the Plaintiff herein had expired in 2013 by the time the Plaintiff gotten judgement and decree to evict the Respondent.

    c. The said lease was for a term of 99 years starting from 1st January, 1914.

    d. The Applicants are occupants on the said plot and they only came to know that the said lease has expired when the Plaintiff/Respondent's Advocate wrote to the counsel for the Applicants that her clients wants to renew/extend the lease.

    e. The Applicants were against the renewal/Extension of the lease since the said Susan Gacheri Rimberia has never taken possession of this property since she was issued with a lease in 2005 and the Defendants/Applicants are the ones who have been in occupation.

    f. The Plaintiff/Respondent through her Advocate had gotten Judgment and she now intended to evict the Applicants who were occupiers on the said land and who had their families living there as well as having their residential houses on the said property.

    g. There was danger that the execution of the order and or decree of 8th October 2013 would affect the Applicants largely together with their families if they are evicted from the said land.

h. The interest of justice requires that this court considers this Application positively and allows the interim prayers sought to allow hearing and determination and subsequently grant a stay pending the hearing and determination of the suit.

i. It was also important that the court considers grants the Applicants interim stay pending the determination of this Application, as this would give the Applicants protection in the period preceding the hearing and finalization of the Application.

j. The Applicants would not suffer prejudice if the orders herein were granted.

15. The Plaintiffs submissions with respect to the Defendants Application dated 28th August 2024 to a large extent, also apply to the submissions herein, "mutatis mutandis". The Plaintiff filed a Replying Affidavit sworn on 8th October 2024. The matter came up for hearing on 24th September 2024 where the court gave the Plaintiff 7 days to reply to the Defendant Application dated 28th August 2024, the Applicants have 14 days and thereafter the Plaintiff Respondents have 7 days with a mention date of 22nd October 2024 to confirm compliance and ruling on the two Application on 21st November 2024. The Defendants despite being served with the Application dated 1st March 2024 has not filed any response as at 18th October 2024 and since the matter comes up on 22nd October 2024 to confirm compliance the Plaintiff will proceed with this submission with respect to the two Applications in absence of the Defendants documents.

16. The Learned Counsel for the Plaintiffs submitted on the following issues:-

17. Firstly, whether the Defendant's Application was moot. The Black's Law Dictionary 10th Edition defines the term 'moot' to mean:-

> " having no practical significance, hypothetical or academic, and a 'moot case' as a matter in which a controversy no longer exists, a case that presents only an abstract question that does not arise from existing facts or rights."

18. To buttress on this point, he referred Court to the case of "Dande & 3 others – Versus - Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023)(Judgment)" where the Court had this to say on the Doctrine of Mootness:-

> " The doctrine of mootness is therefore based on the notion that judicial resources ought to be utilized efficiently and should not be dedicated to an abstract proposition of law and that courts should avoid deciding on matters that are abstract, academic, or hypothetical."

19. Further to that, in the case of:- "Institute for Social Accountability & another v National Assembly & 3 others (Petition 1 of 2018) [2022] KESC 39 (KLR) (8 August 2022) as rightly cited in the case of Dande (Supra) the court stated that:-

> " A matter is moot when it has no practical significance or when the decision will not have the effect of resolving the controversy affecting the rights of the parties before it. If a decision of a court will have no such practical effect on the rights of the parties, a court will decline to decide on the case."

20. The Learned Counsel's contention was that the Defendants Application was moot owing to the fact that it would not lead to the conclusion of the matter by seeking stay of proceedings, Judgment and decree extracted by the Plaintiff 11 years ago and seeking review. It was also highly unlikely that the

Defendants Application would succeed. Eve if it did, it never brought to a conclusion the issues in contention with respect to the Applicants Application dated 15th March 2024 in that the Defendants were not seeking any declaration or any right to stay or be entitled to the property they have been occupying illegally and on this preliminary point the Defendants Application should be dismissed with costs.

21. Secondly, was on whether the matter was "Res – Judicata". The Learned Counsel asserted that the concept of "Res Judicata" was defined in the case of "Peter Mbogo Njogu – Versus - Joyce Wambui Njogu & another [2005] eKLR" by Justice I.E Lanaola thus:-

> " If a litigant were allowed to go on forever re-litigating the same issue with the same opponent before Courts of competent jurisdiction, merely because he gives his case some cosmetic face-lift on every occasion he comes to a Court, then I do not see what use the doctrine of res judicata plays."

22. Further to this, in the case of:- "Joshua Ngatu – Versus - Jane Mpinda & 3 Others (2019) eKLR" the Honourable Court made reference to the case of "Henderson – Versus - Henderson (1843) 67 ER 313" in which the court stated:-

> " ....where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigations in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The pleas of Res Judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time."

23. This matter came to an end when the Defendants through their Advocates abandoned the Appeal dated 10th September 2013 filed only by the 4th Defendant. The rest of the Defendants never preferred any Appeal hence the decree obtained by the Plaintiffs could not be challenged way of review and no special circumstances have been advanced by the Defendants so as to revive a matter 11 years later.

24. Thirdly, on whether the Defendants were aware of the lease expiry date? The Learned Counsel submitted that it was also not in dispute that the suit was filed in the year 2006, 7 years before the expiry of the lease. Judgment was delivered on 23rd August 2013. The Plaintiff proceeded to obtain a decree dated 8th October 2013. The Plaintiff attached a copy of the Certificate of Title to the property among other documents and the Defendants were represented by Advocates in the hearing process. Therefore, the Defendants could not state that a new issue had arisen that the lease to the property expired in the year 2013 since they were aware of the lease expiry date in the documents filed by the Plaintiff. The Plaintiff prayed that the contention that a new issue had arisen be struck out.

25. The Defendants had also always been aware that they were to be evicted from the property. In addition to the fact that during the course of time and after the expiry of the lease the Plaintiff had indeed sworn that he had made several attempted to evict the Defendants but had not succeeded. Since the Defendants had turned violent even in the presence Police from Changamwe Police Station and further that the Plaintiff had ran out of funds in pursuing the matter. Additionally, the Defendants were not claiming adverse possession to the property.

26. The Learned Counsel informed Court that the Plaintiff was unable to renew the lease unless the Defendants are evicted. By a letter dated 28th November 2015 the National Land Commission advised the Plaintiff's Advocate that the mandate of renewal of leases fall on the National Land Commission and the County Government of Mombasa. The Plaintiff had also deposed that he had tried to evict the Defendants, even with the assistance of his Advocates and Changamwe Police Station. He revisited the matter this year and was required to pay an amount of a sum of Kenya Shillings Eight Ninety-One Thousand One Fifty Hundred (Kshs. 891,150/-) to the County of Mombasa Government in addition to other charges in order to start the renewal process of the lease, notwithstanding the fact that it has expired still in the name of the Plaintiff and no other party had been allocated the said lease including the Defendants.

27. The Defendants had been trespassing on the Plaintiff's property for many years, did not pay any rent to the Plaintiff. The Plaintiff had found himself in a difficult position since he was required to pay close to a sum of Kenya Shillings One Million (Kshs. 1,000,000/-) for the renewal of the lease which she had no possession. This was not justified and unreasonable. Hence, the reason why he had sought justice in this Honorable Court.

28. Fourthly, whether the Plaintiff is the registered owner of the property notwithstanding the expiry of the lease. The provision of Section 26 of the *Land registration Act* provides:-

> "The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

29. Further, the provision of Section 13 (1) of the *Land Act*, No. 6 of 2012 the lessee has the right of first refusal should the State wish to extend the lease. It provides that:-

> "Where any land reverts back to the national or county government after expiry of the leasehold tenure the Commission shall offer to the immediate past holder of the leasehold interest pre-emptive rights to allocation of the land provided that such lessee is a Kenya citizen and that the land is not required by the national or the county government for public purposes."

30. The Plaintiff was still the registered owner of the property and had pre-emptive rights to the property. The National Land Commission had not expressed intentions to acquire the property or the County Government of Mombasa. What the Defendant should have done was to agree to purchase the whole property from the Plaintiff at the amount of a sum of Kenya Shillings Seventeen Million (Kshs. 17,000,000/-) or thereabout as per the valuation report. Since the Defendant could not purport to buy the spaces they had illegally built the shelter at the Plaintiff's property subject to the renewal of the lease. Also, they could have required the expense for the renewal of the lease and which would have been deducted from the purchase price. In the meantime, they would have continued to occupy the property during the process.

31. The Defendants, as stated above, have failed and or neglected to file a Response to the Plaintiff's Application dated 15th March 2024. The Plaintiff has given adequate reasons as to why she has not been

able to obtain possession of the property for several years and has made efforts on several occasions to evict the Defendants but has been met with violent opposition even in the presence of Police from Changamwe Police Station. No claim for adverse possession by the Defendants has been made, neither have the Defendants made a plea under the Limitations of Actions Act Cap 22.

32. The Plaintiff found herself in what was called a "hen and egg" situation that is to say which one comes first - the payment of the rates and renewal of the lease as the Defendants continue to illegally occupy the property or have the Defendant evicted first and thereafter proceed to renew the lease? The Defendants never had any right to the property, do not pay any rent to the Plaintiff and it would be untenable for the Plaintiff to renew the lease as they continue to stay on the property. The Plaintiff has submitted on the status of an expired lease. In addition, there was no substantive on the property since the expiry of the lease from National Land Commission, Mombasa County Government and any other third party.

33. In conclusion, and for reasons aforesaid, the Plaintiff prayed that the Defendant's Application dated 28th August 2024 be dismissed with costs. On the other hand, this Honorable Court grants the orders sought together with costs from the application dated 15th March, 2024.

VI. Analysis & Determination.

34. I have carefully assessed all the filed pleadings being the twin applications dated 15th March, 2024 and the other of 28th August, 2024, the written submissions, the cited authorities, the relevant provisions of the *Constitution* of Kenya, 2010 and the statures.

35. For the Honourable Court to reach an informed, fair and reasonable decision, it has crafted the following four (4) salient issues for its consideration. These are:-

    a. Whether the Notice of Motion application dated 15th March, 2024 has any merit and thus allowed.

    b. Whether the Notice of Motion application dated 28th August, 2024 should be allowed for being meritorious or not.

    c. Whether the parties herein are entitled to the reliefs sought.

    d. Who will bear the costs of the two applications?

Issue No. a). Whether the Notice of Motion application dated 15th March, 2024 has any merit and thus allowed

36. Under this Sub – heading, the Honourable Court will decipher on the substratum of the matter herein being whether the Honourable Court can order for eviction and demolition against the Defendants after decree has been issued. The Applicant through the current application, is praying that this court enforces execution of the Decree that was issued against the Defendant. The application has been filed pursuant to the provisions of Section 38 of the *Civil Procedure Act*, Cap. 21 and Order 22 Rule 28 (5) of the Civil Procedure Rules, 2010.

37. The provision of Section 38 of the *Civil Procedure Act*, Cap. 21 provides for powers of the court to enforce execution. It provides as follows:-

> Subject to such conditions and limitations as may be prescribed, the Court may, on application of decree holder, order execution of the decree–
>
> ....

(f) in such other manner as the nature of relief granted may require.

38. Similarly, the provision of Order 22 Rule 28 (5) of the Civil Procedure Rules, 2010 that state as follows:-

> " Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree holder, or some other person appointed by the court, at the cost of the Judgment debtor and upon the act being done the expenses incurred may be ascertained in such manner as the court may direct and may be recovered as if they were included in the decree."

39. The Applicant's grievance is that vide a decree issued by the court on 8th October 2013 attached herein and marked as "SM – 2" the Honourable Court ordered among other things the eviction of the Defendants from the suit property within 90 days and by a further Ruling dated 6th November 2014 the Honourable Court rejected the Defendants Appeal to set aside the said Judgment. His efforts and that of his Advocates on record to evict the Defendants from the property since then had been futile on many occasions. In the meantime, the Lease of the said property expired in the year 2003.

40. The matter had been pending because of lack of funds and with the assistance of his Advocates, he did file an Application to the National Land Commission Mombasa Branch for the renewal of the Lease in February 2024 attached in the affidavit and marked as "SM - 4". As per the attached Rates Statement from the County Government of Mombasa, marked as "SM – 5" the amount outstanding was a sum of Kenya Shillings Eight Ninety-One Thousand Five Eighty Hundred (Kshs.891,580/-) and which was to be paid before the application for the renewal of Lease could be reviewed in addition to other expenses. It would be a futile exercise to proceed with Lease renewal process if the Defendants were not evicted beforehand and that an application requesting assistance of the police as per order No. 3 of the Decree was necessary in the first instance hence this application.

41. That being so, and considering that courts do not issue orders in vain, the structures put up by the Defendant on the suit property should be removed, either by the Defendant himself, or by the Plaintiff at the Defendants costs as stipulated by Order 22 Rule 28 (5) of the Civil Procedure Rules. Indeed, that is the position that was taken by Mbogo J. in the case of "Grace Maundu Kilungya – Versus - Matheka Makuthi & Another [2019] eKLR" where he stated as follows:-

> " It is common ground that there was no prayer for eviction of the Defendants/Respondents from land parcel No. Nzaui/Kikumini/158. Prayer 2 in the Plaintiff's/Applicant's Plaint sought, 'a permanent injunction restraining the Defendants by themselves, their agents and/or servants from entering onto and/or encroaching and/or remaining on and/or grazing on and/or any other manner whatsoever interfering with the land parcel No. Nzaui/Kikumini/158. The above order is in effect a prohibitory and mandatory injunction for the eviction of the Defendants/Respondents from the suit premises. The two defendants ought to have complied with the order since they did not appeal against the Judgment delivered on 10th April 2018. On the 10th April 2018, Judgment was entered against the two Defendants/Respondents in terms of the aforementioned prayer 2 as well as prayers 1 and 2. The two Defendants/Respondents have neither appealed against the said Judgment nor have they sought to set aside and/or have it been reviewed. It is on the basis of the said Judgment that the decree dated 10th April 2018 was drawn...whereas I agree with the Defendants'/Respondents' counsel that there was no prayer for eviction of the Defendants/Respondents

from the suit premises, prayer 2 of the Judgment dated 10th April 2018 and the subsequent decree can only be effected through the eviction of the Defendants/Respondents from the suit premises. In the circumstances, therefore, my finding is that the application has merits and I proceed to allow it in terms of prayers 2, 3 and 4."

42. Having not obtained an order staying the Judgment of this court, it is my finding that the orders that were issued by this court allows the Plaintiff to demolish the structures put up by the Defendants on the suit property at the Defendants' costs. For these reasons, I discern that application by the Plaintiff and the prayers sought has merit and is hereby allowed.

Issue No. b). Whether the Notice of Motion application dated 28th August, 2024 should be allowed for being meritorious or not.

43. Under this Sub - title, I shall now examine the merits of the application dated 28th August, 2024. In so doing, I will be considering the following issues:-

    a. Whether there should be stay of proceedings, Judgement delivered on 23rd August 2013 and the decree issued on 8th October 2013 and all subsequent orders arising therefrom in HCC NO. 61 of 2006.

    b. Whether the Defendants have made a case for the review of the judgment delivered on 23rd August, 2013 and decree issued on 8th October 2013.

44. On the first issue herein,, I am guided by the legal ration founded in the case of "Kenya Wildlife Service – Versus - James Mutembei (2019) eKLR", Gikonyo J held that:-

> " Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent".

45. Further, in the persuasive case of "Global Tours & Travels Limited; Nairobi HC Winding up Cause No. 43 of 2000 Ringera J", (as he then was) stated that: -

> " As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously"

46. Likewise, it will be noted that gin the case of:- "Kenya Wildlife Case (Supra)", Gikonyo J quoted Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332, that:-

> " The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of

> his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."
>
> This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases."
>
> It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case".

47. I am persuaded by the above authorities which lay down the clear principles that stay of proceedings is a grave matter to be entertained only in the most deserving cases as it impacts the right to expeditious trial. It is a discretionary power exercisable by the court upon consideration of the facts and circumstances of each case. As stated by the Court of Appeal in the case of "David Morton Silverstein – Versus - Atsango Chesoni (2002) eKLR": -

> " The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court's own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay".

48. In the instant case, the Applicant seeks to stay proceedings separate and distinct from which the instant suit emanates. Furthermore, the Defendants have not addressed this court on whether he warrants grant of orders of stay of proceedings.In the case of "Muchanga Investments Limited – Versus - Safaris Unlimited (Africa) Ltd & 2 Others (2009) eKLR", the Court of Appeal stated that:-

> " Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice."

49. Hence, it is my finding that the stay orders sought are not merited. Thus, the prayer for the stay of proceedings is rejected.

50. On whether the Defendants have made a case for the review of the judgment delivered on 23rd August, 2013 and decree issued on 8th October 2013, the nature of the application seeks to review the judgment issued on 23rd August, 2013. The power of review in the High Court is anchored in the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya and the Civil Procedure Rules, 2010. Section 80 of the *Civil Procedure Act* 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.

51. The provision of Order 45 Rule 1 of the Civil Procedure Rules, 2010 further provides for review in the following manner: -

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.

52. On several occasion, the Courts have dealt with the issue of review. The Supreme Court in "Application No 8 of 2017, Parliamentary Service Commission – Versus - Martin Nyaga Wambora & others [2018] eKLR", quoted with approval the findings of the East Africa Court of Appeal in "Mbogo and another – Versus - Shah [1968] EA", upon establishing the following principles: -

(31) Consequently, drawing from the case law above, particularly Mbogo and Another v Shah, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:

i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.

ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;

iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.

iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.

v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.

vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:

a. as a result, a wrong decision was arrived at; or

b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.

53. The Court of Appeal in the case of:- "Civil Appeal No 2111 of 1996, National Bank of Kenya – Versus - Ndungu Njau" observed as follows in respect of reviews applications: -

> " A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the

matter nor can it be a ground for review that the court proceeds on an incorrect expansion of the law."

54. The import of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules was considered by the High Court in Miscellaneous Application 317 of 2018, "Republic – Versus - Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR". Upon considering comparative jurisprudence, the Court crystallized the principles for consideration in reviewing its own decisions as follows:-

i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

ii. The expression 'any other sufficient reason' appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/ tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1

55. Now applying these legal principles to the instant application. According to the Defendants/ Applicants there was a new issue which had risen which the Applicants wanted to bring to the Court's address. The Government lease of all that parcel of land known as MSA/MS/Block 237 registered and issued to Susan Gaceri Rimberia the Plaintiff herein had expired in the year 2013 by the time the Plaintiff gotten the Judgement and Decree to evict the Respondents. The said lease was for a term of 99 years starting from the 1st January, 1914 and annexed and marked as "A - 2" was a copy of the said

title deed. The Applicants were the occupants on the said plot. They only came to know that the said lease had expired when the Plaintiff/Respondent's Advocate wrote to the Counsel for the Applicants that her client wanted to renew/extend the Lease. Annexed and marked as "A - 3" was the letter from the Plaintiff's Advocates confirming that the lease had expired.

56. According to the Plaintiff, the Defendants application was only meant to delay this matter and deny the Plaintiff from enjoying the fruits of the Judgement entered on 23rd August, 2013. From the said Judgement, the Honourable Court ordered among other orders that there be eviction of the Defendants from the suit property. Further, it will be noted that vide a Ruling dated 6th November, 2014, the Honourable Court rejected the application by the Defendants to set aside the said Judgement. Further, the Applicants' Application had been brought with extreme undue delay of over 11 years and as such did not fulfill the pre - requisites for review under the provision of Order 45 Rule 1 of the Civil Procedure Rules, 2010 and ought to be dismissed with costs as it is an abuse of court process.

57. The delay in the conclusion and determination of the matter was wholly due to the conduct of the Defendants and as was noted by the Court in its Judgment delivered on 23rd August 2013 attached in the affidavit and marked as "SM – 6" and as such the Defendants should be allowed benefit from their own acts of omission. The Plaintiff instituted the suit in the year 2006 at which time the Lease was yet to expire-and-since-2013 but the Defendants had thwarted all the efforts by himself, his - Advocates and the Likoni Police Station to evict them and on several occasions had turned violent.

58. The case here is not one of discovery of new and important matters of evidence which was in the knowledge of the Court and within the parties' knowledge. In the case of "Evan Bwire – Versus - Andrew Aginda Civil Appeal No. 147 of 2006" cited fin the case of "Stephen Githua Kimani – Versus - Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR" the Court of Appeal held as follows:-

> " An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence."

59. I find that the current Application falls under the above category. The effect of allowing it would amount to re-opening the case afresh. Litigation must come to an end. Parties must present all the facts, documents and evidence in Court at the appropriate time before the Court retires to write its Judgment. Time and time again Courts have advised litigants that they are bound by their pleadings and that you do not prosecute your case piecemeal. What is demonstrated by the Application is a case of poor pleading which is not what was envisaged by the provision of Section 80 of the *Civil Procedure Act*, Cap. 21 nor the Rules under Order 45.

60. I need not say more. What follows and the remaining duty by the Honourable Court is nothing else but to dismiss the Defendants/Applicants' Application dated 28th August, 2024 with costs.

Issue No. d). Who will bear the Costs of Notice of Motion applications dated 15th March, 2024 and 28th August, 2024.

61. 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).

62. 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.

63. In this case, this Honourable Court has reserved its discretion not to award the costs.

VII. Conclusion & Disposition

64. 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 and expansive analysis to the, this court arrives at the following decision and makes the orders below:-

a. That the Notice of Motion application by the Plaintiff/Applicant dated 15th March, 2024 be and is hereby found to have merit and is hereby allowed.

b. That the Notice of Motion application by the Defendants/Applicants dated 28th August, 2024 be and is hereby found to lack merit and is hereby dismissed.

c. That this Honourable court be and is hereby pleased to grant orders of legal eviction and demolition against the Defendants herein from the Plaintiff's land parcel No. Mombasa MS/Block1/237 pursuant to the provision of Section 152E of the *Land Act*, No. 6 of 2012 hereof.

d. That the Officer Commanding Likoni Police station (OCS) be and is hereby ordered to offer security to the auctioneers appointed by the Applicant in carrying out the lawful eviction and demolition exercise and maintain law and order.

e. That there shall be no orders as to costs.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL, MEANS SIGNED AND DATED AT MOMBASA THIS 31ST DAY OF JANUARY 2025.

..

HON. MR. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT

AT MOMBASA

Ruling delivered in the presence of:

a. M/s. Firdaus Mbula, the Court Assistant.

b. M/s. Njoroge holding brief for Mr. Mereka Advocate for the Plaintiff/Respondent.

c. No appearance for the Defendants/Applicants.

HON. LL NAIKUINI (ELC JUDGE)