



REPUBLIC OF KENYA



**KENYA LAW**

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**Kenya Anti – Corruption Commission v Njuguna & 3 others (Environment & Land Case 184 of 2010) [2024] KEELC 4520 (KLR) (28 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4520 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 184 OF 2010**

**LL NAIKUNI, J**

**MAY 28, 2024**

**BETWEEN**

**KENYA ANTI – CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**GILBERT MWANGI NJUGUNA ..... 1<sup>ST</sup> DEFENDANT**

**WILSON GACHAJA ..... 2<sup>ND</sup> DEFENDANT**

**JIMMY KIMARU KIRATU ..... 3<sup>RD</sup> DEFENDANT**

**ESKON RUMWA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. This being a Court of record, it is instructive to note that 16<sup>th</sup> October, 2023, the Honourable Court delivered a ruling on this same subject matter. Being aggrieved by the decision, the 1<sup>st</sup> Defendant, Gilbert Mwangi Njuguna moved Court through the Notice of Motion application dated 17<sup>th</sup> November, 2023 brought under the provision of Article 50 (1) of *the Constitution* of Kenya, 2010, Order 45 Rules 1 and 2 of the Civil Procedure Rules, 2010 and Sections 1A and 1B of the *Civil Procedure Act*, 2010 seeking a raft of reliefs as the Court shall be delving on them in the course of this Ruling herein.
2. Upon service of the said application, and while opposing it, the Plaintiff responded through filing of a Replying Affidavit dated 23<sup>rd</sup> January, 2024. Thereafter, through the leave of Court, the 1<sup>st</sup> Defendant also filed a further affidavit dated 23<sup>rd</sup> February, 2024. The Honourable Court shall in depth assess the said pleadings at a later stage hereof.



## II. The 1<sup>st</sup> Defendant/Applicant's case

3. The 1<sup>st</sup> Defendant/Applicant sought out for the following orders:
  - a. Spent
  - b. That this Honourable Court be pleased to review, vary, and or set aside its ruling and orders delivered on the 16<sup>th</sup> October 2023 by setting aside the proceedings of this court of the 16<sup>th</sup> November 2022.
  - c. That this Honourable Court be pleased to grant such further orders as it shall deem fit and just to grant in the unique circumstances of this case.
  - d. That the cost of this application is provided for.
4. The application by the 1<sup>st</sup> Defendant/Applicant herein was premised on the grounds, testimonial facts and averments made out under Supporting Affidavit of GILBERT MWANGI NJUGUNA sworn and dated 17<sup>th</sup> November, 2023. The 1<sup>st</sup> Respondent/Applicant averred that: -
  - a. He was the 1<sup>st</sup> Defendant/Applicant herein and hence competent and duly authorised to swear this Affidavit on his on behalf.
  - b. Under the provision of Order 45 Rules 1 and 2 of the *Civil Procedure Act*, Cap. 21 this Honorable Court has unfettered jurisdiction to review, vary, and or set aside its orders.
  - c. The provision of Article 50 (1) of *the Constitution* of Kenya, 2010 gives every person the right to a fair hearing while the provision of Article 40 (2) (a) provides that nobody shall be arbitrarily deprived of his property without the benefit of due process.
  - d. By way of a ruling delivered in this matter on the 16<sup>th</sup> October 2023, this Honorable Court dismissed the Applicant's application dated 19<sup>th</sup> April 2023 in which the Applicant had sought to arrest the delivery of a Judgment in this matter and have the court re - open the hearing of the same to enable him, as a party to these proceedings, participate in the hearing in the exercise of his constitutional right to a hearing under the provision of Article 50 (1) of *the Constitution* of Kenya, 2010.
  - e. In dismissing the said application, the court found and held, "inter alia", that the Applicant had been properly served with hearing notice in respect of the hearing that took place on the 16<sup>th</sup> November 2023 and that, therefore, he was sufficiently aware of the said date but chose not to attend.
  - f. However, it had emerged that the said hearing notice was in fact not properly served on the Applicant as instead, the same was served upon the Law firm of Messrs. Lumatete Muchai & Co. Advocates who were not on record for Applicant as at the date of the said service, having been replaced by the Law firm of Messrs. Khaminwa & Khaminwa Advocates pursuant to the Notice of Change of Advocates filed in this matter by the said Law firm of Messrs. Khaminwa & Khaminwa Advocates on the 29<sup>th</sup> September 2023.
  - g. Unfortunately the Applicant's former advocates neither notified the Applicant nor his new advocates of the said service. The fact that the matter had been fixed for hearing on the 16<sup>th</sup> November 2023 with the tragic consequence, it proceeded on the same date as scheduled in the absence of the Applicant and therefore without hearing the Applicant as one principal parties to this dispute.



- h. This fact and evidence of the same was not in the possession of the Applicant as at the time of filing and hearing of the Application for the arrest of the Judgment. Thus, it was not properly brought to the attention of the court for the court's consideration.
- i. Further, in dismissing the Application, the court found and held, erroneously in the respectful view of the Applicant that the Law firm of Messrs. Khaminwa & Khaminwa Advocates never filed a Notice of Appointment of Advocates and therefore were not properly on record for the Applicant. The Honourable Court, on that basis, proceeded to expunge all the pleadings and documents filed in this matter by the said Law firm of Messrs. Khaminwa & Khaminwa Advocates on behalf of the Applicant.
- j. It was the respectful view of the Applicant that said the finding was erroneous because as at the time the law firm of Messrs. Khaminwa & Khaminwa came on record on the 29<sup>th</sup> September 2023, the Applicant was already being represented by the law firm of Messrs. Lumatete Muchai & Co. Advocates. Therefore, what was required of the law firm of Messrs. Khaminwa & Khaminwa Advocates was to file a Notice of Change of Advocates and not a Notice of Appointment of Advocates, which they did file, as confirmed by the court, on the 29<sup>th</sup> September 2023.
- k. It was on basis of this finding that the court proceeded to strike out all the pleadings and documents filed by Messrs. Khaminwa & Khaminwa Advocates, including the Application dated 19<sup>th</sup> April 2023 to arrest the Judgment and re - open the case for hearing.
- l. Hence, it was erroneous, for the court, again in the very respectful view of the Applicant, to proceed and determine an application that it had struck out and expunged from the records, on the basis that the said application was filed by an advocate who was not properly on record, on its merits. On the basis of this, it turned away the Applicant from the seat of justice because the expungement of the said application meant that it was no longer part of the court's proceedings.
- m. Although the Applicant was grateful to the court for granting him the leave, in the interest of the principle of natural justice, equity, and conscience, to file his submissions within twenty - one (21) days of the said ruling, he was unable to take advantage of the court's magnanimity because having not participated in the hearing through adducing and/or challenging the evidence on record, his submissions would, by law, be limited to points of law and therefore prejudice his case.
- n. The court found that the Applicant was not interested in the hearing of this matter based on the evidence and information placed before it. However, the Applicant, based on overwhelming evidence that was not placed before the court because he had no access to his file which was being held by his previous advocates. Contrary to the misleading portrayal by the Plaintiff, he had been a diligent litigant who had keenly followed all the developments in this matter with the sole intention of having this matter heard expeditiously to enable him vindicate his name and protect his property that was the subject matter of this proceedings.
- o. Therefore, the Applicant was now seeking to vary, review, and or set aside the ruling of this court delivered on the 16<sup>th</sup> October 2023. This was on the grounds that the ruling had an error apparent on the face of the record. Further that, he had discovered new evidence that was not in his possession as at the time of the hearing of the application dated 19<sup>th</sup> April 2023 and for other sufficient reasons to be outlined in this application.



- p. The urgency of this matter was comprised in the fact that the court had reserved its Judgment in this matter which was to be delivered on notice. The Applicant was now apprehensive that he stood a risk of losing his property, being the parcel of land known as Land Reference Number Mombasa Municipality/Block XXVI/933, the Suit Property herein, without being heard. Therefore, this would occur without the benefit of due process contrary to the provisions of Article 50(1) of *the Constitution* as read together with Article 40(2) of *the Constitution*

### III. The Plaintiff/Respondent's response to the Application.

5. The Plaintiff/Respondent opposed the said application through a 15<sup>th</sup> Paragraphed Replying Affidavit sworn by SONGOLE B. ASINGWA, an advocate of the High Court of Kenya practicing as such at the Ethics and Anti – Corruption Commission on 23<sup>rd</sup> January, 2024. She averred that:-
- a. All the while the Law firm of Messrs. Lumatete Muchai & Company Advocates had always appeared in court to represent the 1<sup>st</sup> Defendant/Applicant in the subject matter. Service of hearing and mention notices had always been effected by the Plaintiff/Respondent on the said Law firm.
  - b. Whether an Advocate filed a Notice of Appointment of Advocates and/or Notice of Change of Advocates, the provision of Order 9 Rules 5, 6 and 7 of the Civil procedure Rules, 2010 would apply. The notices, whether of change or appointment the same must be SERVED in accordance with the said rules, otherwise the former advocate shall, subject to Rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.
  - c. Furthermore, even if the Applicant had an Advocate (s) on record he still had a duty to follow up and find out the status of the case even at the Court's registry, which was open to any member of the public.
  - d. The mistake of his Counsel to fail to serve the notice of change and/or appointment of Advocates could be prosecuted before the Advocates Disciplinary Tribunal as it did not amount to a bona fide mistake which this court could excuse.
  - e. The 1<sup>st</sup> Defendant/Applicant's application was an afterthought and the real objective was so that they could fill gaps in their case which had been exposed.
  - f. From the Applicant's Replying Affidavit it was clear that the 1<sup>st</sup> Defendant/Applicant was well aware of the matter and the onus of ensuring that he appeared in court to prosecute the matter was on him and not the Plaintiff.
  - g. The 1<sup>st</sup> Defendant/Applicant herein was at all material times of the hearing of the suit fully represented and accorded the opportunity to be heard through their appointed Advocates.
  - h. The 1<sup>st</sup> Defendant/Applicant's application was a technical gimmick and a theatrical maneuver intended to defeat the ends of justice which technicality was abhorred by the provision of Article 159 (2) (d) of *the Constitution*.
  - i. The application shouldn't be allowed as it's filed with the intention of defeating justice and it's in the public interest that the same shouldn't be allowed.
  - j. The application if allowed would prejudice, hinder and risk the recovery of the subject suit parcel of land which was public property.



- k. The 1<sup>st</sup> Defendant/Applicant had not laid any basis to warrant a review of the ruling delivered by this Honorable court and its application was a clear example of abuse of the due process of the court.
- l. The application was unmeritorious, frivolous, vexatious and an about of the Court process whose objective was to waste of the Court's precious judicial time hence should be dismissed with costs to the Plaintiff.

#### **IV. The Further Affidavit by the 1<sup>st</sup> Defendant/Applicant**

6. Upon obtaining the leave of Court, the 1<sup>st</sup> Defendant/Applicant filed a Further Affidavit sworn on 17<sup>th</sup> November, 2023. In response to the Plaintiff's Replying Affidavit sworn on 23<sup>rd</sup> January, 2024 through a 18<sup>th</sup> Paragraphed further affidavit sworn on 23<sup>rd</sup> February, 2024 sworn by Gilbert Mwangi Njuguna, who averred as follows:
  - a. He reiterated that as of the date of the hearing of the main suit on the 16<sup>th</sup> November 2022, he had already instructed the Law firm of Messrs. Khaminwa & Khaminwa Advocates to come on record for him in the place of the Law firm of Messrs. Lumatete Muchai & Company Advocates.
  - b. This change had been communicated to the Law firm of Messrs. Lumatete Muchai & Co. Advocates and the Notice of Change of advocates thereof was in fact filed in this court on the 29<sup>th</sup> September 2022.
  - c. It was therefore unfortunate that the Law firm of Messrs. Khaminwa & Khaminwa Advocates omitted to serve the Notice of Change on the Plaintiff's Advocates as required by the law.
  - d. This omission prejudiced his case in this matter because, although the Plaintiff served the erstwhile Law firm of Messrs. Lumatete Muchai & Co. Advocates with hearing notice for the 16<sup>th</sup> November 2022, the said law firm of advocates failed to notify his new advocates of the date although they were well aware that he had already appointed the Law firm of Messrs. Khaminwa & Khaminwa Advocates to come on record for me in this matter.
  - e. Similarly, the Law firm of Messrs. Lumatete Muchai & Co. Advocates failed and/or neglected to inform the Plaintiff advocates at the time of the service of the hearing notice by the Plaintiff herein that they were no longer on record for me in this matter.
  - f. The contents made out under Paragraph 4 of the Replying Affidavit was therefore a confirmation that the hearing notice was served on the Law firm of Messrs. Lumatete Muchai when he had in fact as at the said date of service already appointed the Law firm of Messrs. Khaminwa & Khaminwa Advocates to come on record for him in this matter.
  - g. Thus, his absence during the hearing was neither deliberate nor willful but was instead occasioned by factors that were clearly beyond his control as a litigant who had in good faith instructed counsels who should have kept him informed and acted in his best interest.
  - h. Indeed he followed the issue with the Law firm of Messrs. Khaminwa and Khaminwa Advocates through several text messages and, in response, they always assured him that the matter was pending but had not been heard.
  - i. It was on the strength of their confirmation that the matter had not been heard, thirteen (13) years after being filed, that he instructed them to file the application dated 16<sup>th</sup> November 2022 in which he had sought to have the suit dismissed for want of prosecution.



- j. All these facts and evidence were not within his knowledge at the time of filing his application dated the 19<sup>th</sup> April 2023 and he only came to learn of these issues after he received his file from the Law firm of Messrs. Lumatete Muchai & Co. Advocates on the 28<sup>th</sup> October 2023 long after this court had delivered its ruling on the 16<sup>th</sup> October 2023.
- k. He was in shock to learn from the said file that the last letter, as per the file that his former advocates sent to him was the letter dated 20<sup>th</sup> May 2021 which for some inexplicable reason was addressed to an address in Mombasa which was not his postal address. On the contrary, his said advocates were well aware that he was living and working in Nairobi at the time. Annexed in the further affidavit and marked as “GMN – 1” was a copy of the said letter.
- l. Therefore, he confirmed not having been aware of the hearing of this matter on the 16<sup>th</sup> November, 2022 for the reason he had already explained above and in his supporting affidavit to the application.
- m. As an officer of this Honourable Court of over 30 years of experience who had served the legal profession both on the bar and on the bench, he wished to confirm that he was aware of his responsibility as a counsel and would not engage in an exercise that would even remotely suggest that he was abusing the court process.
- n. The application was a desperate attempt on his part to have his case in this matter heard in the existence of his right under the provision of Article 50 (1) of *the Constitution*. Hence, it was not a technical gimmick or a theatrical maneuver as alleged by the Plaintiff/Respondent.

## V. Submissions

- 7. On 7<sup>th</sup> February, 2024 in the presence of both parties in Court, the Honourable Court directed that the Notice of Motion application dated 17<sup>th</sup> November, 2023 be canvassed by way of written submission. Pursuant to that the Honourable Court having confirmed complied reserved the date of the ruling on notice.

### A. The written submissions of the 1<sup>st</sup> Defendant/ Applicant

- 8. The 1<sup>st</sup> Defendant/Applicant through the Law firm of Messrs. Adera & Kenyatta Advocates filed their written submissions filed and dated 23<sup>rd</sup> February, 2024. Mr. Kenyatta Advocate commenced their submissions by stating that what was before court was the 1<sup>st</sup> Defendant/Applicant’s application dated 17<sup>th</sup> November 2023 (hereinafter referred to as “the Application”) in which he was seeking, ‘inter alia’, to have this Honorable Court review, vary, and or set aside its ruling delivered in this matter on the 16<sup>th</sup> October, 2023. The application was supported by the Applicant’s affidavit sworn on the 17<sup>th</sup> November 2023 and his further affidavit sworn on the 23<sup>rd</sup> February, 2024.
- 9. The Learned Counsel confirmed to the court that on the 7<sup>th</sup> of February 2024 he was not opposed to the Application. The Plaintiff/ Respondent hereinafter “the Plaintiff” was however opposed to the Application and had filed and served its replying affidavit sworn on the 23<sup>rd</sup> January 2024 in response to the same. On the 7<sup>th</sup> February, 2024 this Honorable Court directed that the Application be disposed of by written submissions. These submissions were therefore being made pursuant to the said directions of the court and in support of the Application.
- 10. On the facts, the Learned Counsel averred that by way of its ruling delivered in this matter on the 16<sup>th</sup> October 2023, this Honorable Court dismissed the Applicant’s application dated 19<sup>th</sup> April 2023 in which the Applicant had sought to arrest the delivery of Judgment in this matter and have the



court re-open the hearing of the same to enable him, as a party to these proceedings, participate in the hearing in the exercise of his constitutional right to a hearing under the provision of Article 50(1) of *the Constitution* of Kenya, 2010. In dismissing the said application, the court found and held, inter alia, that the Applicant had been served with hearing notice in respect of the hearing that took place on the 16<sup>th</sup> November 2022. In essence, therefore, he was sufficiently aware of the said date but chose not to attend.

11. According to the Learned Counsel, it had however emerged that the said hearing notice was in fact not properly served on the Applicant because the same was served on the Law firm of Messrs. Lumatete Muchai & Co. Advocates who were not on record for Applicant as at the date of the said service, having been replaced by the Law firm of Messrs. Khaminwa & Khaminwa Advocates. This was pursuant to the Notice of Change of Advocates filed in this matter by the said Law firm of Messrs. Khaminwa & Khaminwa Advocates on the 29<sup>th</sup> September 2022.
12. Unfortunately, the Applicant's former advocates neither notified the Applicant nor his new advocates of the said service. Further, they never informed him of the fact that the matter had been fixed for hearing on the 16<sup>th</sup> November 2022 with the tragic consequence that the matter proceeded on the 16<sup>th</sup> November 2022 in the absence of the Applicant. That therefore it proceeded without hearing the Applicant as one principal parties to this dispute. The fact and evidence of the same was not in the possession of the Applicant at the time of filing and hearing of the application for the arrest of the Judgment. Thus, it was not properly brought to the attention of the court for the court's consideration.
13. Further in dismissing the Application, the court found and held, erroneously in the respectful view of the Applicant that the Law firm of Messrs. Khaminwa & Khaminwa Advocates never filed a Notice of Appointment of Advocates and therefore was not properly on record for the Applicant. It was on that basis, proceeded to expunge all the pleadings and documents filed in this matter by the said Law firm of Messrs. Khaminwa & Khaminwa Advocates on behalf of the Applicant.
14. According to the Learned Counsel, it was however, the respectful view of the Applicant that said the finding was erroneous because at the time the law firm of Messrs. Khaminwa & Khaminwa came on record on the 29<sup>th</sup> September 2022, the Applicant was already being represented by the law firm of Messrs. Lumatete Muchai & Co. Advocates. Hence, the Counsel averred that what was required of the law firm of Khaminwa & Khaminwa Advocates to file was a Notice of Change of Advocates and not a Notice of Appointment of Advocates, which they did file, as confirmed by the court, on the 29<sup>th</sup> September 2022. It was on the basis of this finding that the Court proceeded to strike out all the pleadings and documents filed by Messrs. Khaminwa & Khaminwa Advocates, including the Application dated 19<sup>th</sup> April 2023 to arrest the Judgment and re - open the case for hearing.
15. Therefore, it was erroneous, for the court, again in the very respectful view of the Applicant, to proceed and determine an application that it had struck out and expunged from the records, on the basis that the said application was filed by an advocate who was not properly on record, on its merits and on that basis turn away the Applicant from the seat of justice because the expungement of the said application meant that it was no longer part of the court's proceedings.
16. According to the Learned Counsel, although the Applicant was grateful to the court for granting him the leave, in the interest of the principle of natural justice, equity, and conscience, to file his submissions within twenty – one (21) days of the said ruling, he was unable to take advantage of the court's magnanimity because having not participated in the hearing and adduced and challenged evidence, his submissions would by law, be limited to points of law and therefore prejudice his case.



17. The court found that the Applicant was not interested in the hearing of this matter based on the evidence and information placed before it. However, the Applicant, based on overwhelming evidence that was not placed before the court because he had no access to his file which was being held by his previous advocates, and contrary to the misleading portrayal of him as an indolent litigant by the Plaintiff, had been a diligent litigant who had keenly followed all the developments in this matter with the sole intention of having this matter heard expeditiously to enable him vindicate his name and protect his property that is the subject matter of this proceedings.
18. Therefore, the Learned Counsel submitted that the Applicant was seeking to vary, review, and or set aside the ruling of this court delivered on the 16<sup>th</sup> October 2023 on the grounds that the ruling had an error apparent on the face of the record, that he has discovered new evidence that was not in his possession as at the time of the hearing of the application dated 19<sup>th</sup> April 2023 and for other sufficient reasons to be outlined in this application. The urgency of this matter was comprised in the fact that the court had reserved its Judgment in this matter to be delivered on notice. Thus, the Applicant was now apprehensive that he stood a risk of losing his property, being the parcel of land known as Land Reference Number Mombasa Municipality/Block XXV1/933, the Suit Property herein, without being heard. Therefore, he was apprehensive not getting the benefit of due process contrary to the provisions of Article 50(1) of *the Constitution* as read together with Article 40(2) of *the Constitution*. However, the Counsel opined that, the Plaintiff contended that the Applicant was properly served with the hearing notice through the Law firm of Messrs. Lumatete Muchai & Company Advocates. That in any event the said Law firm remained on record for the Applicant until the proper service of notice of change of advocates, if any.
19. The Learned Counsel submitted that it was therefore the Plaintiff's case that the failure to serve a notice of change of advocates was not a mistake that would warrant the review of the orders of this court given on the 16<sup>th</sup> October 2023. Hence, the Plaintiff contended that the Applicant was all along aware of the hearing date and that the application was a technical gimmick and a theatrical maneuver intended to defeat the ends of justice which was a technicality abhorred by provision of Article 159 (2) (d) of *the Constitution*.
20. On the law, the Learned Counsel submitted that the substantive power of this court to review its orders is provided under Section 80 of the *Civil Procedure Act*, Cap. 21 and Order 45 Rule 1 of the of the Civil Procedure Rules 2010. According to the Learned Counsel, it was on the basis of the above substantive provision of Section 80 of the *Civil Procedure Act* and the procedural provision of Order 45 Rule I of the Civil Procedure Rules that Applicant had invoked the review jurisdiction of this court seeking to have this court review, vary and or set aside its orders given on the 16<sup>th</sup> October 2023. Under the said provisions of the law, the court may, on the application of the aggrieved party, review its orders for the following reasons;:
  - i. Discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the applicant and or could not be produced by him at the time when the decree or the order was passed or given.
  - ii. Mistake or error apparent on the face of the record.
  - iii. Any other sufficient reason
21. In the proceedings, the Applicant averred that he was not aware of the hearing date of the 16<sup>th</sup> November 2022. According to the Counsel, the hearing of this matter proceeded on the said date in his absence and without him being heard. The Plaintiff however contended that the hearing notice was duly served on the Law firm of Messrs. Lumatere Muchai & Co. Advocates who were then, according



to the Plaintiff, the Law firm properly on record for the Applicant. It had however since emerged and this fact was not controverted that as of the date of the hearing, the Applicant had already appointed the firm of Messrs. Khaminwa & Khaminwa Advocates to come on record for him in the matter.

22. Indeed, as the record would confirm, the said Law firm of Messrs. Khaminwa & Khaminwa Advocates filed their notice of change of advocates on the 29<sup>th</sup> of September 2022. However, they omitted to serve the said notice on the Plaintiff's advocates as required under the provision of Order 9 Rule 6 of the Civil Procedure Rules. It was clear that as of the date of the hearing of this matter on the 16<sup>th</sup> November 2022, there was conclusion on the issue of representation of the Applicant.
23. The Learned Counsel submitted that as the record would confirm that though the Law firm of Messrs. Khaminwa & Khaminwa Advocates had been appointed by the Applicant and, had, pursuant to the said appointment, filed their notice of change of advocates dated 29<sup>th</sup> September, 2022. Unfortunately, the said Law firm of advocates failed to serve the same on the Plaintiff's advocates. Due to this omission to serve the notice of change of Advocates, the Law firm of Messrs. Lumatete Muchai & Co. Advocates was deemed, by law, to be on record for the Applicant. However, the law firm of Messrs. Khaminwa & Khaminwa Advocates having been instructed and filed their notice of appointment had already notified the Law firm of Messrs. Lumatete & Muchai Advocates that they had now come on record for the Applicant.
24. It was in this confusion that the Plaintiff served the hearing notice for the 16<sup>th</sup> November 2022 on the Law firm of Messrs. Lumatete Muchai & Co. Advocates who, unfortunately, neither informed the Applicant nor his new advocates of the hearing date. These facts were not within the knowledge of the Applicant at the time he filed his application dated 19<sup>th</sup> April 2023 seeking to arrest the court's Judgment in this matter. The Applicant only learned of this unfortunate confusion on his representation when he received a copy of his file from the Law firm of Messrs. Lumatete Muchai & Co. Advocates through the Law firm of Messrs. Khaminwa & Khaminwa Advocates in October 2023, long after this court had delivered its ruling on the said application on the 16<sup>th</sup> October 2023.
25. It was therefore the contention of the Learned Counsel that these new facts and evidence amount to, within the meaning of Order 45 Rule 1(b), the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the Applicant and which he could not therefore have produced or relied on the same in support of his said application.
26. The Learned Counsel argued that the court therefore has unfettered discretion under the provision of Section 80 of the *Civil Procedure Act*, Cap. 21 as read together with Order 45 Rule (1) of the Civil Procedure Rules to review, vary, or set aside the interest of justice and fair hearing. To buttress the point, the Learned Counsel relied on the case of:- "V R M – Versus - M R M & another [2006] eKLR" the Court of Appeal held that:-

“the documents were sought to be introduced after the Judgment would “Thus the not per se mean that they were meant to supplement evidence tendered at the hearing. The application for review as acknowledged by the learned Judge was not merely based on the discovery of the new and important matter but also “for any other sufficient reason”, In considering the latter ground, the learned Judge stated:

“The grounds of review under any other sufficient reason must be something which existed at the date of the decree and the rule does not authorize the review of a decree which was right when it was made on the ground of the happening of some subsequent event”

With respect, we think that reasoning is restrictive of the unfettered discretion donated to the court under section 80 of the *Civil Procedure Act* and Order 44 of the rules. We think the



correct statement of the law was that followed by this Court in *Narodhco Kenva Limited – Versus - Loria Michelle Civil Appeal No.24 of 1998 (ur)* when it stated:-

“There was nothing on record to disprove the defendant's allegations to the effect that the said new facts came to its knowledge only after the decree. The power to review is not confined to mistakes or errors in the decree. The power is given by Section 80 of the Civil Procedure Code (sic) and Order 44 of the Civil Procedure Rules as was stated by this court in the case of *Shanzu Investments Limited*. This court said:

“In *Wangechi Kimita & Another – Versus - Mutahi Wahabiru (C.A. No.80 of 1985)* (unreported) it was held that,

Any other sufficient reason need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the court by section 80 of the *Civil Procedure Act*. The court further went on to hold that the other grounds set out in the rule did not in themselves form a genus or class of things with which the third general head could be said to be analogous.

The current position would, then, appear to be that the court ha unfettered discretion to review its own decrees or orders for any sufficient reason”.

In our view it is not incumbent upon the Judges at the stage of the hearing of an application for review, such as was before the judge here, to inquire fully into the correctness of facts. It would suffice if the court is satisfied that the facts brought up after the event are such as to merit a review of the judgment.”

The evidence that was intended to be introduced was crucial in determining with finality whether the appellant was still lawfully married to another person. Refusing to look at or even consider it would not be proof that she was so married. Indeed, it would lead to the absurd conclusion that the appellant was married when, from all indications, she was lawfully divorced. We have looked at the documents ourselves and we find no valid reason for their rejection. Coupled with the finding we made earlier that a favorable finding in that respect would affect the decree, we think there was sufficient reason to grant the application. Whether one therefore applies the test of discover of new and important matter or sufficient reason in the circumstances of this case, it is our judgment that this appeal should be allowed.” Emphasis ours.

27. The Learned Counsel submitted that as a result of the confusion on the issue of representation on the Applicant, the matter proceeded in his absence. Thus, he stood the very real risk of being condemned unheard contrary to all the known rules of the natural justice and the provisions of Article 50 (1) of *the Constitution*. To support his point, he referred Court to the case of: “*David Oloo Onyango – Versus - Attorney - General [1987] eKLR*” the Court held that:-

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at... It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before



making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated.....Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio."

28. The Learned Counsel further relied on the case of "JMK – Versus - MWM & another [2015]eKLR" the court held that;

"In this appeal, the appellant was entitled to contend, as he did, that the judgment of the Industrial Court which directly affected him, was in breach. Not only of the law, but also of *the Constitution* in so far as it condemned him without an opportunity to be heard and in breach of the right to a fair hearing guaranteed by Article 50(1). He was also entitled to contend that to the extent that the judgment found him guilty of sexual harassment without affording him an opportunity to be heard, that in itself constituted sufficient reason for review of the judgment.

The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. In ONYANGO L.ATTORNEY GENERAL(1986-1989)EA 456,Nyarangi,JA asserted at page 459:

"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly."

At page 460 the learned Judge added:

"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."

And in Mbaki & Others – Versus - Macharia & Another (2005)2 EA 206, at page 210, this Court stated as follows:

"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.

29. According to the Learned Counsel, the Applicant was grateful that the court for allowing him to file his submissions, in the Interest of justice, equity, and conscience. However, that accommodation remained



hollow and a pipedream if this court was not minded to vary its orders given on the 16<sup>th</sup> November 2023 by allowing the Applicant to challenge the evidence against him and present evidence in support of his case. However, in dismissing the Application, the court found and held, erroneously in the respectful view of the Applicant that the Law firm of Messrs. Khaminwa & Khaminwa Advocates never filed a Notice of Appointment of Advocates and therefore was not properly on record for the Applicant and the court, on that basis, proceeded to expunge all the pleadings and documents filed in this matter by the said Law firm of Messrs. Khaminwa & Khaminwa Advocates on behalf of the Applicant.

30. The Learned Counsel asserted that it was, the respectful view of the Applicant that said the finding was erroneous because at the time the law firm of Messrs. Khaminwa & Khaminwa came on record on the 29<sup>th</sup> September 2022, the Applicant was already being represented by the law firm of Messrs. Lumatete Muchai & Co. Advocates. Therefore, what was required of the law firm of Messrs. Khaminwa & Khaminwa Advocates was to file a Notice of Change of Advocates and not a Notice of Appointment of Advocates, which they did file, as confirmed by the court, on the 29<sup>th</sup> September 2022. It was on the basis of this finding that the court proceeded to strike out all the pleadings and documents filed by Messrs. Khaminwa & Khaminwa Advocates, including the Application dated 19<sup>th</sup> April 2023 to arrest the judgment and reopen the case for hearing
31. According to the Learned Counsel, it was therefore erroneous, for the court, again in the very respectful view of the Applicant, to proceed and determine an application that it had struck out and expunged from the records, on the basis that the said application was filed by an advocate who was not properly on record, on its merits. On that basis, it turned away the Applicant from the seat of justice because the expungement of the said application meant that it was no longer part of the court's proceedings.
32. It was the humble submission of the Learned Counsel that the order expunging the Applicant documents filed by the Law firm of Messrs. Khaminwa & Khaminwa Advocates from the records while also directing it to file its submissions on the main suit was also an error apparent on the face of the record that warrants the review of ruling of this court delivered on the 16<sup>th</sup> October 2023. The Counsel further stated that the court would note from the record that contrary to the assertions by the Plaintiff the Applicant had been all through these proceedings, save for the confusion on representation in the month of September 2022, a diligent litigant who had always been keen to have this matter heard and concluded expeditiously.
33. According to the Learned Counsel, the court would note that although the Plaintiff instituted this suit in the year 2010 it took no further steps to prosecute the matter leading to the dismissal of the matter for want of prosecution on the 11<sup>th</sup> November 2015 but was reinstated on the 17<sup>th</sup> December 2015 after the Plaintiff was condemned to pay costs. The matter was again dismissed for the non - attendance of the Plaintiff on the 3<sup>rd</sup> June 2019 and again reinstated in the year 2020 on the application of the Plaintiff.
34. The Learned Counsel further went to state that the Applicant remained the registered proprietor of the suit property and had been denied access to the same for the last fifteen (15) years because of the conservatory orders issued by the court in this matter. The Applicant had always been ready for the hearing of the matter and even traveled to Mombasa on the 12<sup>th</sup> June 2022 for a hearing of the matter on the 13<sup>th</sup> and 14<sup>th</sup> June 2022 on the advice of his advocates only to be informed that the matter had been taken out of the days hearing list. Therefore, the Applicant had been a diligent litigant who had always diligently followed up the hearing of this matter.
35. In conclusion, the Learned Counsel submitted that, it was in the interest of justice that the Application be allowed as prayed.



## B. The Written submissions by the Plaintiff/Applicant

36. The Plaintiff through the through the Ethics and Anti – Corruption Commission filed its written submissions dated 1<sup>st</sup> March, 2024. M/s. Songole Advocate averred that on 17<sup>th</sup> November, 2023 the 1<sup>st</sup> Defendant/Applicant filed an application seeking that the Honorable Court vary, review and/or set aside the ruling delivered on 16<sup>th</sup> October, 2023 in which the Court dismissed the application that had been filed by the said Applicant seeking to arrest the Honorable Court from delivering its Judgement. The Plaintiff/Respondent (hereinafter referred to as “the Commission”) has identified issues arising from the Application filed by the 1<sup>st</sup> Defendant/Applicant and will address the Honourable Court on the following three (3) issues for the Honourable Court determination. These were, firstly on whether the 1<sup>st</sup> Defendant/Applicant was offered an opportunity to defend themselves. The Learned Counsel submitted that *the Constitution* of Kenya 2010 under the provision of Article 50 of *the Constitution* of Kenya, 2010 makes the right to a fair hearing one of the rights and fundamental freedom secured by *the constitution*. Article 50 (1) provides that:-
- “Every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, amounting independent and impartial tribunal or body”.
37. The Court has a constitutional mandate to ensure that a trial will be fair. The Applicant himself had demonstrated in his supporting affidavit how well aware he was of matter. The Applicant chose not to appear in Court and could not therefore turn around and state otherwise. Under the provision of Order 12 Rule 2 of the Civil Procedure Rules, 2010, it was clear on procedure for hearing a matter where only the Plaintiff has attended court. The 1<sup>st</sup> Defendant/Applicant was very active to have this matter dismissed for want of prosecution but not so eager to prosecute its case once it came up for hearing. The onus of ensuring that he appeared in court to for hearing was on him and not the Plaintiff/ Respondent. Even if the Applicant had an Advocate (s) on record he still had a duty to follow up and find out the status of its case even at the Court’s registry, which is open to any member of the public.
38. To support her point, she referred Court to Justice Dr. Iur Fred Nyagaka in the case of “Moses Kimaiyo Kipsang – Versus - Geoffrey Kiprotich Kirui & 2 others [2022] eKLR”,
- “Having found that the Defendants were properly served, this court is of the view that it must consider whether the Defendants were accorded a chance for fair hearing. The record speaks for itself. Defendants’ counsel appeared on two occasions only but failed to attend the other court sessions. Again, even when the matter was fixed for hearing and learned counsel failed to attend Court, there is no explanation whatsoever that has been given by the Defendants themselves as to why they did not attend Court in absence of the counsel. There is no law or practice that is to the effect that once learned counsel fails to attend Court the parties he represents also automatically fail to attend Court. This does not show good faith and seriousness on the part of the defendants themselves, especially when they did not file a defence. He has stated that his mistake should not be visited on the client. This court notes that the case is of the client and not his advocate. The totality of the facts and circumstances is that the court is of the opinion that the defendants were accorded a chance to be heard but they chose not to. Order 12 Rule 2 is clear on what the Court should do in the circumstances such as were on 20/05/2021 and the Court cannot be faulted.”
39. According to the Learned Counsel, the 1<sup>st</sup> Defendant/Applicant could not therefore describe himself as a party who was denied a chance to be heard yet throughout the matter the Plaintiff/ Respondent



- took further steps of serving a hearing notice on the 1<sup>st</sup> Defendant/Applicant despite him being present in court when the hearing date was being issued. The court record would bear witness to this fact
40. Secondly, on whether the Honorable Court should vary, review and/or set aside the ruling issued on 16<sup>th</sup> October, 2023. The Learned Counsel submitted that under Section 80 of the *Civil Procedure Act* and Order 45(1) of Civil Procedure Rules sets rules/grounds for review. The grounds were:-
- (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 un reasonable delay
41. On 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, the Learned Counsel relied on the case of “Paul Mwaniki – Versus - NHIF Board of Management [2020] eKLR”, Justice Mativo held that:
- “I rely on Evan Bwire – Versus - Andrew Nginda Civil Appeal No. 103 of 2000Kisumu; (2000)LLR 8340 where the court held that ‘an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh. The principles which can be culled out from the above noted authorities are:-...
- 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
42. The Judge further noted in “Republic – Versus - Principal Secretary, Ministry of Internal Security & another Ex Parte Schon Noorani & another [2020] eKLR”,
- “For material to qualify to be new and important evidence that it could not have been discovered had the applicant exercised due diligence. It must be such evidence or material that was not available to the applicant or the court as the time of making the decision. Differently stated, the material presented by the applicant does not qualify to be new evidence
43. The Learned Counsel submitted that the Applicant could not purport to have made a new discovery that the matter proceeded for hearing yet he had an Advocate on record. He had not demonstrated undertaking any due diligence on the matter. The Courts registry was open to any litigant who wished to know the status of their case. In fact the Applicant had admitted to being an Officer of the Court, meaning he was not new to the operations of the Court’s registries. He should have undertaken due diligence to find out the status of the case. The Applicant could not therefore feign ignorance of the existence of the date of hearing yet he had all the means to access the Registry. The information could have been accessed easily and therefore the reasons advanced by the Applicant in its Application and Submissions did not qualify to be new evidence.
44. On the issue of some mistake or error apparent on the face of the record, the learned Counsel submitted that the 1<sup>st</sup> Defendant/Applicant in his application had stated that there was an error of the face of



the record when the court dismissed documents filed by the Law firm of Messrs. Khaminwa and Khaminwa Advocates. This being a court of record, it could bear witness that the said Law firm only filed a notice of appointment of Advocates, which was never properly served. The Law firm never followed the rules of Civil Procedure Rules as required and was therefore not properly on record. The said Notice of Appointment of Advocates only bore the stamp of the Court and was never served on the Plaintiff/Respondent.

45. The provision of Order 9 Rule 5 of the Civil Procedure Rules, 2010 which provides that:-
- “ A Party suing or defending by an Advocate shall be at liberty to change his Advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of Advocate is filed in Court in which such cause or matter is proceedings and served in accordance with Rule 5, the former Advocate shall, subject to rules 12 and 13 be considered the Advocate of the Party until the final conclusion of the cause the Advocate of the party including any review or appeal.”
46. The import of the failure of service was clearly indicated in the above Order. The 1<sup>st</sup> Defendant/Applicant never effected service of the said notice to any parties more so on the Plaintiff/Respondent. No evidence of service had been produced.
47. The Learned Counsel submitted that unless and until a notice of change of Advocate was filed and duly served an Advocate on record for a party remained the Advocate for that party subject to removal from record at the instance of another party under Rule 12 of the same Order or withdrawal of the Advocate under Rule 13 of the same Order. To support her point, she referred Court to Judge J.G Kemei in the case of:- “Stephen Mwangi Kimote – Versus - Murata Sacco Society [2018]eKLR” stated
- “ Article 50 (2)(b) of *the Constitution* protects the rights of an accused person to choose and be represented by an Advocate. Order 9 does not impede the right of a party to be represented by an Advocate of his choice. It only provides rules to impose orderliness in civil proceedings. Any change of Advocate should comply with the rules. Chaos would reign if parties can change Advocates at will without notifying the Court and the other parties. I have noted that the Applicant did not comply with Order 9 rule 5 as well”.
48. The Learned Counsel asserted that this legal position was also echoed by Justice W. Korir in the case of:- “Simon Barasa Obiero – Versus - Jackson Onyango Obiero [2016] eKLR” where he stated:-
- “ Any change of advocate should comply with the rules. Chaos would reign if parties can change advocates at will without notifying the Court and the other parties”.
49. The Learned Counsel opined that the Law firm of Messrs. Khaminwa and Khaminwa were therefore improperly on record. It is for these reason that the Plaintiff/Respondent continued to serve the Law firm of Messrs. Lumatete Muchai & Company Advocates who were properly on record and still appeared in court even when the date for hearing was confirmed by court. The court record would bear witness to this fact.



50. On the issue of whether there was a mistake or error apparent on the face of the record, the Learned Counsel relied on the case of “Paul Mwaniki – Versus - NHIF Board of Management [2020] eKLR”, where the Court held that:

“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”.

51. Additionally, in the case of:- “Nyamongo & Nyamongo – Versus - Kogo (2001) EA 170” the Court noted that:-

“There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which was to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a review adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”

52. The Learned Counsel submitted that this Honorable Court dismissed the Applicant's application of merit. Despite service the Applicant failed to attend court for hearing. The fact of the matter was that the Applicant was served with the hearing notice. The purported failure of service was what had raised arguments before this Court on whether the same was done properly, within the Civil Procedure Rule and/or whether it was effected on the right firm.

53. The Learned Counsel relied on the case of “Republic – Versus - Principal Secretary, Ministry of Internal Security & another Ex Parte Schon Noorani & another [2020] eKLR”, Justice Mativo held:-

“The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on face of the record if it is not manifest or self-evident and requires If-evident and requires an examination or argument to establish it. Review is impermissible without a glaring omission, evident mistake or similar omission error. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be error apparent on the face of the two opinions can hardly be said to be an error apparent on the face of record. Where an alleged error is far from self-evident and if it can be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review.

54. On whether the reasons advanced by the Applicant sufficient to warrant his application. The Learned Counsel submitted that the 1<sup>st</sup> Defendant had not advanced any sufficient reasons to warrant his application being allowed. He instead had gone to apportion blame to the Plaintiff who was not a party to his choice of legal representation. The issues raised by the Applicant were matters that should be dealt with the Advocates Disciplinary Tribunal and not this Honorable Court. The 1<sup>st</sup> Defendant/Applicant who had been well aware of the matter and who had admitted being an officer is indeed aware of the existence of a court registry. Such that if indeed his Advocate never informed him of the date as he alleged, then he would have gone to the Courts registry to find out the status of the matter. So as not to lock out the Applicant from the temple of Justice, the Honorable court was lenient enough to allow the Applicant to file submissions in the matter. Surely, the Honorable Court had been fair to the Applicant as he would make his case in the submissions.



55. The Learned Counsel further went ahead to state that his application therefore never met the threshold for review under Section 80 of the *Civil Procedure Act*, Cap. 21 and Order 45 of the Civil Procedure Rules, 2010. The 1<sup>st</sup> Defendant application should not be allowed as it's filed with the intention of defeating justice and it's in the public interest that the same should not be allowed. Allowing the same would violate the provisions of Article 159 of *the Constitution* and Sections 1A and 1B *Civil Procedure Act*. It would also cause prejudice by hindering and risking the recovery of the subject suit parcel of land which was public property that should be in use by Government officers.
56. In conclusion, on which party should bear the costs of the application. The Learned Counsel submitted that the 1<sup>st</sup> Defendant/Applicant's application was unmerituous, frivolous, vexatious and an abuse of court process whose objective it to waste court's precious judicial time hence should be dismissed with costs to the Plaintiff/1<sup>st</sup> Respondent.

## VI. Analysis and Determination

57. I have carefully read and considered the pleadings herein being the application dated 26<sup>th</sup> July, 2023 by the 1<sup>st</sup> Defendant/Respondent, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
58. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
- a. Whether the Honourable Court will be pleased to review, vary, and or set aside its ruling and orders delivered on the 16<sup>th</sup> October 2023 by setting aside the proceedings of this court of the 16<sup>th</sup> November 2022?
  - b. Whether the parties are entitled to the reliefs sought.
  - c. Who meets the costs of the Notice of Motion application dated 17<sup>th</sup> November, 2023?

### **ISSUE No. a). Whether the Honourable Court will be pleased to review, vary, and or set aside its ruling and orders delivered on the 16<sup>th</sup> October 2023 by setting aside the proceedings of this court of the 16<sup>th</sup> November 2022.**

59. Under this Sub – heading, the main substratum is on causing the Honourable Court to consider review, setting aside, varying and/or discharging its ruling. The application by the 1<sup>st</sup> Defendant/Applicant was brought under the provisions of Article 50(1) of *the Constitution* of Kenya, 2010, Order 45 Rule 1 and 2 of the Civil Procedure Rules, 2010 and Sections 1A and 1B of the *Civil Procedure Act*, Cap. 21. The principles governing review of rulings are found in Section 80 *Civil Procedure Act* Cap 21 and Order 45(1) and (2) of the Civil Procedure Rules, 2010 and an appeal can be preferred.
60. Therefore, this Honorable Court finds it significant to critically examine the provisions for review, setting aside and/or varying Court orders. These are found mainly under the provisions of law already stated herein. A clear reading of these provisions indicates that Section 80 is on the power to do so while Order 45 sets out the rules on doing it.
61. 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.”

62. 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.”

63. On this front, I wish to cite 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.”

64. Further, 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.

65. 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.”

66. From the stated provisions, it is quite clear that they 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.
67. Additionally, 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.”
68. The 1<sup>st</sup> Defendant/Applicant has urged that by way of its ruling delivered in this matter on the 16<sup>th</sup> October 2023, this Honorable Court dismissed the Applicant's application dated 19<sup>th</sup> April 2023 in which the Applicant had sought to arrest the Judgment in this matter and have the court re-open the hearing of the same to enable him, as a party to these proceedings, participate in the hearing in the exercise of his constitutional right to a hearing under Article 50(1) of *the Constitution* of Kenya, 2010. In dismissing the said application, the court found and held, inter alia, that the Applicant had been served with hearing notice in respect of the hearing that took place on the 16<sup>th</sup> November 2023 and that, therefore, he was sufficiently aware of the said date but chose not to attend.
69. It has however emerged that the said hearing notice was in fact not properly served on the Applicant because the same was served on the Law firm of Messrs. Lumatete Muchai & Co. Advocates who were not on record for Applicant as at the date of the said service, having been replaced by the Law firm of Messrs. Khaminwa & Khaminwa Advocates pursuant to the Notice of Change of Advocates filed in this matter by the said Law firm of Messrs. Khaminwa & Khaminwa Advocates on the 29<sup>th</sup> September 2023. Unfortunately the Applicant's former advocates neither notified the Applicant nor his new advocates of the said service and the fact that the matter had been fixed for hearing on the 16<sup>th</sup>



November 2023 with the tragic consequence that the matter proceeded on the 16<sup>th</sup> November 2023 in the absence of the Applicant and therefore without hearing the Applicant as one principal parties to this dispute. This fact and evidence of the same was not in the possession of the Applicant as at the time of filing and hearing of the Application for the arrest of the Judgment and was therefore not properly brought to the attention of the court for the court's consideration.

70. Further in dismissing the Application, the court found and held, erroneously in the respectful view of the Applicant that the Law firm of Messrs. Khaminwa & Khaminwa Advocates did not file a Notice of Appointment of Advocates and therefore were not properly on record for the Applicant and the court, on that basis, proceeded to expunge all the pleadings and documents filed in this matter by the said Law firm of Messrs. Khaminwa & Khaminwa Advocates on behalf of the Applicant. It was the respectful view of the Applicant that said the finding was erroneous because as at the time the law firm of Messrs. Khaminwa & Khaminwa came on record on the 29<sup>th</sup> September 2023, the Applicant was already being represented by the Law firm of Messrs. Lumatete Muchai & Co. Advocates and, therefore, what was required of the law firm of Messrs. Khaminwa & Khaminwa Advocates to file was a Notice of Change of Advocates and not a Notice of Appointment of Advocates, which they did file, as confirmed by the court, on the 29<sup>th</sup> September 2023.
71. According to the Applicant it was therefore erroneous, for the court, again in the very respectful view of the Applicant, to proceed and determine an application that it had struck out and expunged from the records, on the basis that the said application was filed by an advocate who was not properly on record, on its merits and on the basis turn away the Applicant from the seat of justice because the expungement of the said application meant that it was no longer part of the court's proceedings.
72. The Plaintiff in response to the Application told the Court that all the while the Law firm of Messrs. Lumatete Muchai & Company Advocates had always appeared in court to represent the 1<sup>st</sup> Defendant/Applicant. Service of hearing and mention notices have always been effected by the 1<sup>st</sup> Plaintiff/Respondent on the said firm. Whether an Advocate files a notice of appointment of Advocates/Notice of change of Advocates; Order 9 Rules 5, 6 and 7 apply. The notices, whether change of appointment the same must be SERVED in accordance with the said rules, otherwise the former advocate shall, subject to Rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.
73. According to the Plaintiff, even if the Applicant had an Advocate(s) on record he still had a duty to follow up and find out the status of the case even at the Court's registry, which is open to any member of the public. The mistake of his Counsel to fail to serve the notice of change/appointment of Advocates can be prosecuted before the Advocates Disciplinary Tribunal as it does not amount to a bona fide mistake which this court can excuse. From the Applicant's replying affidavit it is clear that the 1<sup>st</sup> Defendant was well aware of the matter and the onus of ensuring that he appeared in court to prosecute the matter was on him and not the Plaintiff.
74. For the Honourable Court to case proper analysis of this matter, the starting point would be the background of the case at hand. The Court in the Ruling delivered on 16<sup>th</sup> October, 2023 opined itself as follows:-
  38. My understanding of right to be heard in the trial of civil cases comprises, on the part of a Defendant, of a right to be notified of the existence of the case and the dates when court attendance is required, liberty to file documents in response to the Respondent's claim and entitlement to attend court and participate in the proceedings as provided for in the law guiding trial cases of this nature. The Court record shows that on 21<sup>st</sup> October, 2010 the suit was to be heard however the same was removed from the cause list. The Plaintiff/Respondent



was present in court but the 1<sup>st</sup> Defendant/ Applicant was not. On 11<sup>th</sup> November, 2015 the suit was dismissed for non-appearance of the 1<sup>st</sup> Plaintiff/Respondent and reinstated on 17<sup>th</sup> December, 2015 after the Plaintiff filed a notice of motion application seeking for the orders. There are several mention notices to the 1<sup>st</sup> Defendant/Applicant on record. On 17<sup>th</sup> May, 2017 the matter came for notice to show cause why the suit shouldn't be dismissed for want of prosecution wherein the 1<sup>st</sup> Defendant/Applicant informed the Honorable Court that they intended to compromise the suit. The Honorable court directed the matter be mentioned on 19<sup>th</sup> July, 2017 to confirm if the 1<sup>st</sup> Respondent/Plaintiff had filed an application to compromise the suit. The 1<sup>st</sup> Defendant/Applicant was ably represented by its Advocates. As already stated, there is a copy of the Defence on record but it is clear that the 1<sup>st</sup> Defendant/Applicant had no desire to participate in these proceedings. When the matter came up on 2<sup>nd</sup> May, 2018 for pre-trial direction, the 1<sup>st</sup> Defendant/Applicant was present in court. the 1<sup>st</sup> Defendant/Applicant was present in court when the matter was set down for hearing on 18<sup>th</sup> October, 2022

39. Further, that the manner of exercising that discretion is set out by Odeny J in the case of:-  
“David Kipkosgei Kimeli – Versus - Titus Barmasai [2017] eKLR”:-

“Kasango J. in the case of Samuel Kiti Lewa – Versus - Housing Finance Co. Of Kenya Ltd & another [2015] eKLR referred to a Ugandan High Court, Commercial Division case of Simba Telecom –Versus - Karuhanga & Anor (2014) UGHHC 98 which dealt with an application to reopen a case for purposes of submitting fresh evidence, the court referred to an Australian case Smith –versus- New South Wales [1992] HCA 36; (1992) 176 CLR 256 where it was held that:

“If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations, the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised.”

It should be noted that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened as was held in the abovementioned Ugandan case. It further held that even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not. I also subscribe to the above that ultimately if the court allows reopening of a case, it still has the discretion to admit the evidence adduced or introduced. The court can still reopen the case and disregard the evidence from the witnesses. What purpose would that kind of move serve as it would be an exercise in futility. That is why the court is under a duty to exercise its discretion judiciously. The court should pose the question, Is the reopening of the case likely to embarrass or prejudice the opposing party? Is it going to cause injustice? If the answer is in the affirmative then the discretion should not be exercised in the applicant's favour.”

75. This Court made declarations that;
- a. That the Notice of Motion application dated 19<sup>th</sup> April, 2023 is found to lack merit and hence be and is hereby dismissed in its entirety.



- b. That in the interest of the principle of natural Justice, Equity and Conscience, an order is made that the 1<sup>st</sup> Defendant/Applicant is at liberty to file their submissions if they deem fit to do so within the next 21 days from the date of the delivery of this Ruling.
- c. That the Law firm of Messrs. Khaminwa & Khaminwa Advocates are not properly on record for the 1<sup>st</sup> Defendant and all the pleadings filed by the said law firm are expunged from record. In the meantime, the esteemed Law firm is at liberty within the next 21 days from this ruling to regularize their representation pursuant to the provision of Order 9 Rules 5 & 6 of the Civil Procedure Rules, 2010.
- d. That notwithstanding the foregoing directions, the matter shall proceed on as previously scheduled for the reservation of a Judgment date in accordance with the directions pronounced by Court on 11<sup>th</sup> July, 2023.

**ISSUE No b). Whether the parties are entitled to the reliefs sought**

76. Under this sub heading, the Court will endeavor to assess whether the parties herein are entitled to the reliefs sought from the filed pleadings. With all due respect, this Honourable Court holds that in the current present application, the 1<sup>st</sup> Defendant/ Applicant has not demonstrated that the legal ingredients found under the provision of Section 80 of the *Civil Procedure Act*, Cap. 21 and Order 45 of the Civil Procedure Rules, 2010 which govern issues of review have been fulfilled. In saying so, I state that there has been no discovery of any new and important matter or evidence, nor has there been an error apparent on the face of the record as the Court had used the recommendations in expunging from record all documents filed by the Law firm of Messrs. Khaminwa & Khaminwa Advocates as they were properly not on record. The basis of this argument is that the Court can not sit on appeal on its own decision. Critically speaking, the Applicant has failed to graphically pin point the specific errors that are apparent on the face of the record.
77. Review can also be allowed for any other sufficient reason. The expression sufficient reason means a reason sufficiently analogous to those specified in the rule. In case of “Shanzu Investments Limited – Versus - Commissioner for Lands (Civil Appeal No 100 of 1993)” the Court of Appeal held that:-
- “Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by section 80 of the *civil procedure act*: and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”
78. According to the 1<sup>st</sup> Defendant/Applicant this Honorable Court dismissed the Applicant's application dated 19<sup>th</sup> April 2023 in which the Applicant had sought to arrest the judgment in this matter and have the court re-open the hearing of the same to enable him, as a party to these proceedings, participate in the hearing in the exercise of his constitutional right to a hearing under Article 50(1) of *the Constitution* of Kenya, 2010. In dismissing the said application, the court found and held, inter alia, that the Applicant had been served with hearing notice in respect of the hearing that took place on the 16<sup>th</sup> November 2022 and that, therefore, he was sufficiently aware of the said date but chose not to attend.
79. On 16<sup>th</sup> October, 2023 the Court extensively opined itself on why the hearing notice the Applicant complains about was properly served hence it shall not repeat itself. On what constitutes sufficient



cause for purposes of review, the Court of Appeal in the case of the “Official Receiver and Liquidator – Versus - Freight Forwarders Kenya Ltd (2000) eKLR” stated that;

“These words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot with out at times running counter to the interest of justice limited to the discovery of new and important matter or evidence or occurring of an error apparent on the face of the record.”

80. The Applicant has not demonstrated any sufficient reason to warrant a review of the ruling of this Court. Finally, the Applicant must demonstrate that the application has been made without unreasonable delay.
81. The Applicant averred that there was no delay in presenting the application, the ruling they seek a review from was delivered on 16<sup>th</sup> October, 2023 and the instant application to review the same is dated 17<sup>th</sup> November, 2023. The duration is reasonable. On the prayer for review of the ruling delivered on 16<sup>th</sup> October, 2023 the Applicant has failed to plead its case.
82. On the issue of setting aside of the proceedings of this court of the 16<sup>th</sup> November 2022, the Applicant has not demonstrated any sufficient reason for the same. The Honourable Court concurs with the Plaintiff, the 1<sup>st</sup> Defendant having claimed to have been a judicial officer knows how the court works and the registry. A litigant needs to be very vigilant even when represented by an advocate. And in the case of the 1<sup>st</sup> Defendant the bar is even higher being a legal practitioner and well vast with the law and procedures of the court.
83. Be that as it may, I dare say that this is case of splitting hairs meted by the 1<sup>st</sup> Defendant/Applicant. In the given circumstances, I find that the application dated 26<sup>th</sup> July, 2023 is devoid of merit and the same is dismissed.

#### **ISSUE No. c). Who meets the costs of the Notice of Motion application dated 17<sup>th</sup> November, 2023**

84. 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 (2014) eKLR” and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, (2014) eKLR”.
85. 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.
86. I find this to be an appropriate case where to award the Plaintiff/ Respondent the costs of the application, the provision of section 27 of the *Civil Procedure Act* chapter 21 of the Laws of Kenya notwithstanding.

#### **VII. Conclusion and Disposal**

87. The upshot of the foregoing is that after conducting such an intensive and elaborate analysis to the framed issues, the court is satisfied that the 1<sup>st</sup> Defendant/Applicant in the Notice of Motion application dated 26<sup>th</sup> July, 2023 has not on balance and preponderance of probability established its claim for review of the ruling delivered on 16<sup>th</sup> October, 2023. For avoidance of any doubts, I proceed to specifically order:-



- a. THAT the Notice of Motion application dated 17<sup>th</sup> November, 2023 be and is hereby found to be devoid of merit and hence it is disallowed in entirety with costs.
- b. THAT for expediency sake, the Honourable Court shall proceed to render its Judgement on 31<sup>st</sup> July, 2024 .
- c. T HAT the costs of the Notice of Motion application dated 17<sup>th</sup> November, 2023 shall be borne by the 1<sup>st</sup> Defendant/Applicant to be awarded to the Plaintiff/Respondent.

It is so ordered accordingly.

**RULING DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 28<sup>TH</sup> DAY OF MAY 2024.**

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

Ruling delivered in the presence of:-

- a. M/s. Firdaus – the Court Assistant.
- b. Mr. Omondi Advocate holding brief for Mr. Kenyatta Advocate for the 1<sup>st</sup> Defendant/ Applicant.
- c. M/s. Songole Advocate for the Plaintiff/Respondent.
- d. M/s. Gitau Advocate holding brief for M/s. Ngure Advocate for the 2<sup>nd</sup> Defendant.
- e. No appearance for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.

