Manchester Outfitters Limited & 2 others v Galot Holdings Limited & 3 others (Environment and Land Case Civil Suit 358 of 2012) [2024] KEELC 6029 (KLR) (19 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6029 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT 358 OF 2012

OA ANGOTE, J

SEPTEMBER 19, 2024

BETWEEN

MANCHESTER OUTFITTERS LIMITED ..... 1ST PLAINTIFF

MOHAN GALOT ..... 2ND PLAINTIFF

GALOT LIMITED ..... 3RD PLAINTIFF

AND

GALOT HOLDINGS LIMITED ..... 1ST DEFENDANT

MACHESTER OUTFITTERS (E.A) LIMITED ..... 2ND DEFENDANT

PRAVIN GALOT ..... 3RD DEFENDANT

RAJESH GALOT ..... 4TH DEFENDANT

RULING

1. Vide a Motion dated May 28, 2019, brought pursuant to the provisions of Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act* and Order 45 Rule 1 and 3(2) and 51 Rule 1 of the *Civil Procedure Rules*, the Plaintiffs/Applicants seek the following reliefs;

    i. Spent.

    ii. That this Honourable Court be pleased to review and set aside its orders of 31st October, 2018 dismissing the suit for want of prosecution.

    iii. That the Plaint filed on 19th June, 2012 be reinstated for hearing.

    iv. That this Honourable Court be pleased to grant such other or further orders as it shall deem fit and just for the preservation of justice regarding the nature and circumstances of this case.

    v. That the Respondents be ordered to pay costs of this Application.

2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Mohan Galot, the 2nd Plaintiff, Chairman of the Board of Directors and Governing Director of the 1st and 3rd Plaintiffs of an even date.

3. The 2nd Defendant deponed that the Plaintiffs instituted the suit vide a Plaint on 19th June, 2012; that contemporaneously with the Plaint, they filed a Motion under a certificate of urgency seeking temporary injunctive reliefs; that the Defendants filed a Defence on 28th August, 2013 and that while the parties were prosecuting the interlocutory phases of the suit, a contention arose with respect to the directorship of the 1st Plaintiff putting into question the capacity of the Plaintiffs to file the suit.

4. According to the 2nd Plaintiff, the 1st Plaintiff is the legitimate owner of the property L.R No 24092(Grant No I.R 793398) (hereinafter the suit property), situate along Mombasa Road, having purchased the same from the 3rd and 4th Defendants for valuable consideration on 2nd December, 2011 and that the suit property was later on inexplicably transferred to the 1st Defendant, through a fraudulent process.

5. The 2nd Defendant deponed that these proceedings arise from fraud and breach of fiduciary duty by the 3rd and 4th Defendants when they were the 1st Plaintiff's directors; that the directorship and shareholding of the 1st Plaintiff has been the subject of protracted litigation before a 3 judge bench in Milimani HCCC 55 of 2012: Manchester Outfitters v Pravin Galot & 4 Others and that the parties herein and in HCCC 55 of 2012 aforesaid are largely the same and had entered into a consent in HCCC 55 of 2012 to carry out an inventory of all the matters related to the suit.

6. Mr Mohan posited that he is aware that the aforesaid inventory was carried out and thereafter the said matters were ordered stayed pending the determination of HCCC 55 of 2012 and that the issue of directorship having also arisen in this suit, the Plaintiffs filed a Motion dated 31st March, 2014 seeking to have the matter stayed pending determination of HCCC 55 of 2012 noting that it was not among the matters listed in the inventory.

7. It was his deposition that on 17th October, 2017, the Court, suo moto issued a mention notice to the parties to appear before the Deputy Registrar who directed that the matter be placed before the Presiding Judge for a Notice to Show Cause as to why the matter should not be dismissed for want of prosecution on the 27th February, 2018 and that their Counsel appeared on the aforesaid date and explained why the matter had not been set down for hearing.

8. It was deposed by the 2nd Plaintiff that on the aforesaid date, the Court having noted that this matter was not among those listed in the inventory in HCCC 55 of 2012, ordered that they file a substantive motion for stay; that when the matter came up on 31st October, 2018, Counsel informed the Court that they had indeed filed a stay application which was pending; and that inexplicably, the Court elected to dismiss the suit.

9. Mr Mohan urged that the matter has been erroneously dismissed for want of prosecution; that the delay in prosecuting the matter is not inordinate and has been explained; that the Plaintiffs are desirous of prosecuting the case and that the interests of justice mandate that the suit be reinstated.

10. The Plaintiffs, through the 2nd Plaintiff filed a Supplementary Affidavit, in furtherance to the Affidavit in support of the Motion on 25th June, 2024. He deposed that their previous Counsel, convinced them that it was futile to attempt to move the matter forward when the High Court matter was pending.

11. According to the 2nd Plaintiff, vide a ruling delivered by this Court on the 15th August, 2013, this Court held that the parties had entered into a consent to await determination of the directorship/

shareholding of the 1st Plaintiff to be made in HCCC 55 of 2012 and that the Defendants had also taken the position that this matter was bound by the outcome of HCCC 55 of 2012.

12. It was his assertion that while the Plaintiffs own view was that the suit could proceed with or without the question of directorship, it had to obey the Court and its lawyers who knew better; that even if the suit was not dismissed for want of prosecution, it would not have proceeded until the issue of directorship of the Plaintiffs was resolved; that the Plaintiffs were not immediately informed of the dismissal to enable them take immediate remedial action and that having lost confidence in the way the suit was handled, they hired new Counsel to proceed with the matter.

13. Mr Mohan urged that the fact that the Court in HCCC 55 of 2012 had issued direct orders staying matters which had disputes on the 1st Plaintiffs' directorship and that this Court having had acknowledged this fact vide its Ruling of 15th August, 2013; and the fact that their Counsel did not sufficiently appraise them of the status of the matter and the fact that the dispute on directorship caused serious flaws in the prosecution of the matter, the Court should exercise its general and inherent jurisdiction and reinstate the suit.

14. The Plaintiff urged that in reinstating the suit, the Court would be avoiding a situation where the Plaintiffs' individual shareholders file an independent suit under a derivative suit which would continue to clog and choke the judiciary unnecessarily and that interests of justice dictate that this matter is fully and finally determined on its merits.

15. The 1st Defendant, through its Director Pravin Galot, who is the 3rd Defendant, filed a Replying Affidavit in response to the Motion on the 14th August, 2024. He deponed that the Plaintiffs initiated this suit through a Plaint dated 19th June 2012, in which they sought inter-alia, a declaration that the suit property was fraudulently and illegally transferred by the 3rd and 4th Defendants from the 1st Plaintiff to the 1st Defendant and an order revoking the transfer and compelling a re-transfer.

16. It was his deposition that the Plaint was filed contemporaneously with a Motion brought under urgency seeking injunctive orders restraining the Defendants from transferring, charging, selling, or alienating the suit property, as well as from commencing or conducting any operations, including the manufacturing of clothes, on the suit property.

17. He averred that in response to the Motion, it was his position that he and the 4th Defendant purchased the suit property from Chemchemi Holdings Limited for a sum of Kshs.8,000,000; that at the time, the 1st Plaintiff, where he was a director, was experiencing financial difficulties and resolved to seek a loan of Kshs.10,000,000 from Barclays Bank (Kenya) Limited and that him and the 4th Defendant agreed to transfer the suit property, which was registered in their names, to the 1st Plaintiff at a nominal value of Kshs.500,000, to be used as security for the loan and upon repayment, the same would be re-transferred to them.

18. It was the deposition of the 3rd Defendant that subsequently, the 1st Plaintiff secured the loan of Kshs.10,000,000 from Barclays Bank (Kenya) Limited, and the suit property was charged via an instrument of charge and upon payment of the loan, the same was discharged; that the purpose for the transfer having been concluded, the property was re-transferred to the 1st Defendant and that vide its determination on the 15th August, 2013, the Court found no merit in the assertions that the transfer to the 1st Defendant was procured by fraud.

19. According to the deponent, after the Ruling aforesaid, the Plaintiffs took no steps to set the suit down for hearing but instead filed a Motion dated the 31st March 2014, seeking to stay the proceedings in this case pending the hearing and determination of HCCC 55 of 2012; that they however did not pursue

the same and that on 27th February 2018, nearly four years later, with no action taken in either the main suit or the application aforesaid, the matter was brought up for a Notice To Show Cause why it should not be dismissed for want of prosecution.

20. It was deposed that on the aforesaid date, Mr. Mwanje holding brief for Mr. Kibe for the Plaintiffs, requested time to seek instructions from his clients, which the Court granted, adjourning the matter to 31st August 2018 and that when the matter came up again on 31st August 2018, Mr. Mwanje, on behalf of the Plaintiffs, cited the pending application seeking to stay proceedings in this case until HCCC 55 of 2012 was determined.

21. The 3rd Defendant deposed that after reviewing the parties' submissions, the Court noted that the last action taken in this matter was on 17th July 2014 after which the Plaintiffs had not pursued either their pending application for stay or the main suit; that the Court found the Plaintiffs' reasons for inaction unsatisfactory, noting that public policy requires Court matters to be concluded expediently and that the Court dismissed the suit for want of prosecution.

22. It is the 1st Defendant's position that the Plaintiffs' explanation that they were awaiting the outcome of HCCC 55 of 2012 is insufficient, as that case has no connection to this one; that while this case concerns the alleged fraudulent transfer of the suit property, HCCC 55 of 2012 pertained to issues of directorship within the 1st Plaintiff and that the issue of fraud in the transfer and re-transfer would have been determined irrespective of the findings on directorship of the 1st Plaintiff.

23. He urged that if indeed the Plaintiffs were legitimately awaiting the issue of directorship, they should have prosecuted their Motion of 31st March, 2014 seeking a stay of proceedings; that even after its dismissal, it took the Plaintiffs a further 10 months to seek reinstatement and even then, they only prosecuted the same in 2024 and that litigation must come to an end and the Defendants cannot continue to be held hostage by the Plaintiffs.

24. The 4th Defendant swore a Replying Affidavit on 18th July, 2024 and filed Notice of Preliminary Objection on 19th July, 2024. Vide the Replying Affidavit, Mr Rajesh Galot deponed that the proceedings of 31st October, 2018 confirm that the issue of the pendency of the Motion for stay was brought to the attention of the Court and the same having been considered, the Court's determination in this regard cannot be said to constitute an error apparent on the face of the record nor be a ground for review.

25. He deponed that as advised by Counsel, if the Plaintiffs were of the view that the determination was wrong, they should have appealed against the decision; that the second ground, to wit, having been misadvised by Counsel is an afterthought belatedly introduced to hoodwink the Court; that he knows for a fact that Mr Mohan gets Court briefings after every appearance and that nonetheless, mis-advise from Counsel cannot constitute a ground for the review of Court Orders.

26. According to the deponent, the Plaintiffs lost interest in this suit after the Court dismissed the Motion for injunction in its Ruling of 15th August, 2013; that in the Ruling, the Court discharged its earlier injunctive orders issued on 20th June, 2012; that in its Ruling aforesaid, the Court concurred with them and dismissed the Plaintiffs claim that the transfers were fraudulent and that after this, the Plaintiffs took no step to prosecute the same between the years 2013-2018.

27. It is his assertion that it is the Court that woke the Plaintiffs from their slumber by way of a Notice to Show Cause issued in the year 2018; that when the aforesaid Notice came up before the Court first on the 27th February, 2018, the Plaintiffs' Counsel sought for more time to seek instructions further affirming the Plaintiffs' loss of interest in the matter and that the Court graciously indulged

the Plaintiffs' Counsel by granting him 8 months to seek instructions and fixed the Notice for 31st October, 2018.

28. The 4th Defendant deposed that on 31st October, 2018, Counsel, now fully instructed opposed the Notice on the basis that there was a related matter being HCCC 55 of 2012 and that the Plaintiffs had filed a Motion seeking to stay the suit pending determination of HCCC 55 of 2012 which was dismissed as aforesaid and that the present Motion was brought eight months after the dismissal which constitutes an inordinate and inexcusable period as the Plaintiffs did not bother to explain it.

29. He stated that on the 23rd September, 2020, this Court, while staying the instant Application and the Motion of 21st September, 2020 noted that this suit remained dismissed and the file closed as at 23rd September, 2020 and that the averment that the High Court stayed this matter pending determination of HCCC 55 of 2012 is false and misleading.

30. The 4th Defendant posited that after the dismissal of the suit, they embarked on development of the suit property by constructing a Kshs 675,000,000/= manufacturing complex where they carry out several businesses and employ over 300 staff; that attempts to revive the suit are motivated by jealousy and malice and that this suit is in any event statute barred and the Court was divested of jurisdiction to determine this matter in 2020.

31. The Preliminary Objection by the 4th Defendant is premised on the grounds:

    i. That as the Plaint dated the 19th June, 2012 demonstrates, the Plaintiffs suit herein which was dismissed on the 31st October, 2012 sought:

        a. The recovery of all that parcel of land known as L.R No 24092(Grant No L. R 79398).

        b. An order for accounts by the 1st, 2nd, 3rd and 4th Defendants in respect of the money borrowed, obtained from the Plaintiff and extended to develop L.R No 24092(Grant I.R 793398)from the 27th February, 2007.

        c. General damages for alleged loss of user.

    ii. That under:

        a. Section 7 of the *Limitation of Actions Act*, an action for the recovery of land may not be brought by any person to recover the land after the end of twelve years from the date of which the right of action accrued to him or, if it first accrued to some person through whom he claims to that person. The Plaintiffs claim for recovery of land having accrued in the year 2010 is therefore stature barred under the provisions of Section 7 of the Limitations of Actions Act.

        b. Section 4(2) of the *Limitation of Actions Act* provides that an action founded on tort may not be brought after the end of three (3) years from the date on which the cause of action accrued. The Plaintiffs claim for damages on the basis of alleged loss of use in relation to the L.R No 24092(Grant No IR 79398) having arose in the year 2010 and being founded on tort are therefore statute barred under the provisions of Section 4(2) of the Limitations Act.

    iii. That the Supreme Court in the case of *Samuel Macharia & Anor v Kenya Commercial Bank Limited & 2 Others* [2012]eKLR held that a Courts jurisdiction flows from either the *constitution* or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred by the *constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the law.

iv. That the Plaintiffs suit herein was dismissed for want of prosecution on the 31st October, 2018 and there is therefore no pending suit before this Honorable Court.

v. That pursuant to the provisions of Sections 4(2), (3) and of the *Limitation of Actions Act*, the jurisdiction of this Court to deal with any suit or dispute arising from the transfer of the suit property on the 14th February, 2007, although the Plaintiffs claims that they only learned of the same in the year 2010, was ousted by the operations of the said provision of the law on the years 2013, 2016 and 2022 respectively upon the lapse of the limitation period.

vi. That the Court, having dismissed this suit for want of prosecution on the 31st October, 2010 is now barred by the said provisions of the *Limitation of Actions Act* from reinstating the same because the suit has since become statute barred, and therefore a non-starter.

vii. That any application for reinstatement is based on the presumption that the Court has jurisdiction to hear the primary suit and therefore becomes bad in law, a non-starter and fatally defective if the suit being sought to be reinstated is already statute barred.

viii. That this Court therefore lacks the jurisdiction to hear and determine the Application and must in law down its tools.

ix. That the Application is otherwise irresponsible, fatally defective, an abuse of the Court process and is liable to be struck out in limine.

32. Both parties filed submissions and authorities which I have considered.

Analysis and Determination

33. Having considered the Motion, responses and submissions, the following arise as the issues for determination;

i. Whether this Court has jurisdiction to entertain the matter?

ii. Whether the Motion is competent and if so?

iii. Whether the Plaintiffs have met the threshold for the review of the Court's Orders of 31st October, 2018?

34. Vide the present Motion, the Plaintiffs seek to have the Court review its decision dismissing the suit and reinstate the same. This is strenuously objected to by the 1st, 3rd and 4th Defendants who have raised a host of objections urging the Court to preliminarily dismiss the Motion. The Court will consider these first.

35. Beginning with the 4th Defendant, he asserts vide a Preliminary Objection, inter-alia, that this Court has no jurisdiction to determine the suit as the same is statute barred virtue of Sections 4(2), (3) and 7 of the *Limitation of Actions Act* and that the Court having dismissed the suit on 31st October, 2018, is barred from considering the present Motion.

36. In response, the Plaintiffs maintain that the Objection has not been properly brought, the same not being founded on pure points of law but consisting of issues requiring factual and evidential probing; that the objection can only challenge the Motion before the Court and not the substantive suit and that further still, the question of reinstatement being one requiring judicial discretion cannot form grounds for a Preliminary Objection.

37. The threshold of a preliminary objection was set out by the Court of Appeal in the locus classicus case of *Mukhisa Biscuits Manufacturing Co. Ltd. v West End Distributors* [1969] EA 696 at 700 wherein Law, JA stated that:

> " ...a 'preliminary objection' consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

38. Newbold, P further held that:

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop."

39. The Supreme Court in the case of *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others*, Petition No. 10 of 2013, [2014] eKLR re-affirmed the principle as set out in the Mukhisa Case(supra) stating as follows:

> " A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion'."

40. It is trite that jurisdiction is everything and it need not be gainsaid that the question of jurisdiction is prima facie a proper preliminary question. The question of limitation is a question that goes to the jurisdiction of this Court. Where there is no factual dispute, it constitutes a pure point of law, which if argued as preliminary point may dispose of the suit.

41. In the circumstances however, and as admitted by the 4th Defendant, this suit was dismissed on 31st October, 2018 for want of prosecution. This means there is no suit before the Court in which the Court can interrogate the question of whether it is statute barred, whether vide the objection or otherwise.

42. Similarly, assertions that the suit is res judicata, on account of the determination of the Court vide its Ruling of 15th August, 2013 cannot be entertained.

43. As to the contention that the suit is statute barred on account of having been dismissed, the Court contends that that this argument is a misnomer. The Plaintiff seeks to review the orders of the court dismissing the suit. There is no limitation of time as regards the Motion to review orders of the Court.

44. It has also been alleged that this Court has no jurisdiction to entertain the matter being functus. The functus officio doctrine is one of the mechanisms by which the law gives expression to the principle of

finality. Discussing the same, the Supreme Court in *Raila Odinga & Others v IEBC & Others* [2013] eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in "The Origins of the *functus officio* Doctrine, with Specific Reference to its Application in Administrative Law" (2005) 122 SALJ 832 in the following words:

> "The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

45. Indeed, the Court harbours no doubt that a dismissal of a suit is a final determination. This doctrine however has exceptions. These were highlighted by the Court in *Mombasa Bricks & Tiles Ltd & 5 Others v Arvind Shah & 7 Others* [2018] eKLR, which persuasively stated thus:

> "I understand the doctrine, like its sister, the res- judicata rule to seek to achieve finality in litigation. It is a way of a court saying, 'I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level'. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits.
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> It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes.As was held by the court of Appeal in Telkom Kenya Ltd v John Ochanda, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file...There are several proceedings that can only be undertaken after judgment and not before. The following are just but examples; Application for stay; Application to correct the decree; Application for accounts; Application for execution including garnishee applications; Applications for review; Application under section 34 of the Act.
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> If one was to accede to the position taken by the judgment debtor that the court is functus officio then it would mean that the provisions of law providing for such proceedings are otiose or just decorative and of no substance to the administration of justice."

46. Similarly, the Court in *Silvanus Kizito v Edith Nkirote Mwiti* [2021] eKLR, stated thus:

> "It was thus incorrect for the trial court to have held as she did that the court had become functus officio. The court does not become functus officio merely because it has delivered a final decision in civil proceedings. The court retains its power to undertake several actions including but not limited to stay, review, execution proceedings and such other acts and steps...In *Leisure Lodge Ltd v Japhet Asige and another* [2018] eKLR the court said and held:
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> "On the question that this court is functus officio, I do find that a trial court retains the duty and jurisdiction to undertake and handle all incidental proceedings...That is the reason, the court must undertake settlement of a decree, if parties cannot agree, handle applications for stay, review, setting aside and even execution proceeding including applications under Section 94 of the Act."

47. Indeed, the review orders herein form part of the matters that the Court is vested with jurisdiction to undertake after final determination of the matter. Ultimately, the Court finds that it has the requisite jurisdiction to entertain the matter.

48. Apart from questioning the Court's jurisdiction, questions have been raised as to the competence of the Motion. It is alleged that the Orders sought to be reviewed are not capable of being reviewed. The 3rd Defendant contends that a dismissal of a suit for want of prosecution where parties are heard can only be appealed with leave of Court.

49. Indeed, it is undisputed that the present suit was dismissed pursuant to the provisions of Order 17 of the *Civil Procedure Rules*, a notice to show cause having been issued. The notice to show cause was duly litigated and a determination made in which the suit was dismissed.

50. Having been dismissed upon full hearing of the parties, the Court agrees that the Plaintiffs could not have sought for the reinstatement of the suit because under Order 17 aforesaid, this would be tantamount to a re-litigation of the notice to show cause.

51. However, the dismissal of the suit was a decision of the Court. Having been so aggrieved by that decision, the Plaintiffs had two options open to it so as to remedy that grievance by availing themselves of the remedies of appeal or review under Section 80 of the *Civil Procedure Act*. Having not appealed the decision, the remedy of review is open to the Plaintiffs.

52. In the cases of *Ronald Mackenzie v Damaris Kiarie* [2021] eKLR and *George Kipyegon Moi v Linet Minagi Mshanka & Another*[2022]eKLR, relied on by the 3rd Defendant, the Courts were dealing with Motions to reinstate as per the parameters set out in Order 12 Rule 7 of the Civil Procedure Rules and under the Courts' general discretionary powers. It is also noted that sub-rule 2(6) of Order 17 referenced by the 3rd Defendant was a 2020 amendment to the *Civil Procedure Rules*.

53. Another contention in this regard is that the Plaintiffs' failure to annex a copy of the Ruling they seek to have reviewed is a fatal mistake. Considering the Motion, the aforesaid decision was indeed not annexed thereto. The Court however notes that there is no requirement under Order 45 of the *Civil Procedure Rules* for an Applicant to annex the Order or Ruling sought to be reviewed.

54. This is a requirement that has gained footing as a result of practice. As such, the failure to annex the same cannot render the Motion fatal. As expressed by the Court of Appeal in *Peter Kirika Githaiga & Another v Betty Rashid* [2016] eKLR:

> " Of course an order or decree is the formal expression of the decision of the court. An order emanates from a ruling whereas a judgment gives rise to a decree and should ordinarily be extracted. As already stated Order 45 (1) does not expressly provide that an order or decree must be annexed to the application for review. The rule only provides that where a party is aggrieved by an order or decree, he may apply for review. Our understanding is then that, where a formal order or decree has not been extracted or attached to the application for review but a party is able to direct the court's attention to that part of the ruling or judgment which he complains of, since such decision would be on the court file anyway, the application for review cannot be rendered fatally defective."

55. Consequently, even though the Plaintiffs herein did not annex the decision sought to be reviewed, this Court shall apply the oxygen principles as provided for under Article 159 of the *constitution* of Kenya, as well as various statutory provisions to the effect that "justice shall be administered without undue

regard to procedural technicalities." In any event, there is no ambiguity as to which order the Motion relates to.

56. Having affirmed the Motion's competence, the Court will now move onto its merits.

57. The law governing the framework of review is set out in Section 80 of the *Civil Procedure Act* and Order 45, Rule 1(1) of the *Civil Procedure Rules*. Section 80 of the *Act* which provides as follows:

> " 80. 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
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> (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."

58. Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 provides as follows:

> " Rule 1 (1)Any person considering himself aggrieved-
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> (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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 review of judgment to the court which passed the decree or made the order without unreasonable delay."

59. A reading of the above provisions makes it is clear that while Section 80 of the *Civil Procedure Act* grants the Court the power to make orders for review, Order 45 sets out the jurisdiction and scope of review by limiting it to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.

60. This position was restated by the Court of Appeal in *Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited* [2014] eKLR where the Court observed that:

> " In the High court, both the *Civil Procedure Act* in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review".

61. In *Ajit Kumar Rath v State of Orisa & Others*, on 2 November, 1999, the Indian Supreme Court in discussing the scope of review had this to say:

> " ...the power of review available to the Tribunal is the same as has been given to a court under Section 114 read with Order 47 CPC. The power is not absolute and is hedged in by the

restrictions indicated in Order 47. 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 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..."

62. By way of brief background, the Plaintiffs instituted this suit vide a Plaint on 19th June, 2012 seeking inter-alia, a declaration that the transfer of the suit property to the 1st Defendant was procured by fraud and illegality. They sought to have the transfer in that respect revoked and that eviction orders issue.

63. Contemporaneously with the Plaint, they filed a Motion for injunctive orders which was determined on 15th August, 2013. On the 27th February, 2018, the Plaintiffs were before the Court upon service of a Notice to Show Cause upon them by the Court, directing them to give reasons as to why the suit should not be dismissed. Counsel sought and was granted more time and the Notice was set for hearing on 31st October, 2018.

64. On the aforesaid date, the parties, through their Counsel, appeared before the Court for the hearing of the Notice to Show cause. Upon hearing counsel for the parties, the Court proceeded to dismiss the suit resulting in the present Motion.

65. The first port of call in this respect is a determination of whether the Motion has been filed without unreasonable delay, a critical consideration pursuant to Order 45 of the *Civil Procedure Rules*. In *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014]eKLR, the Court persuasively stated:

> " The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgement could be unreasonable delay depending on the judgement of the court and any order given thereafter..."

66. The suit herein was dismissed on the 31st October, 2018 and the present application was filed on 28th May, 2019. The period between dismissal of the suit and filing of the Motion is a period of 7 months.

67. The Plaintiffs' explanation for this delay is that they were not aware that the suit was dismissed but rather were under the impression that the same had been stayed having been advised that it was not possible for the same to continue while the issue of directorship was pending. They contend that the Advocates' negligence in this respect should not be visited upon them.

68. The 1st, 2nd and 3rd Defendants on their part contend that the delay is unreasonable and un-explained; that after failing to get injunctive orders, the Plaintiffs lost interest in the matter by failing to prosecute not only the main suit but their Motion for stay which was in itself filed a year later.

69. Indeed, it is undisputed that right upon the institution of this matter, the question of the directorship of the 1st Plaintiff became an issue. Vide its determination of 15th August, 2013, the Court took cognizance of this.

70. In its Ruling of 15th August, 2013, the Court noted that while it was not convinced that the 2nd and 3rd Plaintiffs had the requisite locus to institute the suit on behalf of the 1st Plaintiff to the extent that it sought to enforce its proprietary rights, by virtue of the consent entered between the parties in HCCC

55 of 2012, it was clear that the parties were in agreement, as to their disagreement on directorship and/shareholding and that any matters in which this question arose would abide the outcome of the commercial suit.

71. While it is plausible that the Plaintiffs were under the belief that the matter could not proceed in view of the dispute on directorship, it was upon them to affirm the position in this regard. They had undertaken the right course in this respect by filing a formal Motion for stay. The same however remained unprosecuted.

72. Courts have been categorical that the case belongs to the litigant and not its Advocates. However, Courts have also stated that a mistake of counsel ought not be visited upon the client. In the circumstances, considering the mistake by Counsel coupled with the fact of the Plaintiffs' reasonable, albeit erroneous position on the status of the case, the Court is prepared to excuse the delay.

73. Moving to the merits of the Motion, the same is predicated on the grounds of error apparent on the face of the record and sufficient reason. In discussing this concept, the Court of Appeal in *Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs)* [2019] eKLR referred to its various decisions as follows:

> " This Court in *Muyodi v Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243 described an error on the face of the record as follows:
>
> "In Nyamogo and Nyamogo v Kogo [2001] EA 174 this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is 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 or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

74. This position was also stated by the Ugandan Court of Appeal in the case of *Apollo Waswa Basude & 2 Others (As administrators to the Estate of the late Sepiriya Rosiko) v Nsabwa Ham*, Civil Appeal No 288 of 2016, where the court at para 310 stated thus:

> " ...an error apparent on the face of the record is one that is evident and its incorrectness does not require any extraneous matter by way of proof. It is so manifest and clear that no court of law exercising its judicial power would allow it to remain on the court record. This error may be either of fact or of law..."

75. From the foregoing, it is apparent that an error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.

76. So what is the error herein? According to the Plaintiffs, the same is evinced by the fact of the dismissal of the suit while their Motion dated the 31st March, 2014 was pending, and the Court's failure to consider that that the parties were all parties in HCCC 55 of 2012 causing the delay.

77. In response, the Defendants argue that the contention does not pass the test of an error or omission which must be self-evident and should not require an elaborate argument to be established.

78. The Court has considered the proceedings leading to the dismissal of the suit. During the hearing of the Notice to Show Cause, Counsel for the Plaintiffs informed the Court that there was a pending matter in the High Court, Commercial Division, in which the 1st Plaintiffs' directorship was in contention and that they had filed a Motion seeking to stay the suit pending determination of the commercial matter. The Court found this unsatisfactory and dismissed the matter.

79. In view of the foregoing narration, it is clear that what is being called into question is the merit of the Court's determination, a question that falls squarely within the purview of an Appeal. As aptly stated by the Court of Appeal in Nyamongo v Nyamongo(*supra*):

> " ..... Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

80. The threshold for review on account of error on the face of the record has not been met.

81. The scope of the ground "for any other sufficient reason" has been subject to different interpretations by the Courts. There are two schools of thought, first being that the "sufficient reason" alluded to must be analogous to the grounds pertaining to discovery of new evidence or error on the face of the record and second, that the "sufficient reason" need not be analogous to the previous grounds.

82. The position that the sufficient reason ought to be analogous to the grounds of discovery of new and important evidence and error apparent on the face of the record was embraced by the Court in *Nasibwa Wakenya Moses v University of Nairobi & Another* [2019] eKLR, where Mativo J observed:

> " An application for review may be allowed on any other "sufficient reason." The phrase 'sufficient reason' within the meaning of the above rule means analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1. This position was illuminated in Sadar Mohamed v Charan Singh and Another [13] where the court held that: -
>
> "Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter)."
>
> Mulla in the Code of Civil Procedure [14] (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression 'any other sufficient reason'...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in the rules, would amount to an abuse of the liberty given to the tribunal under the Act to review its judgment.Perhaps it is worth citing Evan Bwire v Andrew Nginda [15] where the court held that 'an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh."

83. Similarly, the Court of Appeal in the case of *Assets Recovery Agency v Charity Wangui Gethi & 3 others* [2020] eKLR stated that:

> " The ground "other sufficient reason" has been held to be consonant with the first two grounds: See Kuria v Shah [1990] KLR 316."

84. Taking a contrary position, the Court of Appeal in Official Receiver and *Liquidator v Freight Forwarders Kenya Ltd* [2005] eKLR held, inter alia, that:

> " With respect, the learned Judge erred in his conclusion that "for any (sic) sufficient reason" had to be ejusdem generis with the first two grounds set out in Order 44 r. 1(1) or analogous to them. This Court in the well known case of Wangechi Kimita v Wakibiru [1982-88] 1KAR 978, which was determined in 1985, and which was binding on the learned Judge, espoused the contrary view of the law. Nyarangi JA. in his judgment in this case, had this to say on the issue:
>
> "I see no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly s 80 of the *Civil Procedure Act* confers an unfettered right to apply for a review and so the words 'for any other sufficient reason' need not be analogous with the other grounds specified in the Order: See Sadar *Mohamed v Charan Singh* [1959] EA 793.".
>
> In his concurring judgment, Hancox JA. as he then was, made the following observation:
>
> "I would add that I also agree with the reasoning of Nyarangi JA that the third head under Order 44 r. 1(1), enabling a party to apply for review, namely 'or for any other sufficient reason' is not necessarily confined to the kind of reason stated in the two preceding heads in that sub-rule, which do not in themselves form a genus or class of things with which the third, general, head, could be said to analogous.".
>
> Kneller JA's brief concurring judgment was as follows:
>
> "Nyarangi JA's judgment embraces the essential facts and the relevant law to be applied to them in this appeal, and, with respect, I am in agreement with the conclusions he has reached."

85. Similarly, the Court of Appeal in P*ancras T. Swai v Kenya Breweries Limited* [2014] eKLR stated that:

> " As repeatedly pointed out in various decisions of this Court, the words, "for any sufficient reason" must be viewed in the context firstly of Section 80 of the *Civil Procedure Act*, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order. In Sarder Mohamed v Charan Singh Nand Singh and Another [1959] EA 793, the High Court correctly 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. In *Shanzu Investments Limited v. Commissioner for Lands* (Civil Appeal No. 100 of 1993) this Court with respect, correctly invoked and applied its earlier decision in Wangechi Kimata & Another v Charan Singh (C.A. No. 80 of 1985) (unreported) wherein this Court held that
>
> "any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the *Civil Procedure Act*; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous."

86. The Court adopts the position that "any sufficient reason" must not be analogous to the grounds of discovery of new evidence and/or error apparent on the face of the record.

87. As to what constitutes sufficient cause, the Court will be guided by the exposition of the Supreme Court of India in the case of Civil Appeal 1467 of 2011 *Parimal v Veena Bharti* [2011] which stated:

> "Sufficient cause is an expression which has been used in large number of statutes. The meaning of the word, "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which then the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man..."

88. According to the Plaintiffs, the sufficient reason in the circumstances include the fact that its lawyers had convinced them that trying to proceed with the matter would be futile and that the Court held the same position.

89. Further that the Court in HCCC No. 55 of 2012 had issued direct orders staying matters which had disputes on the 1st Plaintiff's directorship and that this Court had acknowledged this fact vide its Ruling of 15th August, 2013. Further that their Counsel did not sufficiently appraise them of the status of the matter and the fact that the dispute on directorship caused serious flaws in the prosecution of the matter.

90. In response, it is alleged that these issues were canvassed before the Court in its Ruling of 31st October, 2018 which fully determined the same and the same cannot form the basis of sufficient cause.

91. As already hereinabove stated, at the hearing of the Notice to Show Cause, the Plaintiffs' Counsel stated as follows:

> "There is another matter pending in the Commercial Court between the same parties in which the issue of directorship of the 1st Plaintiff is in contention. We have filed an application for stay in this suit pending the hearing of the suit before the Commercial Court."

92. In response, the Court stated inter-alia:

> "I have noted that the last time this matter came up before the Court was on the 17th July, 2017. From that time, the Plaintiffs have never taken any action either to prosecute the pending application for stay of the suit or the main suit. I have found the reasons given by the Plaintiffs for their inaction unsatisfactory..."

93. Indeed, the Court considered the pendency of the commercial matter in which the 1st Plaintiff's directorship was in issue and the fact that there was an unprosecuted application for stay and the Court cannot reconsider these issues.

94. However, the Court notes that not only was the dispute over the 1st Plaintiff's directorship pending in the commercial court, the aforesaid Court had stayed all the matters in which this issue arose. Whereas this suit was filed subsequently, it was affected by the issue of directorship. This is so because right from the interlocutory phases, the Defendants had raised objections as to the Plaintiffs' locus, a material issue as admitted by this Court on 15th August, 2013.

95. The Court agrees that it would have been impossible for the matter to proceed in the circumstances until the issue of directorship was finally determined. The issue of the directorship having been resolved

by the High Court, it is only just that the dispute over the property proceeds and be fully determined on its merits.

96. As to whether the Defendants will be unduly prejudiced, the Court thinks not. A fully merited determination of the dispute will enable all the parties involved have their positions fully heard and evaluated thus promoting a fair and equitable resolution of the dispute.

97. The Court finds that sufficient reasons have been established warranting the review of the Orders of 31st October, 2018.

98. In conclusion, the Court finds the Motion dated 28th May, 2019 to be merited and proceeds to grant the following orders:

a. The Court does hereby review and set aside its orders of 31st October, 2018 dismissing the suit for want of prosecution.

b. The Plaint dated 19th June, 2012 be and is hereby reinstated.

c. The matter shall be set out down for hearing on priority basis.

d. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF SEPTEMBER, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Kaka for 3rd Defendant

Mr. Otieno for 1st Defendant

Mr. George Gilbert and Awiti for Plaintiff

Mr. Kenyatta for 4th Defendant

Court Assistant - Tracy