Mramba & 45 others v St Elizabeth Academy - Karen Limited & 2 others (Enviromental and Land Originating Summons 67 of 2020) [2024] KEELC 5728 (KLR) (22 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5728 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIROMENTAL AND LAND ORIGINATING SUMMONS 67 OF 2020

LL NAIKUNI, J

JULY 22, 2024

BETWEEN

KAZUNGU MRAMBA .... 1ST PLAINTIFF

ELIZABETH KAMALA .... 2ND PLAINTIFF

MAGDALINE NYAMBURA & 43 OTHERS & 43 OTHERS .... 3RD PLAINTIFF

AND

ST ELIZABETH ACADEMY - KAREN LIMITED .... 1ST DEFENDANT

ANNE WANJIKU MUNENE .... 2ND DEFENDANT

AYUB KIANJA .... 3RD DEFENDANT

RULING

I. Introduction

1. This Honourable Court was moved and tasked to make a determination of the Notice of Motion application dated 13th March, 2024 by St. Elizabeth Academy – Karen Limited, Anne Wanjiku Munene and Ayub Kianja, the 1st Defendants/ Applicants herein. It was brought under the provision of Sections 1A, 1B, 3A and Section 63 of the *Civil Procedure Act* Cap. 21 Laws of Kenya, Order 25, 45 Rules 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules, 2010.

2. Upon effecting service of the Notice of Motion application, the Plaintiffs/Respondents responded through a Replying Affidavit sworn on 22nd November, 2022 and 12th April, 2024 respectively.

3. It is instructive to note that in the pendency of this proceedings, upon the request by the parties, the Honourable Court on 17th May, 2024 conducted a site Visit ("Locus in Quo"). A report to that effect has been attached as part of this Ruling hereof whatsoever.

II. The Defendants/Applicants' case

4. The Defendants/Applicants sought for the following orders:-

   a. That this Honourable Court be pleased to review and set aside its ex-parte order of 31st May, 2023 in its entirety.

   b. That this Honourable Court be pleased to set aside the Ex - Parte Orders made for withdrawal of ELC No. 24 of 2018 Said Musa Mitsonga & Others – vs - Yusuf Ali Ismail and others.

   c. That this Honourable Court be pleased to review and set aside its Orders of 31st May, 2023 since ELC No. 67 of 2020 is still sub-Judice as ELC No. 24 of 2018 is still live and active in light of the Counter-Claim dated 25th April, 2018 by the Defendants therein.

   d. That this Honourable Court be pleased to review its order of 31st May, 2023 and reinstate its Ruling delivered on 28th July, 2022 and the Orders therein.

   e. That costs of this Application be provided for.

5. The application by the Applicants herein was premised on the grounds, testimonial facts and averments made out under the 15 Paragraphed Supporting Affidavit of Anne Wanjiku Munene, the Managing Director for the 1st Defendant/Applicant herein with three (3) annextures marked as "AWM - 1 to 3" sworn and dated 13th March, 2024 averred that:

   a. There was an apparent mistake on the face of the record in light of the notice of withdrawal in the Civil Suit ELC No. 24 of 2018 being filed and effectuated in this suit ELC No. 67 of 2020.

   b. The Court ought to have taken into account that the voluntarily withdrawal of the Plaintiff suit in ELC No. 24 of 2018 did not automatically dispose of the Counter - Claim therein. (He annexed in the affidavit a copy of the counterclaim dated 25th April, 2018 and mark the same as Annexure "AWM - 1".

   c. The Defendants/Plaintiffs in the Counter - Claim had been rendered without justice through the machination of the Plaintiffs in the civil case - ELC No. 24 of 2018.

   d. In any event, the withdrawal of the civil case ELC No. 24 of 2018 raised serious questions on whether an Advocate being an officer of the Court could withdraw a matter in which she did not appear. The same raised ethical issues and such conduct borders on fraud.

   e. On 31st May, 2023, the matter herein came up to Court for granting of directions and for purposes of highlighting of Submissions. However, the parties were informed that the Court was in a meeting only for it to later transpire that the court sat in chambers on this matter and gave the ex-parte Order complained of herein on that same day without hearing the parties as per the earlier directions for highlighting of both applications dated 15th September, 2022 and 29th November, 2022 respectively.

   f. Following the court's ex-parte directions of 31st May,2023 which were issued without Notice, the matter had been certified for hearing without hearing both the Applications dated 15th September, 2022 and 29th November, 2022 on merit and without delivering a Ruling on the said Applications matter yet the same was opposed by the Applicants. Annexed in the affidavit was a copy of the Court Order given on 31st May, 2023 and marked the same as Annexure "AWM - 2".

g. There was an error apparent on record since the Orders given on 31st May, 2023 in which the court set aside its earlier Orders of 28th July, 2022, of stay of the suit herein for being sub-Judice until ELC suit No. 24 of 2018 was heard and determined to its finality by the trial court thereof whereas the Orders of 31st May, 2023 directed to proceed with ELC No. 67 of 2020 despite there being a live and active Counter - Claim in the civil case ELC No. 24 of 2018 filed by the Defendants therein. {He annexed in the affidavit a copy of the Ruling delivered on 28th July, 2022 and mark as Annexure "AWM - 3".

h. Allowing the Orders sought herein and reviewing its Orders of 31st May, 2023 should enable the court arrive to a fair and just finding on merit with full knowledge of all facts pertinent in this case and the court was vested with the discretion and its inherent jurisdiction to allow the orders sought herein.

i. There was real danger of a miscarriage of justice should the orders withdrawing the suit ELC No. 24 of 2018 which was not before the trial court was granted as given on 31st May, 2023 would be contrary to the rules of natural justice.

j. The Applicant had brought this application without undue delay.

k. It was therefore in the interest of justice that this application be allowed.

III. The 2nd – 23rd Defendants/Respondents Response to the Application

6. The Plaintiffs opposed the Application through a 37 paragraphed Replying affidavit sworn by KAZUNGU MRAMBA, the 1st Plaintiff who also had been duly authorized to swear this affidavit on behalf of the 2nd Plaintiff/Respondent.(Reference made to the filed Authority to swear dated 28th November 2022.) where he averred that:-

a. The genesis of the confusion that plagues this instant matter emanated from the application dated 15th February 2021 where the original Forty Five (45) Plaintiffs sought injunctive reliefs from this Honorable court in respect to all that parcel of land known as LR.395/II/MN due to the threat of eminent eviction that was posed by the Defendants herein who claimed to be the lawful owners of the suit property

b. Vide a Notice of Preliminary Objection dated 12th March 2021and Ground of Opposition dated 19th March 2021 the Defendants' counsel opposed the suit instituted via Originating summons dated 8th June 2021 and application dated 25th February 2021 respectively.

c. The said application was tabled before Justice Yano on the 23rd March 2021 who at the time directed parties to file their responses and submissions and to subsequently appear before him on the 22nd June 2021 for highlighting of submissions.

d. On 22nd June 2021, as the court record will bear witness, the Defendant/Respondent had not filed his submissions and Ms. Waithera who was acting for the Plaintiffs orally sought the leave of court to amend the said application due to an apparent error in respect to the description of the suit property as it had been described as LR.395/III/MN instead of LR.395/II/MN.

e. At the time of making the application, the Counsel for the Defendants was present and he raised no objection to the same. Pursuant to that, Justice Yano proceeded to allow the amendment of the pleadings and the interim orders that were initially given by the court on the 25th February 2021 were to subsist until the application and Originating Summons were

heard and determined. (Annexed and marked as "KM – 1" was a copy of the Court order dated 22nd June 2021.).

f. It was on that basis of the court order dated 22nd June 2021,that the Plaintiffs proceeded to file the Amended Notice of Motion application dated 14th July 2021 and which was subsequently filed on the 15th July 2021.

g. In response the Counsel for the Defendants on record vide a Notice of Withdrawal dated 16th July 2021 proceeded to withdraw the Notice of Preliminary objection dated 12th March 2021 and sought to substitute it with a Notice of Preliminary objection dated the 19th July 2021.

h. On 26th July 2021, parties appeared before court for highlighting of submissions but due to the turnaround of events, the court directed that the Notice of Preliminary Objection dated 12th March 2021 stood withdrawn with costs to the Plaintiffs and in its place the Notice of Preliminary Objection dated 19th July 2021 would be disposed of through written submissions and court further directed that the parties appear before it on the 27th October 2021 to confirm filing of submissions and to take a ruling date. Annexed and marked as "KM – 2" was a copy of the court order dated 28th October 2021.

i. On the 28th October 2021, Justice Yano had left the station and this Honourable Court ably took up the matter and rendered its decision on the Notice of Preliminary Objection dated 19th July 2021 and dismissed the same with costs to the Plaintiffs.

j. Vide its ruling dated 2nd March 2022, the court vide its ruling directed that parties dispose of the Plaintiffs/Applicants Notice of Motion application dated 25th February 2021 and which was subsequently amended on the 14th July, 2021. This Honourable Court proceeded to render its Ruling dated 28th July 2022 to the effect that one, the Amended Notice of Motion Application dated 14th July 2021 is struck out as it was amended without leave.

k. He made reference to the Court proceedings of 22nd June 2021 and the extract of the Court order evidencing that leave was actually granted. At the time of filing the said responses to the initial said Notice of Motion none of the parties sought to have the Amended Notice of Motion dated the 14th July 2021 struck out and even if the same was raised by the defendants' in the submissions as referenced in the Ruling, the latter cannot take the place of pleadings as a court of law is required to only address itself on matters pleaded by the parties.

l. After the delivery of the said Ruling, the deponent together with the 2nd Plaintiff sought to engage the services of another counsel to act on their behalf and it is at that point in time, they instructed the firm of Paul Kenneth Kinyua & Associates Advocate vide a Notice of Appointment dated 17th October 2022.(Annexed and marked as "KM – 3" a copy of the Notice of Appointment dated 17th October 2022.

m. Vide the 1st and 2nd Plaintiffs/Applicants' application dated the 28th November 2022, they sought to have the court's ruling dated the 28th June 2022 reviewed in light of the orders that had been made by Justice Yano on the 22nd June 2021 allowing the amendment to the application dated 25th February 2021. The said application though not a pleading within the definitions of provided for under the provision of Section 2 of the *Civil Procedure Act*, Cap. 21 was a document and as such can be amended by virtue of the provision of Order 8 Rule 5 of the Civil Procedure Rules, 2010.

n. Their application dated 28th November, 2022, was made in good faith as ably illustrated above and as such it would be in the interest of justice that the said application is decided on merit.

o. In the interest of saving judicial time and resources, this Honourable Court was empowered vide the provision of Section 99 of the *Civil Procedure Act*, 2010 to on its own motion correct the said anomaly.

p. For ease of reference, the provision of Section 99 of the *Civil Procedure Act*, Cap. 21 provides as follows:-

> "Amendment of judgments, decrees or orders Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."

q. This proposition would enable the correction of the error arising therein in respect to the proposition that leave was not granted. In response to Paragraphs 3, 6, 7, 8 of the Supporting affidavit, the deponent stated that neither 1st or the 2nd Plaintiff were privy to the said Notice of withdrawal as the same was within the purview of the advocate representing the 3rd to 60th Plaintiffs herein.

r. Their position with reference to the above was clearly espoused by their response dated 28th November 2023 to the application dated 15th September 2023 that clearly showed that the Defendants did not participate in the withdrawal of the same.

s. Further to the above neither 1st nor the 2nd Plaintiffs was party to the suit referred to as ELC No. 24 of 2018 and further reference being made to the Annexture marked as "AMW – 1" and the authority to plead therein their names did not appear anywhere.

t. Both the 1st and the 2nd Plaintiffs sought adverse possession with reference to their occupation of part of all that Land known as LR.NO 395/11/MN as evidenced by their Amended Originating Summons dated the 10th February 2024 and it would be in contravention to their right to fair hearing as guaranteed under the provision Article 50 of *the Constitution* of Kenya, 2010.

u. He had lived in the suit property for over fifteen years to the extent that he had constructed his permanent house therein where he had raised his family. At no time during his subsistence on the suit property he had never known the owners of the suit property as the developments he had done therein had been effected without any resistance.

v. It would be an upfront of justice, if this Honourable Court proceeds to stay thus suit yet he had sought to independently purse the same as evidenced by the filed Amended – originating summons dated 10th February, 2024.

w. He further he believed that though documents have been filed herein in respect to ELC 24 No. of 2018, it was difficult for this Honourable court to ascertain the true position as its stands they were not aware of its true position and in particular the averments that the counsel representing the 3rd to 60th Plaintiffs was not the one handling the matter.

x. It would be in the interests of justice that this Honourable court to direct that the said file: "ELC No. 24 of 2018 - Said Musa Mitsange and others – Versus - Yusufali Ismailee

Jivanjee” and others be placed before this Honourable Court and if it deemed fit order for the consolidation of the two suits.

y. The primary consideration on whether to consolidate the two suits, if the court deems fit, was that this Honourable Court was required to weigh the cost, time, effort and judicial resources as was alluded to by Supreme court of Kenya in the case of: “Omoke – Versus - Kenyatta & 83 others (Petition 11 (E015) of 2021) [2021]KESC 27 (KLR) (Civ) (9 November 2021) (Ruling)” where reference was made to the court decision of “Atlantic States Legal Foundation Inc – Versus - Koch Refining Co 681 F Supp 609,615 (D Minn 1988”.

z. A consolidation would be necessary in the event that upon perusal of the said court file it is evident that no steps had been taken to prosecute the Counter - Claim filed therein as the same would evidence that the Defendants herein was taking advantage of the same to the detriment of other litigants. The said application had been made in bad faith as it had been brought one year after the Ruling was delivered. There was no plausible explanation that had been given by the Defendants on the same in fact as the court record bears witness, the Counsel for the Defendants had attended to subsequent court proceedings and at no time had he taken steps to file an appeal or review of the said ruling. In the absence of the explanation, it was only prudent that this Honourable court exercises its inherent powers as provided for under the provision of Section 3A of the *Civil Procedure Act*, Cap. 21 to make orders that would ensure the said matter was matter was heard and determined to its logical conclusion.

IV. Submissions

7. On 14th March, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application 13th March, 2024 be disposed of by way of written submissions. Unfortunately, by the time of penning down this Ruling, the Honourable Court had not managed to access any of the filed Written submissions by the parties herein if at all they were ever filed. Pursuant to that, on 29th April, 2024 a ruling date was reserved on its own merit on notice pending the site visit to the property by Honourable Deputy Registrar accordingly.

V. Analysis & Determination.

8. I have carefully read and considered the pleadings herein by the Applicant, the relevant provisions of *the Constitution* of Kenya, 2010 and the statures.

9. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has two (2) framed issues for its determination. These are:-

a. Whether this Honourable Court can review and set aside its ex-parte order of 31st May, 2023 in its entirety since ELC 67 OF 2020 is still sub judice as ELC 24 OF 2018 is still alive in light of the counter claim dated 25th April, 2018 by the Defendants therein.

b. Whether this Honourable Court can set aside the ex parte orders made for withdrawal of ELC No. 24 of 2018 Said Musa Mitsonga & Others – vs - Yusuf Ali Ismail and others

c. Whether this Honourable Court can be pleased to review its order of 31st May, 2023 and reinstate its Ruling delivered on 28th July, 2022 and the Orders therein.

d. Who will bear the Costs of Notice of Motion application dated 6th July, 2022.

Issue No. a). Whether this Honourable Court can review and set aside its ex-parte order of 31st May, 2023 in its entirety since ELC 67 of 2020 is still sub judice as ELC 24 OF 2018 is still alive in light of the counter claim dated 25th April, 2018 by the Defendants therein

10. As already indicated, prior to embarking on the analysis of the framed issues herein, the Court did conduct a site visit to that effect in the presence of the parties. The report is hereby reproduced for ease of reference.

Site Visit report

Republic Of Kenya

In The Environmental And Land Court At Mombasa

Elc Case No. 67 Of 2020

Kazungu Mramba

Elizabeth Kamala

Magdaline Nyambura & 43 Others............................plaintiffs

- Versus –

St Elizabeth Academy – Karen Limited

Anne Wanjiku Munene

Ayub Kianja...defendants

Site Visit Report Held On 17Th May, 2024 At The Utange (Bamburi) - Mombasa At 12.00 Am.

I. Quorum

A. Court

1. Hon. J. M. Nyariki - Deputy Registrar (ELC)
2. Zainab Khalid - Court Assistant
3. Midega Jaika - Advocate Trainee

B. The Representation And Parties Present

1. Ms. Kimathi – Advocate for the 1st and 2nd Plaintiffs,
2. Ms. Onyango – Advocate for the 3rd to 43rd Plaintiffs.
3. Mr. Gitonga – for the Defendants

C. The Other Parties At The Site Visit

1. The Parties to the suit
    a. Elizabeth Kamala - The 2nd Petitioner
    b. Japheth Mwangi – Committee Member
    c. Other parties to the suit
2. The Police Officers

a. Inspector Gift Mwawaza

b. Sergeant Sirengo Aggrey

c. Police Constable Felix Hellema

d. Police Constable Samuel Mweni

e. Police Constable Joseph Kagia

f. Police Constable Charles Otieno

g. Police Constable Peter Mwangi

II. Preliminaries

1. At 12.00 noon, while at the site with the parties were in agreement that the land in dispute herein was L.R. 395/II/MN and not L.R. 394/II/MN. The Court elected to conduct individual interview sessions with the parties laying claims to the land being that they claim ownership by way of adverse possession.

III. Interviews

1. Peter Okeyo (9th Plaintiff) – told the court that he had stayed in the property since 2007 in a mud house. His current house was built between 2013 and 2014 and he moved in in 2020. He showed the court a grown banana plant and a pit latrine as proof that he had stayed on the property from 2007. According to him his neighbors had a permanent house too. The people stated settling on the suit property in 2007. He averred that the school [St Elizabeth] was already there when he settled on the property and it was demolished in December 2023. According to him his mother used to farm on the land he occupied. The mother left him the plot he was living in. He had no building permits for his house.

2. Damaris Mkamba – She did not recall her date of birth or year. She was not sure if the brother is a party to the suit. Her grandmother Nyevu Yaa used to farm on the land then she left the property to the her and her brother although her brother had also left. The grandmother left in 2021 to go back to Kilifi due to old age. According to Damaris her grandmother informed her that the property as hers and that she should take care of it. The brother who was a party to the suit did not live in the property. She did not recall when they settled in the property. The neighbors had already built their houses by the time she settled there. They had semi-permanent houses. There was a man who lived near her but he had died. She recognized some of the neighbors.

3. Nzasi Shida Nduru – A 50 year old and a mother told the court that she had stayed in the property for 20 years. She found people farming in the suit property. Her father was the one previously on the property but was since deceased. She used to stay in Mariakani before moving into the suit property where she had been married. She had four siblings but she inherited the property from her father. The siblings all lived in different places. Her house was a semi-permanent structure which according to her had been built by her father. She identified Mama Pastor as her neighbor. She had no knowledge of the demolished school or whether it existed. She told the court that her 1st born was 35 years old, she had born before she stated living in the suit property. Her last borns who were 7 years and 14 years were born after she started residing in the suit property. Her neighbor had not purchased the land.

4. Elizabeth Kamala (2nd Plaintiff) – told the court that she had been invited into the suit property in 2005 by one Mr. Kazungu Mramba who gave her husband the land. They hailed from the same village with Mr. Mramba. He gave them the land for free at the time Mramba was the only person living on that land. The entire place was bushy, they had to clear the area and build their semi-permanent structure and in 2012 they started building their permanent house. The other people started moving in at around 2015. She did not know her neighbors. According to her St. Elizabeth School was present when she moved there. She was 49 years old and her first born was 26 years old. They started living in the property in 2012. Se went to court to ensure her proprietor safety. They planted the fence in 2005. They did not have a permit to build their permanent house from the County Government. They had never been displaced nor threatened to be displaced from the land.

IV. Comments And Observations

1. Court:

   From the observation of the court it was evidence that the parties were not able to identify the boundaries of L.R. 395/II/MN. There was no surveyor on the ground to confirm the location of L.R. 394/II/MN. The court proceeded to conduct a site visit for L.R. 395/II/MN. The land was subdivided into two by a murram road. The Plaintiffs indicated that they only resided in one of the halves of the divided parcel L.R. 395/II/MN. The Defendants indicated that the area had a school that had been demolished. The Court also noted that there were no old semi-permanent houses. Some of the interviewed property owners indicated that they had renovated the old houses.

V. PICTURES CAPTURED AT THE SITE

a. The Suit property and the building in it

The site visit was concluded at 2:45 P.M.

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HON. J. M. NYARIKI(DEPUTY REGISTRAR)

ENVIRONMENT AND LAND COURT - MOMBASA

11. Now back to the issues under this Sub heading. Critically, the main substratum of the matter is on review, setting aside and/or varying of the court's orders. 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."

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

> " (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."

13. In the case of "Republic - Versus - Public Procurement Administrative Review Board & 2 others [2018] eKLR" it was held: -

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

14. Additionally, in the case of:- "Pancras T. Swai – Versus - Kenya Breweries Limited [2014] eKLR" the Court of Appeal held: -

> " Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limps therein stated or "for any sufficient reason……………………….."

15. Further, the case of: "Sarder Mohamed – Versus - Charan Singh Nand Sing and Another (1959) EA 793" where the High Court held that the provision of Section 80 of the *Civil Procedure Act*, cap. 21 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.

16. Discussing the scope of review, the Supreme Court of India in the case of "Ajit Kumar Rath – Versus - State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608". had this to say:-

> " the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" …………… means a reason sufficiently analogous to those specified in the rule"

17. In the case of:- "Tokesi Mambili and others – Versus - Simion Litsanga" the Court held as follows: -

    i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.

    ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.

18. I still wish to cite the case of:- "Republic – Versus - Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018" John M. Mativo Judge culled out the following principles from a number of authorities: -

    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.

19. Moreover, the said Applicant filed an application for variation of orders issued on 31st May, 2023. According to the Applicant, there was an apparent mistake on the face of the record in light of the notice of withdrawal in ELC No. 24 of 2018 being filed and effectuated in this suit ELC No. 67 of 2020. The Court ought to have taken into account that the voluntarily withdrawal of the Plaintiff suit in ELC No. 24 of 2018 did not automatically dispose of the counterclaim therein. (He annexed in the affidavit a copy of the counterclaim dated 25th April, 2018 and mark the same as Annexure "AWM - 1". The Defendants/Plaintiffs in the Counterclaim have been rendered without justice through the machination of the Plaintiffs in ELC No. 24 of 2018. In any event, the withdrawal of ELC No. 24 of 2018 raised serious questions on whether an Advocate being an officer of the court can withdraw a matter in which she does not appear. The same raises ethical issues and such conduct borders on fraud. The matter herein came up for Directions on 31st May, 2023 for purposes of Highlighting of Submissions wherein the parties were informed that the court was in a meeting only for it to later transpire that the court sat in chambers on this matter and gave the ex-parte Order complained of herein on that same day without hearing the parties as per the earlier directions for Highlighting of both Applications dated 15th September, 2022 and 29th November, 2022.

20. The Application cannot be said to fall under the category of

> "....................... 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................"

21. The Application could also not pass the Test of:

> " ....or for any other sufficient reason................"

which reasons leading authorities hold must be analogous to the other grounds mentioned under the Act and rules, a reason sufficiently analogous to those specified in the rule".

22. 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."

23. The current application falls under this category. The effect of allowing the application will be rendering another suit sub judice which according to the site visit report by the Deputy Registrar as per the paragraph below does not deal with the same portion of land meaning that the suit properties are different as rightfully agreed upon by the parties in this suit during the site visit:-

    II. Preliminaries

    At 12.00 noon, while at the site with the parties were in agreement that the land in dispute herein was L.R. 395/II/MN and not L.R. 394/II/MN. The Court elected to conduct individual interview sessions with the parties laying claims to the land being that they claim ownership by way of adverse possession.

24. According to the 2nd Plaintiff/Respondent, the genesis of the confusion that plagues this instant matter emanated from the application dated 15th February 2021 where the original Forty Five (45) Plaintiffs sought injunctive reliefs from this Honorable court in respect to all that parcel of land known as LR.395/II/MN due to the threat of eminent eviction that was posed by the Defendants herein who claimed to be the lawful owners of the suit property. Vide a Notice of Preliminary Objection dated 12th March 2021and Ground of Opposition dated 19th March 2021 the Counsel for Defendants' opposed the suit instituted via Originating summons dated 8th June 2021 and application dated 25th February 2021 respectively. The said application was tabled before Justice Yano on the 23rd March 2021 who at the time directed parties to file their responses and submissions and to subsequently appear before him on the 22nd June 2021 for highlighting of submissions. d. On 22nd June 2021, as the court record will bear witness, the Defendant/Respondent had not filed his submissions and Ms. Waithera who was at the acting for the Plaintiffs orally sought the leave of court to amend the said application due to an apparent error in respect to the description of the suit property as it had been described as LR.395/III/MN instead of LR.395/II/MN.

25. Further the Plaintiff argued that it would be an upfront of justice, if this Honourable Court proceeds to stay thus suit yet he had sought to independently purse the same as evidenced by the filed amended – originating summons dated 10th February, 2024.

26. What is exhibited by the Applicant is an act that may be prejudicial to the Plaintiffs and the other suit property in contention in the other matter. I do not find this as a case where I should review my orders. Further with reference to the Notice of withdrawal in ELC 24 OF 2018, the Plaintiffs have averred that neither of them are party to the suit referred to as ELC 24 of 2018 and further reference being made

to the Annexture marked as AMW-1 and the Authority to plead therein their names do not appear anywhere.

27. The issue of sub judice had already been determined and disposed off with in this Court's ruling of 2nd March, 2022 where is opined myself as follows:-

> " 17. For the above conditions to be established the party pleading Res judicata ought to provide court with the pleadings in the former suit. In this case, the respondents ought to have provided court with the pleadings in ELC (Mombasa) 28 of 2018 to enable court make a determination whether the said conditions exists. The 1st, 2nd and 3rd Defendants/Respondents ought to provide the court with the specific particulars to support the doctrine of Res judicata. The provisions of Section 107 of the *Evidence Act* is clear on the burden of proof, the Respondent ought to provide full disclosure of particulars, they rely on. I take notice that the 1st, 2nd and 3rd Defendants/ Respondents have impressively , extensively and elaborately submitted on doctrine of res judicata in their submissions and even explained to court the five conditions as analyzed above, I must admit but come short on bringing out how it applies to the facts of this suit.
>
> 18. Despite having perused the entire file, unfortunately, I have not come across any single pleading from the filed Civil suit of ELC (Mombasa) 28 of 2018 making any nexus and or pertaining to the legal conclusion or finding that the doctrine of res judicata or sub judice applies or offends of the provisions of Sections 6 and 7 of the *Civil procedure Act*, Cap. 21.

28. Therefore based on the foregoing reasoning, this Honourable Court will not render itself on a matter it already settled.

Issue No. b). Whether this Honourable Court can set aside the ex parte orders made for withdrawal of ELC No. 24 of 2018 Said Musa Mitsonga & Others – vs - Yusuf Ali Ismail and others.

29. Under this sub title the Applicant seeks an order setting aside the of a notice of withdrawal. This court is a court of law and justice. In determining the matters before it, it is guided by *the Constitution* of Kenya, the provisions of law and equity and the principles of natural justice. Given these, the Court is enjoined to give effect to the overriding objective both the provision of Sections 3(1) of the Environment and *Land Act* and 1A (1) of the *Civil Procedure Act*, Cap. 21 that it to say, to facilitate "… the just, expeditious, proportionate and accessible resolution of disputes". That has to be done without procedural technicalities, as contemplated in Article 159 (2) (d) of *the Constitution* of Kenya 2010.

30. From the court record, it is not disputed that there was the withdrawal of "ELC No. 24 of 2018 Said Musa Mitsonga & Others – Versus - Yusuf Ali Ismail and others". A discussion on the law relating to withdrawal of suits is apt so as to analyze its import and that of the consent that withdrew the suit herein.The law and procedure governing withdrawal or discontinuance of suits, in Superior and Subordinate Courts is found under the provision of Order 25 of the Civil Procedure Rules. The Order is headed "Withdrawal, Discontinuance and Adjustment of Suits". Rule 1 thereof provides discontinuance of the whole or any part of the Claim where a suit has not been set down for hearing. The procedure thereto has been explained elaborately by the Court of Appeal in "Beijing Industrial Designing & Research Institute – Versus - Lagoon Development Ltd (2015) eKLR". In this instant case the Applicant averred that there was an apparent mistake on the face of the record in light of the notice of withdrawal in ELC No. 24 of 2018 being filed and effectuated in this suit ELC No. 67 of

2020. The Court ought to have taken into account that the voluntarily withdrawal of the Plaintiff suit in ELC No. 24 of 2018 did not automatically dispose of the counterclaim therein. (He annexed in the affidavit a copy of the counterclaim dated 25th April, 2018 and mark the same as Annexure "AWM 1".

31. Order 25 provides as follows:

Order 25 – Withdrawal, Discontinuance And Adjustment Of Suits

1. At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.

2.

(1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.

(2) Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.

(3) The provisions of this rule and rule 1 shall apply to counterclaims.

32. The Defendants/Plaintiffs in the Counter - claim have been rendered without justice through the machination of the Plaintiffs in ELC No. 24 of 2018. In any event, the withdrawal of ELC No. 24 of 2018 raised serious questions on whether an Advocate being an officer of the court can withdraw a matter in which she does not appear. The same raises ethical issues and such conduct borders on fraud. The matter herein came up for Directions on 31st May, 2023 for purposes of Highlighting of Submissions wherein the parties were informed that the court was in a meeting only for it to later transpire that the court sat in chambers on this matter and gave the ex-parte Order complained of herein on that same day without hearing the parties as per the earlier directions for Highlighting of both Applications dated 15th September, 2022 and 29th November, 2022. There was real danger of a miscarriage of justice should the orders withdrawing the suit ELC No. 24 of 2018 which is not before the trial court is granted as given on 31st May, 2023 will be contrary to the rules of natural justice.

33. Vide the 1st and 2nd Plaintiffs'/Applicants application dated the 28th November 2022, they sought to have the court's ruling dated the 28th June 2022 reviewed in light of the orders that had been made by Justice Yano on the 22nd June 2021 allowing the amendment to the application dated 25th February 2021. The said application though not a pleading within the definitions of provided for under Section 2 of the *[Civil Procedure Act](#)* is a document and as such can be amended by virtue of Order 8 Rule 5 of the Civil Procedure Rules.

34. Critically speaking, I fully concur with the sentiments expressed by the Plaintiff that the Court is being called upon to examine documents of a matter that is not available to the court during the determination of this application. Clearly, this is purely pre – mature. I may not be able to determine at this point and confirm the allegations by the parties concerning ELC No. 24 of 2018. To sustain good order in the proceedings, all these issues should brought out during the full trial where all parties including the Court will bear ample opportunity to critically interrogate and examine all issues brought out through both empirical oral and documentary evidence adduced. Therefore, in the given circumstances, the prayer to review the notice of withdrawal in ELC No. 24 of 2018 fails.

Issue No. c). Whether this Honourable Court can be pleased to review its order of 31st May, 2023 and reinstate its Ruling delivered on 28th July, 2022 and the Orders therein

35. Through out this ruling the court has been in an awkward position as it is required by the Defendants/ Applicants to review, vary and set aside orders issued in another suit. The provisions of Section 107 of the *Evidence Act* is clear on the burden of proof, the Respondent ought to provide full disclosure of particulars, they rely on. It is clear from the application that the Court is being tasked with the determination of issues in another suit all together.

36. According to the Applicant, there was apparent an error on record since the Orders given on 31st May, 2023 in which the court set aside its earlier Orders of 28th July, 2022, of stay of the suit herein for being sub-Judice until ELC suit No. 24 of 2018 is heard and determined to its finality by the trial court thereof whereas the Orders of 31st May, 2023 directs to proceed with ELC No. 67 of 2020 despite there being a live and active Counter-claim in ELC No. 24 of 2018 filed by the Defendants therein. {He annexed in the affidavit a copy of the Ruling delivered on 28th July, 2022 and mark the same as Annexure "AWM 3").

37. There is no where in this court that it was indicated that ELC No. 24 of 2018 was sub judice in any way and it its ruling on 2nd March, 2022 dismissed a preliminary objection brought under the dint of Section 6 and 7. Therefore on the Honourable Court finds this prayer unmerited as well.

38. The Honorable Court has observed that the Plaintiffs in the response has indicated that they are not parties to ELC 24 OF 2018 and further reference being made to the Annexture marked as "AMW – 1" and the Authority to plead therein their names did not appear anywhere. The Deponent went further to state that the 1st and the 2nd Plaintiff sought adverse possession with reference to our occupation of part of all that Land known as LR.NO 395/11/MN as evidenced by their Amended Originating Summons dated the 10th February 2024 and it would be in contravention to our right to fair hearing as guaranteed under the provision of Articles 25 (c) and 50 (1) and (2) of *the Constitution* of Kenya, 2010. According to the Deponent it would be an upfront of justice, if this Honourable Court proceeds to stay thus suit yet he had sought to independently purse the same as evidenced by the filed amended – originating summons dated 10th February, 2024. He further he believed that though documents have been filed herein in respect to ELC 24 of 2018, it was difficult for this Honourable court to ascertain the true position as its stands they were not aware of its true position and in particular the averments that the counsel representing the 3rd to 60th Plaintiffs was not the one handling the matter. The Plaintiffs further averred that it would be in the interests of justice that this Honourable court to direct that the said file; "ELC 24 OF 2018 SAID MUSA MITSANGE and others – Versus - Yusufali Ismailee Jivanjee" and others be placed before this Court and if it deems fit order for the consolidation of the two suits.

39. Be that as it may, the Honourable Court is of the opinion that parties can approach the court appropriately to achieve this. Further even with the pleadings from the other matter it is difficult for the court to decide on another matter where all parties are not present and were not served this present application it will be prejudicial to determine their matter without them present. For that fundamental and stand alone reason the application by the Defendants fails to succeed accordingly.

Issue No. d). Who will bear the Costs of Notice of Motion application dated 13th March, 2024.

40. It is now well established that the issue of Costs are at the discretion of the Court. The Black Law Dictionary defines cost to means:-

> " the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other"

41. In other words, 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 of the *Civil Procedure Act*, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the *Civil Procedure Act* provides as follows;-

> "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

42. A careful reading of the provision of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book The Code of Civil Procedure, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.

43. Additionally, the provision provides for 'costs of and incidental to all suit or application' which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book Judicial Hints on Civil Procedure, 2nd Edition, 2005 at 95 notes that the words 'the event' means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.

44. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In "Morgan Air Cargo Limited – Versus - Everest Enterprises Limited [2014] eKLR" the court noted that;

> "The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Cost follow the event'' was driven by the fact that there could be no ''one-size-fit-all'' situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

45. In this case, as this Honourable Court has opined above, the Plaintiffs/Respondents and the 2nd to the 23rd Defendants shall have the costs.

VI. Conclusion & Disposition

46. 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 rather omnibus application, this court arrives at the following decision and makes the order below:-

    a. That the Notice of Motion application dated 13th March, 2024 be and is hereby found to lack merit and the same is dismissed entirely.

    b. That for expediency sake the matter to be heard on 10th December, 2024, there shall be a mention on 9th October, 2024 for purposes of conducting Pre – Trail conference in accordance with the provision of Order 11 of the Civil Procedure Rules, 2010.

    c. That the costs of the Notice of Motion dated 13th March, 2024 shall be borne by the 1st Defendant/Applicant herein to be awarded Plaintiffs/Respondents and the 2nd to the 23rd Defendants/Respondents herein.

    It Is So Ordered Accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 22ND DAY OF JULY 2024.

....

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. Mr. Gitonga Advocate for the 1st Defendants/ Applicants.

c. M/s. Kimathi Advocate for the Plaintiffs/ Respondents.

d. M/s. Onyango Advocate for the 2nd to the 23rd Defendants/Respondents.