Shede v Mweri & 5 others; Okoth (Intended Defendant) (Environment & Land Case 196 of 2019) [2024] KEELC 6462 (KLR) (24 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6462 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 196 OF 2019

LL NAIKUNI, J

SEPTEMBER 24, 2024

BETWEEN

JOHN MWATELA SHEDE ..... PLAINTIFF

AND

DAVID CHARO MWERI ..... 1ST DEFENDANT

ELPHAS OCHIENG OUDA ..... 2ND DEFENDANT

JAVAN MWANDAWIRO ..... 3RD DEFENDANT

SAMSON KAVOI ..... 4TH DEFENDANT

ABIGAEL AMBASA BUCHERE ..... 5TH DEFENDANT

ANTHONY MWENDWA (SUED ON HIS BEHALF AND ON BEHALF OF 48 OTHERS) ..... 6TH DEFENDANT

AND

BERNARD OTIENO OKOTH ..... INTENDED DEFENDANT

RULING

I. Introduction

1. What is before the Honourable Court for its determination is the Notice of Motion application dated 19th February, 2024. It was brought by the Intended Defendant/Applicant pursuant to the provision of Order 45 and 51 (1) of the Civil Procedure Rules, 2010, Sections 3A, 63 (e) and 80 of the *Civil Procedure Act* Cap. 21.

2. Upon service, and while opposing the said application, the Intended Defendant filed its Replies accordingly.

The case by the Intended Defendant.

3. The Intended Defendant sought for the following orders.

    a. Spent.

    b. That pending the hearing and determination of this application Inter - Partes the Applicant herein be granted leave to join these proceedings as an Intended Defendant.

    c. That pending the hearing and determination of this application Inter - Partes an order do issue suspending any further dealings in regards to property comprised in plot numbers 2847/VI/MN, 2848/VI/MN, 2851/VI/MN, 2852/VI/MN, 2853/VI/MN the subject of these proceedings.

    d. That the proceedings herein, the Judgment dated 31st October, 2023 and the resultant decree issued on 18th December, 2023 be unconditionally, reversed and/or set aside.

    e. That pending the hearing and determination of this suit the intended Defendant be granted leave to join these proceedings as a Defendant and the pleadings herein be amended to reflect as such.

    f. That upon being joined the Applicant/Defendant be at liberty to file his pleadings within 21 days after joinder for purposes of prosecuting the suit de novo.

    g. That the costs of this application be provided for.

4. The application was based on the grounds, testimonial facts and averments of the twenty one (21) Paragraphed Supporting Affidavit of BENARD OTIENO OKOTH sworn and dated 18th February, 2024 together with six (6) annextures marked as "A", "B", "C", "D", "E" and "F" respectively annexed thereto. He averred as follows:-

    a. He was the Applicant herein and thus competent to swear the affidavit.

    b. He was the legal, registered and beneficial owner of the parcel that comprised title L.R 2846/VI/MN, 2847/VI/MN, 2849/VI/MN, 2850/VI/MN and 2854/VI/MN as shown from a copy of the Confirmation of Grant dated 25th June, 2009 and the Mother Titled marked as "C" of the annextures.

    c. He stated that the said parcels of land were initially owned by one Vithalbhai Bulebhai Patel before being transferred and registered to the late mother of the Applicant – M/s. Elizabeth Auma Agunda fact which has also been mentioned in previous pleadings by the other parties.

    d. In a surprising turn of events it had come to his attention that he was facing eminent eviction from his land as a result of Judgement delivered on 31st October, 2023 in respect of Plots L.R 2846/VI/MN, 2847/VI/MN, 2849/VI/MN, 2850/VI/MN and 2854/VI/MN.

    e. While he was at all material times owner of land parcels and plots referred to as L.R 2846/VI/MN, 2847/VI/MN, 2849/VI/MN, 2850/VI/MN and 2854/VI/MN he had never been served with summons to attend Court and file any Defence, similarly he was not named as the Defendant in the suit despite his disclosed proprietary right and interest in the plots registered in his favour.

f. Despite of the Plaintiffs full knowledge of his proprietary interest in the suit land they fraudulently misled this Court into issuing a Judgement without considering his right to be heard.

g. On the advice of his advocate, had been notified of the proceedings then the orders/judgment of this court would have conflicted with other Judgments.

h. The failure to include him as a Defendant and proceed to issue a Judgement and Decree was an apparent mistake on the face of record thus forming a ground for review of the Judgement dated 31st October, 2023.

i. He averred being entitled by law to be heard in any forum where he was likely to be adversely affected by the outcome of the proceeding and where his right to protection of his property was likely to be interfered with.

j. On the face of it, the pleadings and the Judgement disclosed that he was a necessary party in the case.

k. The Plaintiffs had the greater obligation to notify all affected parties to join the instant proceedings and thus the failure to do so was malicious.

l. His right to be heard was a fundamental Constitutional right which could not be taken away from him. There could never be a fair trial when crucial parties adversely mentioned in the pleadings or affected by decrees emanating from Courts were not summoned by Court to give their side of the story.

m. He pleaded to be granted an opportunity to be heard prior to adverse action was taken against his land – it being taken away from him.

n. He urged Court to give him reprieve by suspending any further dealings in his property pending the hearing and determination of the application, joinder of party and to set aside the Judgement.

II. The response by the Plaintiff/Respondent

5. While opposing the application, the Plaintiff herein in a rejoinder filed a 24 Paragraphed Replying Affidavit sworn by John Mwatela Shede and dated 25th March 2004 together with three (3) annextures marked as "JMS – 1 to 3" annexed thereto. He averred as follows:-

a. He confirmed being the Plaintiff herein and thus competent to swear this affidavit.

b. He held that the contents of the application were shocking but also preposterous and without basis or at all and vehemently opposed.

c. He came to Court seeking orders for specific properties as mentioned in the Plaint and which were distinct. These properties were never owned by the late Elizabeth Auma Agunda to the contrary the Judgement in Civil Case Numbers 188 of 1995 which the Applicant purports to use to support his claim. If one was to go by that Judgement, the late Auma and another were awarded Plot Numbers 2847 and 2854.

d. It was the case number 188 of 1995 that the two plots were awarded to two people and not Elizabeth Auma Agunda alone and were title deeds to be issued then they would have been given out in names of both of them.

e. There exists another Civil Suit – 121 of 2002 where the Applicant filed a suit against two people where these two plots – Numbers 2849 and 2850 where Deponent had nothing to do with the said plots.

f. The Certificate of Confirmation of the Grant talks of two plots - 2849 and 2850 and a Swahili house. There was no evidence that these Plots have any relation to the suit property herein as mentioned in the Plaint. Indeed Plot number 2854 has not been mentioned in the Plaint.

g. The Deponent sued the Defendants as they were the people who were in occupation on the suit property and not the Intended Defendant who was not in occupation of the suit land.

h. The Intended Defendant has produced an old title deed not knowing that the old title which the Deponent's grand father had got lost in his possession and was issued with a Provisional Title in November, 2006 which he had kept todate.

i. On perusal of the Provisional Title Deed from the Lands Registry there was an order emanating from Misc. Application No. 188 of 1995 (OS) made as an entry which suit the Intended Defendant had referred to which showed the late M/s. Agunda and Duncun Mutema Njuru were awarded Plot Numbers 2849 and 2850 carrying CR Numbers 41059 and 41060. This was confirmed in the HCCC No. 121 of 2009 and indication these titles were different the ones in the suit property.

j. A claim that there was a person who had Plot Numbers 2846/VI/MN and which was sub – divided into Plot numbers 2847 and 2854 was false. M/s. Agunda was only dealing with her two plots – numbers 2849 and 2850 as they appeared in the Provisional Title deed.

k. The Deponent had always held the mother title but which got lost and he was issued with a Provisional Title deed. What the Intended Defendant produced in Court was not updated all intended to mislead the Court.

l. The Applicant had been claiming all the parcels of land yet he knew well what belonged to the deceased. Further, he refused to reveal that these two plots were Co – Jointed. With this history there was no need to have sued the Intended Defendant.

m. He was still making arrangements to register his Deed Plans with the Land Registry Mombasa at which point the Mother Title would be extinguished the Intended Defendant also having collected his title deed.

6. The Mother Title deed was still registered in the name of the Deponent's grand father and him as the beneficiary and he would occasionally pay the rates to the County Government o Mombasa. He produced a statement claiming that he has been paying land rates but no receipts were attached.

n. The Applicant had failed to bring any proof of ownership of the aforementioned properties and further that the said properties were distinct from the suit properties as explained in paragraphs 3 and 8 of the Plaint herein.

7. It was his contention that the judgment of Mombasa High Court O.S 188 of 1995 held that plot 2847 and 2854 were not awarded to the late Elizabeth Auma Agunda alone. He further states that in Mombasa High Court Civil Suit 121 of 2009, the suit properties mentioned were 2849 and 2850 with which he has no claim upon.

8. He was onerous in detailing that this suit only involved Defendants who had houses on the suit properties which the Intended Defendant never had and referred to an organization of the Defendants

who lived on the suit properties who were named Lilongwe Landlords Welfare Association where similarly the intended defendant was not one of them. That the copy of title the intended defendant produced was replaced by a provisional title issued in November 2006.

9. He went to the lands office and upon perusal he discovered that an order emanating from Mombasa HCCOS 188 of 1995 was made entered into the register whereby plot 2849 and 2850 which was awarded to the late Elizabeth Auma Agunda and Duncan Mutema Njeru were cited with C.R 41059 and 41060; a fact confirmed in Mombasa HCC 121 of 2009. He claims that the provisional title the intended defendant holds is different from his.

10. The Deponent averred that he had been holding title for the suit properties and that the Intended Defendant had never held title and that upon sub - division of L.R 2846/VI/MN to 2847, 2848, 2849, 2850, 2851, 2852, 2853 and 2854/VI/MN the late Elizabeth Auma Agunda was limited to only plot 2849 and 2850/VI/MN.

11. He also attached a certificate of search dated 29th September 2009 showing that the "mother title" L.R 2846/VI/MN was in the name of his grandfather; however, the court has taken note that it is in the name of Vithabal Bhulabhai Patel.

III. The Supplementary affidavit by the Plaintiff

12. The Plaintiff filed a six (6) Paragraphed Supplementary Affidavit sworn on 21st May 2024. He averred that:-

    a. The Court had been moved to correct an error in its Judgement and which had been done.

    b. He referred to an order in entry 7 in the aforementioned provisional title he annexed in his replying affidavit and stated that the title for the intended party was different from his.

    c. He reiterated that his understanding of the intended Defendant's application was a claim for plot Numbers 2849 and 2850 of which he had no claim to.

    d. He emphasized that the Judgment in Mombasa HCCOS 188 of 1995 confirmed that plot 2846 was subsequently sub - divided into 2849 and 2850 and that in Mombasa HCC 121 of 2009 the court held that the Intended Defendants are only 2849 and 2850.

IV. The Submissions.

13. On 17th May, 2024 while all the parties were present in Court, direction was taken to have the Notice of Motion applications dated 19th February, 2024 be disposed off by way of written submissions. Pursuant to that all the parties complied and the Court reserved to be delivered on 24th September, 2024 accordingly.

A. The Written Submissions by the Intended Defendant

14. The Law firm of Messrs. Borona & Associates Advocates filed their written submissions dated 10th June 2024 on behalf of the Intended Defendant. Mr. Borona Advocate commenced by providing Court with brief facts of the case. He stated that the Applicant was the legal, registered and beneficial owner of the property registered as numbers 2846/VI/MN, 2847/VI/MN, 2849/VI/MN, 2850/VI/MN and 2854/VI/MN. These properties were derived from the mother title belonged to one Vitalbhai Bulebhai Patel.

15. Despite of this, the Plaintiffs full knowledge of the Applicants proprietorship interest in the suit land, he fraudulently misled this Honourable Court into issuing a Judgement without according the

Applicant his right to be heard before adverse orders against him were entered. According to the Learned Counsel, the matter proceeded on with the participation of the Applicant who ought to have been the Defendant but was never served with pleadings to enter appearance.

16. Further, the matter proceeded on and subsequently, Judgment was delivered on 31st October 2023. That the said Judgment conflicted with the Intended Defendant's Certificate of Confirmation of Grant dated 25th June 2009; the aforementioned Mombasa Judgments HCCC 188 of 1995 (O.S) and HCC 121 of 2009. The Judgement ordered for vacant possession and eviction from these Plots. Taking that the 90 days from the date of delivery of judgment had already passed and thus they are at risk of being evicted.

17. The Learned Counsel submitted that there was a legal basis based on the provision of Section 80 of the *Civil Procedure Act*, Cap. 21 and Order 45 of the Civil Procedure Rules, 2010. He relied on the ground that there is error on the face of the record where an error does not need to be established by a long-drawn process of reasoning and to support this. He averred that the Applicant had stashed that he was neither aware of the impugned proceedings nor was he aware by way of summons being served upon him to defend himself before the adverse orders were issued in the Court's Judgement dated 31st October, 2023 and the subsequent Decree. He argued that it was trite law that a clear case of error on the face of the record was where an error on a substantial point of law stared one in the face as it was in the case of the Applicant herein. To bettress on this point, he cited the case of: "Zablon Mokua – Versus - Solomon M. Choti & 3 Others (2016) eKLR by Okwany J.

18. The properties were transferred to his late mother Elizabeth Auma Agunda and as proof he annexed a Mombasa High Court Civil Suit 188 of 1995 (0S) Judgment by Onyancha J. delivered on 20th March 2003 whereby the deceased together with another named Duncan Mutema Njeru were granted ownership of previous subdivision 2846 and were then known as 2847 and 2854 C.R 15040 delineated on survey no. 99307.

19. The Intended Defendant also attached a Mombasa High Court Civil Suit 121 of 2009 Judgment by Odero J. delivered on 30th November 2011 whereby the same gave the following orders:-

    a. Nullification and cancellation of Title Deeds issued to the Defendants in respect of parcels of land known as subdivision no. 2849 (original No. 2846/4) of section IV Mainland North, C.R.4/059/1 and more particularly delineated on deed plan no 99401 AND parcel of land known as subdivision number 2850 (Original Number 2846/5) of Section IV Mainland North C.R 41060/1 and Deed Plan No. 99402.

    b. Mandatory injunction do issue to the defendants from interfering [sic], selling alienating or dealing with the parcels of land known as subdivision no. 2846 currently known as subdivision no. 2847 and 2854 (original 1058 and 1067) C.R NO. 15040 delineated on survey no. 99307 which the Plaintiff is occupying and forms part of the plot known as subdivision no 2849 (original no. 2846(4) of Section VI Mainland North C. R 41059/1 and more particularly delineated on Deed Plan No. 99401 AND parcel of land known as subdivision no. 2850 (original number 2846/5) of Section VI Mainland North C.R 41060/1 and deed plan no. 99402.

B. The Written Submissions by the Plaintiff

20. The Plaintiff through his Advocates, the Law firm of Messrs. Stephen Oddiaga & Co filed his written submissions dated 10th July 2024. Mr. Oddiaga Advocate commenced by laying down the foundation of the filed pleadings relied on by the Plaintiff herein in support of his case. He informed Court that

there had been a conglomeration of different court cases whereby these plots were awarded to the Intended Defendants and their mother.

21. He emphasized that in Mombasa HCC (OS) 188 of 1995 where to the late Elizabeth Auma Agunda was awarded two plots being Land Reference Numbers 2847 and 2854. Additionally, from the civil suit - Mombasa HCC 121 of 2009 the late Elizabeth Auma Agunda alone was awarded 2849/VI/MN and 2850/VI/MN respectively. Further, from the Civil Suit HCCC. No. 188 (OS) of 1995, the Court ordered that the Applicant, Elizabeth Auma Agunda and Duncan Mutema Njuru be registered as proprietors in common for Plot Numbers 2846. The Counsel averred that from Civil Case Numbers 121 of 2009 the Applicant sort nullification and cancellation of Plot Numbers 2849 (Original No. 2846/4) Section/IV/Mainland and parcel Number 2850 (Original number 2846/5) of Section/IV/ Mainland. Thus, following these two cases the Applicants titles were Plots N. 2849 and 2850.

22. The Learned Counsel argued that the said Certificate of Confirmation of Grant was with regards to plot 2846 and it cannot be discerned to deduce that the court was referring to L.R 2846/VI/MN and 2847/VI/MN as the plot number was not fully cited.

23. The Learned Counsel reiterated that the Intended Defendant is a fibster by claiming that L.R 2846/ VI/MN was subdivided into 2847/VI/MN and 2854/VI/MN and that plot 2846/VI/MN, 2849/VI/ MN and 2850/VI/MN were all transferred to Duncan Mutema Njeru. They submitted that in the judgment of Odero J. in Mombasa HCC 121 of 2009 the intended defendant plots were sub - divided into 2849/VI/MN and 2850/VI/MN which are not part of the plots in the decree re-issued on 2nd May 2024.

C. Analysis and Determination.

24. I have keenly considered the filed Notice of Motion application dated 19th February 2024, the responses, the written submissions by the both the Learned Counsels, the relevant provision of *the Constitution* of Kenya, 2010 and the statures.

25. For the Honourable Court to arrive at an informed, fair and reasonable decision the following salient issues have been crafted for its determination. These are:

    a. Whether the Notice of Motion application dated 19th February, 2024 has any merit or not?.

    b. Whether the parties are entitled to the reliefs sought.

    c. Who will bear the costs of the application?

    ISSUE No. a). Whether the Notice of Motion application dated 19th February, 2024 has any merit or not?.

26. Under this sub – heading, the main substratum of this application is for the review, setting aside and/or varying of this Court's Judgement delivered on 31st October 2023. On quick computation, it is more than 10 months ago to the period this Court is now penning down the instant ruling. From the filed pleadings, herein, the Intended Defendant herein has sought to be joined as a party in the matter based on the principles of natural justice and fair hearing. The provision of Articles 25 (c), 47 and 50 (1) of *the Constitution* of 2010 attest to that legal principle. Article 50 (1) provides:-

    1. Every person has the 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, another independent and impartial tribunal or body."

27. The test in applications for joinder is firstly, whether an applicant can demonstrate he has an identifiable interest in the subject matter in the litigation though the interest need not be such interest as must succeed at the end of the trial. Secondly, and in the alternative it must be shown that the applicant is a necessary party whose presence is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. Has the applicant demonstrated he has sufficient interest in the subject matter of the suit or that he is a necessary party whose presence is necessary to enable the court to effectually and completely adjudicate upon all the issues in the suit?

28. While, the provision of Order 1 Rule 10 (2) of the Civil Procedure Rules states as follows: -

> " The court may at any stage of the proceedings, either upon, or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon or settle all questions involved in the suit, be added."

29. Additionally, the provision of Order 1 Rule 3 of the Civil Procedure Rules states as follows: -

> " All persons may be joined as Defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise."

30. Thus, it will be seen from the provision of Order 1 Rule 3, that the court may order the joinder of a person as Defendant if there is a claim against him arising out of the same act or transaction complained of or if a separate suit were brought against him it will bring common questions of law or fact as in the existing case. It should however be noted that the joinder of the person as defendant in this instance must be in relation to a claim made against him by the Plaintiff, for if it were not the case, he would not be defendant. Critically speaking, the very presence of a person as Defendant implies that the Plaintiff has a case against him.

31. In reference to the case of "Omboko – Versus - Speaker & Chairperson of Busia County Assembly Service Board & 6 others (Petition E005 of 2020) [2022] KEELRC 14695 (KLR)(7th July 2022) (Ruling)" wherein the court in its determination relied on the case of "Habiba W Ramadhan & 7 others – Versus - Mary Njeri Gitiba Court ELC Case No 119 of 2014 the court stated as follows:(2017) eKLR; Nairobi High":

> " As already observed by the court, under Order 1 Rule 10 (2) the court has discretion to order joinder of any party to a suit at any stage of the proceedings so long as the presence of that party before the court is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions in dispute..."

Still on this point, the Honourable Court has placed its reliance on the position of the case of "Communications Commission of Kenya & 4 others – Versus - Royal Media Services Limited & 7 others [2014] eKLR":

> " the Supreme Court of Kenya held that: '(22) (23) In determining whether the applicant should be admitted into these proceedings as an interested party we are guided by this court's ruling in the Mumo Matemo case where the court (at paragraphs 14 and 18)held:
>
> "[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the court then it is made, either today. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause..." Similarly, in the case of Meme – Versus - Republic, [2004]1 EA 124,the High Court observed that a party could be enjoined in a matter for the reasons that:
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> i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
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> ii. 54. joinder to provide protection for the rights of a party who would otherwise be adversely affected in late; joinder to prevent a likely course of proliferated litigation.

32. To this end, I strongly find that it will be necessary to join the proposed parties as the 3rd, 4th and 5th Defendants in this matter. Thus, the application succeeds to that extend the Intended Defendant to be joined as a party to this suit thereof.

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

33. Under this sub – heading, the Honourable Court having arrived at the conclusion that in the interest of natural Justice, Equity and Conscience there is need to join the Intended Defendants, it follows that there will be need to hear the case afresh notwithstanding that it had entered the Judgement had been delivered in favour of the Plaintiffs. In saying so, the Honourable Court sought refuge from the case of:- "Menginya Sahim Mugani – Versus - Kenya Revenue Authority (2014) eKLR the court stated thus: -

> " It is a general principle of law that a court after passing Judgment, becomes functus officio and cannot revisit the Judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by the law".

34. The only exception to this rule and the laws governing review of Court's decision are provided in Order 45 of the Civil Procedure Rules, 2010. The conditions and powers to review are set in Section 80 of the *Civil Procedure Act*, Cap. 21 while the provision of Order 45 Rule 1 of the Civil Procedure Rules, 2010 is on the rules to do so. The provision of Section 80 of the *Civil Procedure Act* Cap 21 provides as follows:

> " Any person who considers himself aggrieved—
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> 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."

35. The provision of Order 45 Rule 1 of the Civil Procedure Rules states as follows:

> " 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."

36. In order to fully appreciate this concept, I am compelled to extensively cite adequate precedents by the Court of Law herein. 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."

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

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

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

37. From above, it is quite clear that the these provisions of the Law are discretionary in nature. Thus, it follows that 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.

38. 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."

39. Additionally, 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.

40. In 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.

41. Discussing the scope of the review, the Supreme Court of India also referred to by the Learned Counsel for the Respondent herein, in the case of "Ajit Kumar Rath – Versus - State of Orisa, (Supra)." had this to say:-

> " The power can be exercised on application of a person on the 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 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 for 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..."

41. Additionally, in the case of:- "Nyamongo & Nyamongo – Versus - Kogo [2001] EA 170" discussing what constitutes an error on the face of the record, the Court rendered itself as follows:-

> " An error apparent on the face of the record cannot be defined or exhaustively, there being an element of definitiveness inherent in its very nature and it must be determined judicially on facts of each case. 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 has to be established by a long-drawn process of reasoning on points where there may conceivably 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 possible. Mere error or wrong is certainly no ground for review though it may be one for appeal....."

Discussing the scope of review, the Supreme Court of India in the case of "Ajit Kumar Rath – Versus - State of Orisa & Others, (Supra)" 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"

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."

Similarly in the case of:- "Phillip Chemwolo & Another – Versus - Augustine Kubede [1982-88] KLR 103" at 1040 Apaloo J/A as he then was stated thus:-

> " Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit". [own emphasis]

44. Having made extensive reference to numerous Court cases, I now wish to apply the legal principles to the instant case. Critically, based on the surrounding facts and inferences in the instant case, the Honourable Court has been guided by and scaled down the ingredients to three (3) components. These are:-

    i. There is discovery of new and important matter or evidence which, after the exercise of due diligence;

    ii. These information 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

    iii. For any other sufficient reason, desires to obtain a review of the decree or order.

44. From a face value, I hold that the application by the Intended Defendant is a game changer and has further brought out facts that were missing and which the court had referred to in paragraph 91 of the said Judgment. The Intended Defendant has consistently argued that he is the legal, registered and beneficial owner of the property comprised in the title LR/MN/VI/2846/2847/2854/2849 and 2850 which is the subject matter of these proceedings. The said plots were derived from the mother title which belonged to one Vithalbhai Bulebhai Patel. According to the pleaded facts and averments by the

Applicant, the matter proceeded without his participation yet he ought to have been a Defendant but was never served with the pleadings to enable him enter appearance.

45. Having assessed the evidence placed before Court, the Court has noted there exists a myriad of inconsistencies and contradictions which there would be need to keenly assess them. As a practical way out, there will be need to provide all parties an opportunity to fully present them before Court during a full trial. For instance, and without wanting to decent to the arena of litigation, whatsoever, it is clear that so far the Applicant had failed to bring any proof of ownership of the aforementioned properties and further that the said properties were distinct from the suit properties as explained in paragraphs 3 and 8 of the Plaint herein. For clarity purposes paragraph 3 of the Plaint reads as follows:

> 3. The Plaintiff avers that at all material times to this suit, the Plaintiff was the Administrator of the Estate of the late Ngala Mbui Chuphi who has been the registered owner and or owner of Plot Nos. 2847/VI/MN, Plot No 2848/VI/MN, 2851/VI/MN, NO. 2852/VI/MN and No. 2853/VI/MN and the Plaintiff brings this suit pursuant to grant and subsequent certificate of confirmation of grant dated 4th May 2018."
>
> Paragraph 8 reads as follows:
>
> > "The Plaintiff avers that the Defendants have no right whatsoever to be on plot no.s 2847/VI/MN, 2848/VI/MN, 2851/VI/MN, 2852/VI/MN and 2853/VI/MN and the plaintiff now prays that this court should order their removal and hand the Plaintiff vacant possession."

49. Further, there is one sensational twist unfolding from the matter. This is the fact that there has been two (2) Provisional Certificates of Titles in existence. Interestingly, both of them tell the same story. Additionally, there is also the gigantic clash of court orders whereby the Plaintiff was issued with a Certificate of Confirmation of Grant vide the Succession Cause, Mombasa HCC 414 of 2012 with respect to the suit properties while at the same time, the Mombasa HCC 180 of 2008 issued a Certificate of Confirmation of Grant with regards to plot no. 2847, 2849, 2850 and 2854 and Mombasa HCC 188 of 1995 (OS) reiterated that Plots numbers 2847 and 2854 (original 2846 C.R 15040) belonged to the late Elizabeth Auma Agunda and Duncan Mutema Njeru. Mombasa HCC No. 121 of 2009 did not award ownership but negated the transfers of Plot Numbers 2849, 2850 and ordered a mandatory injunction on Plot Numbers 2847, 2854, 2849 and 2850. It is certain that when the court in Mombasa HCC 414 OF 2012 was issuing a Certificate of Confirmation of Grant dated 4th May 2018 it was not aware of the mandatory injunction above mentioned. Furthermore, ownership with regard to Plot numbers 2847, 2849, 2850 and 2854 had already been awarded to the Plaintiff and another on 25th June 2009.

50. Notably, all the courts mentioned are of concurrent jurisdiction which raises a web of confusion which this court is mandated to untangle and finally conclude who owns the suit properties. I agree with the Plaintiff's advocates that if the Intended Defendant is heard, the outcome may be different. I also refer to paragraph *2* of this ruling where I stated that the evidence of the alleged Mrs. Oduor would be vital and I am curious as to whether the late Elizabeth Auma Ogunda is one and the same as Mrs. Oduor but this can only be clearly brought in the hearing and evidence produced.

51. It is instructive to note that all these allegations have been vehemently refuted by the Plaintiff/Respondent who holds that these titles deeds were distinct and separate from the ones pleaded in the pleadings and therefore there was no need to have served him in this matter. Definitely, the Honourable Court will not want to be entangled into the issues of service or not and taking that the Plaintiff has not confirmed the non – service and thus lack of participation of the Intended Defendant in the matter,

I will leave it at that point. Undoubtedly, there exists extremely significant information but which unfortunately were never placed before the Honourable Court for its consideration in arriving at an informed decision. Clearly, taking that the Intended Defendant were never part of these proceedings, there was no way out that the Court would consider these important evidence.

52. by and large, upon hearing both the Plaintiff and the Defendant's case, this court delivered an amended Judgment in rem with regard to parcels of land L.R No. 2847/VI/MN, 2848/VI/MN, 2851/VI/MN, 2852/VI/MN and 2853/VI/MN by holding "inter alia" as follows:-

    a. That Judgment be and is hereby entered in favour of the Plaintiff with costs in entirety.

    b. That there be an order for the vacant possession from Plot No. 2847/VI/MN, 2848/VI/MN, 2852/VI/MN, 2851/VI/MN, 2853/VI/MN.

    c. That the Amended Defence and Counterclaim dated 31st March 2020 by Defendants as the Plaintiffs thereof be and is hereby dismissed for lack of merit.

    d. That there be an order for peaceful and lawful eviction from Plot No. 2847/VI/MN, 2848/VI/MN, 2852/VI/MN, 2851/VI/MN, 2853/VI/MN of the Defendants pursuant to the provisions of section 152E of the *Land Act* No. 6 of 2012 within ninety (90) days from the date of the delivery of this Judgment.

    e. That in the alternative to order (b) above, the Defendants embrace the offer to purchase the portion of land where they are occupying as already proposed to them vide the letters by the Plaintiff's advocates dated 14th June, 2018 and 22nd August, 2018 by entering into a sale agreement terms and condition stipulated thereof as per the Laws of Contract Cap 23 and the *Land Registration Act* No. 3 of 2012 and Section 38 of the *Land Act* No. 6 of 2012 within the next ninety (90) days from the date of delivery of this judgment.

    f. That there be an order for mesne profits of Kenya Shillings One Thousand (Kshs.1,000=) from each Defendants per month from the date of filing this suit in court to the date of delivery of this Judgment.

    g. That costs be awarded to the Plaintiff.

53. Fundamentally, therefore, the Court is fully persuaded that there are adequate grounds for causing the review, setting aside and/or varying of this Judgement taking that the same was irregular, unfair but unconstitutional as it adversely affected the Intended Defendant and his right to private property. Thus, I discern that it follows that the above fleshed out three conditions are all applicable herein. For these reasons, therefore, the application must succeed accordingly.

    ISSUE No. b). Who bears the costs of the application?

54. It is now well established that the issue of costs is at the discretion of Courts. Costs mean the award that is granted to a party at the conclusion of any legal action or process of any litigation. The provision of Section 27 of the *Civil Procedure Act*, Cap. 21 costs usually follows the event unless there is sufficient or good reason to depart from this section. By event, it means the result or outcome of such legal action. In the case of "Republic – Versus - Rosemary Wairimu Munene, Ex-Parte Applicant – Versus - Ihururu Dairy Farmers Co - operative Society Limited Judicial Review application no 6 of 2014 this court held as follows: -

> " The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it

is for compensating the successful party for the trouble taken in prosecuting or defending the case".

55. In the instant case, the Honourable Court has already found that there is sufficient reason to set aside the Judgment dated 18th December 2023 and thus the Plaintiff/Respondent should bear the costs of this application and to pay the Intended Defendant some thrown away costs for the inconveniences caused by his failure to involve them in this suit right from the beginning of the proceedings hereof.

VII. Conclusion and directions

56. In conclusion, having carefully critically assessed crafted issues herein, and Preponderance of Probabilities and the balance of convenience, the Honourable Court arrives at the following decision. It directs as follows: -

    a. That an order is made to the effect that the proceedings herein, the Judgment dated 31st October 2023 and the resultant decree issued on 18th December 2023 be and are hereby unconditionally, reversed and/or set aside.

    b. That the intended Defendant be and is hereby granted leave to join these proceedings as a Defendant and the pleadings herein be amended to reflect as such.

    c. That the Intended Defendant granted 21 days leave to file and fully comply with the provision of Order 6, 7 and 11 of the Civil Procedure Rules, 2010.

    d. That the Intended Defendant to pay a thrown away costs of Kenya Shillings One Hundred and twenty (Kshs. 120, 000.00) to the Plaintiff before the next mention date of this matter.

    e. That for expeditious sake, this matter to be heard and finalized on 9th December, 2024. There be a mention on 6th November, 2024 for conducting of Pre – Trial Conference in accordance with the provision of Order 11 of the Civil Procedure Rules, 2010.

    f. That costs of this application be awarded to the intended Defendant.

It Is So Ordered Accordingly.

RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED THIS 24TH DAY OF SEPTMEBER, 2024.

.....

HON. MR. JUSTICE L.L. NAIKUNI,

ENVIRONMENT & LAND COURT AT

MOMBASA

Ruling delivered in the presence of:-

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

b. Mr. Odiagga Advocate for the Plaintiffs/Respondents.

c. Mr. Borona Advocate for the 1st Defendant/Applicant.

d. No appearance for the other Defendants.