



**Kangara v Rock and Pure Limited & 3 others (Environment & Land Case
136 of 2021) [2024] KEELC 7063 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7063 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 136 OF 2021
LL NAIKUNI, J
OCTOBER 24, 2024**

BETWEEN

ZIPPORAH NJOKI KANGARA PLAINTIFF

AND

ROCK AND PURE LIMITED 1ST DEFENDANT

**REGISTRAR OF LAND MOMBASA THROUGH THE HON ATTORNEY
GENERAL 2ND DEFENDANT**

PETER NJOGU WAWERU 3RD DEFENDANT

**CATHERINE WANJIKU WARUGURU ALIAS (CATE WARUGURU) 4TH
DEFENDANT**

RULING

I. Introduction

1. This Honorable Court is tasked with the determination of two Notice of Motion applications dated 17th April, 2024 and another dated 24th June, 2024 both filed by Zipporah Njoki Kangara, the Plaintiff herein and a Notice of Preliminary objection dated 25th July, 2024 raised by Rock and Pure Limited, Peter Njoku Waweru and Catherine Wanjiku Waruguru alia Cate Waruguru the 1st, 3rd and 4th Defendants herein.
2. Upon service of these Notice of Motion applications the Defendants responded through filing of a Replying Affidavits sworn on 20th May, 2024 and 25th July, 2024 respectively. The Honourable Court shall be dealing with the replies indepth at a later stage of this ruling hereof and the motions simultaneously though distinctly and separately.



II. The Notice of Motion application dated 17th April, 2024

3. The Plaintiff/Applicant brought the Notice of Motion application under dint of the provision of Articles 48, 159 of *the Constitution* of Kenya 2010, Sections 1A, 1B, 3, 3A and 63 (e) of the *Civil Procedure Act* Cap. 21 Laws of Kenya, Order 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules, 2010, and Rules Cap 5 Laws of Kenya). She sought for the following orders: -
 - a. Spent.
 - b. That this Honourable Court be pleased to review its Judgment delivered on 19th March 2024, and set aside or stay any consequential orders that arise thereto by reinstating the suit and ordering its transfer to Family Divorce Court.
 - c. Spent
 - d. That pending the transfer of this instant suit to the High Court Family Division, the Honourable Court be pleased to stay the execution of the Judgement and Decree dated 19th March 2024, together with all consequential orders arising thereto.
 - e. Spent.
 - f. That this Honourable court be pleased to issue an order of injunction against the Defendants herein, their servants, agents and/or employees, from executing the Decree-in this suit, trespassing, building, constructing, dealing, leasing, selling, wasting, damaging, intruding, developing and/or in any way interfering with all that property known as all the properties known as CR.43865, CR 43991, CR 43992, CR 44515, CR 44516, situated in Mombasa and NAJROBI/BLOCK 83/672, pending the transfer, registration of the case at the High Court family division registry, and commencement of the suit at the High Court Family and Divorce Court.
 - g. That costs of this application be provided for.
4. The Application was supported on the face of it by the grounds, testimonial facts and the averments made out under the 25 Paragraphed supporting affidavit by ZIPPORAH NJOKI KANGARA, the Plaintiff/Applicant herein on 17th April, 2024 together with six (6) annextures marked as “ZNK - 1 to 6”. She averred that:
 - a. She instituted this suit vide a Complaint and Notice of Motion Application dated 10th July 2021, against the Defendants/Respondents seeking injunctive orders against them, their agents, assigns, friends or anyone acting through their orders or under their authority from valuating, conducting a search, charging, selling, auctioning or transferring or in any way interfering with all the properties referred to as CR.43865, CR 43991, CR 43992, CR 44515, CR 44516, situated in Mombasa and NAIROBI/BLOCK 83/672.
 - b. On 14th September 2021, the 1st, 3rd and 4th Defendants/Respondents entered appearance and filed a Preliminary Objection challenging the court’s jurisdiction to determine the said matter. (Annexed in the affidavit and marked as “ZNK- 1” was a copy of the Preliminary Objection dated 14th September 2021)
 - c. The Preliminary objection was dispensed away with by way of written submissions filed by the Defendants/Respondents on 30th September, 2021 and the Plaintiff on 4th October, 2021.



- d. On 16th December, 2021, the Court delivered its Ruling and dismissed the Preliminary Objection stating that it lacked merit and confirmed that the court had jurisdiction determine the matter. Annexed in the affidavit and marked “ZNK - 2” was a copy of the Ruling and Order dated 23rd February 2022.
- e. The matter thereafter proceeded for hearing and all parties adduced their evidence and testimonies to which the court thereafter listed the matter for Judgement on 19th March 2024.
- f. The Judgement was delivered on 19th March 2024, to which the court determined that it did not bear the jurisdiction to determine the matter as during the pendency of the proceedings, the Plaintiff and the 3rd Defendant got divorced vide divorce proceedings filed at the Chief Magistrate’s Court being: “Mombasa Divorce Cause No. 145 of 2021 Peter Njogu Waweru – Versus - Zipporah Njoki Kangara”.
- g. The Court reasoned that due to the said divorce, the cause of action and the substrata of the case changed drastically as the determination of the matter laid on the management and distribution of matrimonial property after the dissolution of the Marriage pursuant to the provisions of Section 6 and 7 of the Matrimonial Causes Act, laws of Kenya and transferred the said suit to the High Court Family and Divorce division.
- h. The Court erred in law and in fact in determining so as it was aware of the divorce proceedings initiated at the Mombasa Chief Magistrate’s Court as her representatives had on 30th June 2022, filed a Notice of Motion Application dated 29th June 2022, seeking the stay of the Divorce cause proceedings pending the hearing and determination of this instant suit. Annexed in the affidavit and marked as “ZNK -3” was a copy of the Notice of Motion Application dated 29th June 2022.
- i. In reponse to the said application, the 1st, 3rd and 4th Defendants/Respondents filed a preliminary objection questioning the Jurisdiction of the court to stay the said proceedings. Annexed in the affidavit and marked as “ZNK-4” was a copy of the Preliminary Objection and Replying Affidavit dated 13th July 2022).
- j. Due to unforeseen circumstances, her representatives later on withdrew the said application however the same was on record as part of the pleadings and the court was well aware of the same.
- k. As part of the delivered Judgment, the Court on its own motion proceeded to determine the matter and held that:-
 - a. Judgement be and is hereby entered in favour of the 1st, 2nd, 3rd and 4th Defendants as against the Plaintiff here as per the statement of Defence dated 18th February, 2022 with costs.
 - b. The suit as per the Plaint dated 10th July, 2021 and filed on 13th July, 2021 be and is hereby struck out.
 - c. The suit be and is hereby transferred to the Family Division of the High Court at Mombasa.
 - d. The suit to be mentioned in the presence of all the parties herein on 16th April, 2024 before the Deputy Registrar in charge of the High Court Family Division for purpose



of taking further direction on the disposal of the matter of the administration and distribution of the suit properties herein.

- e. The 1st, 2nd, 3rd and 4th Defendants shall have the costs of this suit by the Plaintiff dated 10th July, 2021 to be borne by the Plaintiff.

Annexed in the affidavit and marked as “ZNK – 5” a copy of the Judgment and decree dated 19th March, 2024.

- l. It was evident by the said Judgment that there was an error apparent on the face of the Judgment after the court determined the matter and thereafter issued an award on costs despite pronouncing that it lacked jurisdiction to do so. This was found at paragraph 100 lines 1 to 5.
- m. The question of jurisdiction can be raised at any time including before or during the delivery of the Judgement.
- n. Once a court pronounces that it lacks the jurisdiction to determine a matter, the court must down its tools and any orders thereafter issued by the court are considered invalid.
- o. She attested that the question of jurisdiction was visited at least twice in this suit to which the court confirmed that it had the jurisdiction to proceed with the matter.
- p. The Court erred in law and fact by proceeding to determine certain issues in the matter even after it pronounced that it did not bear the jurisdiction to determine the matter.
- q. The Court further erred in fact and law by striking out her Plaintiff dated 10th July, 2021, and asserting that he had not proved her case and thereafter awarded costs to the Defendants.
- r. Following the determination of the matter, the court on its own motion transferred the matter to to the High Court Family Division to be heard and determined which contradicted its judgement as it struck out her Plaintiff on the basis that she had properly proved her claim.
- s. Vide its Judgement, the court rendered both this instant suit and the one to be determined before the family court nothing but an academic exercise because it delved and determined issues despite stating that it had no jurisdiction
- t. Striking out of the Plaintiff bore severe consequences as it was the foundation of her suit before this Court and the High Court Family Division, which was an action that she considered to be draconian taking into consideration the severity and sensitivity of the suit.
- u. On the 4th April, 2024, the Defendants/Respondents served her representatives with a Draft Decree communicating their intention to execute the the court's Judgement which further undermines the Jurisdiction and authority of the High Court, Family Division to determine the matter. Annexed in the affidavit and marked as “ZNK - 6” was a copy of the Draft Decree.
- v. On 16th April, 2024, her representatives appeared before the Deputy Registrar, Family Division as directed by the Court however the matter was not listed in court and every attempt made to follow up on the same bore no fruit thus the same was not mentioned.
- w. The transfer of the suit to a different court of competent jurisdiction was a lengthy and time consuming process which the Plaintiff/Applicant did not possess. The transfer of a suit that is already determined to another court of equal jurisdiction and stature raises various, questions and/or legal concerns including res judicata thus unclothing the jurisdiction the court initially had.



- x. The determination of this Honourable Court has exposed her children and herself to imminent risk and losses as the Defendants/Respondents could at any moment proceed with the execution of the Judgment and evict her and her children thus depriving them of their right to own and administer property within the Republic of Kenya.
- y. Unless the instant application was urgently heard and the orders sought herein were granted the determination of the matter would hinder some her constitutional rights to a fair trial and be heard and which were non – derogable rights.
- z. This court was accorded with inherent power and authority to make and deliver any such orders’ as may be necessary for the ends of justice as enshrined in the provision of Article 159 of *the Constitution* of Kenya, 2010.
- aa. It was only fair and in the interest of justice that the Honourable Court grants the above sought orders and review its Judgement delivered on 19th March 2024 and stay any consequential orders that may arise thereto.

I. The Response by the Defendants/Respondents

5. The Defendants/Respondents responded to the Notice of Motion application dated 17th April, 2024 through a 16 paragraphed Replying Affidavit sworn by Peter Njogu Waweru, the 3rd Defendant/ Respondent on 20th May, 2024. He averred that:-
 - i. The Application by the Plaintiff/Applicant for orders to set aside and/ or review and/or stay execution of the judgment delivered by this Honourable Court on the 19th March, 2024 was hopelessly misconceived, frivolous, scandalous, vexatious, embarrassing, totally devoid of merit and mala fides for the reason inter alia, that the Application was an abuse of court process and a waste of judicial time and ought to be struck out.
 - ii. The current motion had been brought before this Honourable Court maliciously, in bad faith with an intention of defeating and/or derailing the course of justice and was an attempt to deny them from enjoying the fruits of their judgment.
 - iii. Judgment in this matter was entered in their favour as against the applicant on the 19th of March 2024 where the final orders as stated above.
 - iv. The matter is already spent and therefore, the orders sought in the present application cannot be granted as this Honourable Court is now functus officio so far as the application was concerned.
 - v. This Honourable court had finalized the proceedings in this matter and therefore did not have jurisdiction to further-determine issues raised by the applicant. The scope of the directions given by the court was specific, and further, the directions given by the court did not require the parties to return to the same court. The determination by the court on the entire suit brought the whole matter to a final close, and they as the parties, were bound by court orders which require strict compliance.
 - vi. This Honourable court is “functus officio”, having rendered its Judgment on February 19th of March 2024 which inter alia, directed that the suit herein be transferred to the family division of the high court at Mombasa for purposes of disposal of the matter of administration and distribution of the properties, and therefore, as far as they were condemned, the Court has discharged all its duties with regards to the present case.



- vii. A court is functus when it had performed all its duties in a particular case. The purpose of the doctrine was to provide finality, and that once proceedings are finally concluded, the court could not review or alter its decision; any challenge to its ruling on adjudication has to be taken to a higher Court on Appeal if that right was available.
- viii. The present application for stay of execution never met and/or satisfy the minimum threshold, for granting an order for stay of execution since the Applicant herein was merely intent on delaying, obstructing and/or defeating the realization of the fruits of our judgment, and the application was therefore devoid of merits.
- ix. It would not be in the interest of justice to exercise Court's discretion and grant stay of proceedings or to allow the Judgment to be reviewed and/or set aside, as the same would only serve the purpose of delaying the case further, to his detriment.
- x. The Applicant had not demonstrated the principle for consideration for issuance of orders of review and/or setting aside and/or stay i.e.
 - i. The present application for stay of execution does not meet and/or satisfy the minimum threshold since the Applicant has failed to demonstrate any prejudice/danger that she was likely to suffer if the orders sought in the application were not granted.
 - ii. The Applicant has failed to demonstrate/ satisfy the conditions for seeking Review of judgment since the Applicant has failed to demonstrate the existence of new evidence that was not within her knowledge, and which she could not get even after exercising due diligence.
 - iii. An application for setting aside of Judgment is an application which should in law, only succeed when principles regulating it were met. The discretion to grant this application was fettered and could not be granted merely because an application has been filed.
- xi. They urged the Honourable Court to balance their interests to enjoy the fruits of their Judgment as against that of the Plaintiff/Applicant, who was only keen on delaying this matter further.

IV. The Notice of Motion application dated 24th June, 2024

- 6. As indicated above, the Plaintiff/Applicant brought this Notice of Motion application under dint of the provision of Articles 48, 159 of *the Constitution* of Kenya 2010, Sections 1A, 1B, 3, 3A and 63 (e) of the *Civil Procedure Act* Cap. 21 Laws of Kenya, Order 40, Order 51 Rule 1 of the Civil Procedure Rules, 2010, and Rules Cap 5 Laws of Kenya. She sought for the following orders: -
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That this Honourable Court be pleased to issue an order of injunction against the Defendants herein, their servants, agents and/or employees, from evicting the Plaintiff and her children, trespassing, building, constructing, dealing, leasing, selling, wasting, damaging, intruding, developing and/or in any way interfering with her matrimonial home situated in Afro estate,



Utange within Mombasa County and referred to as CR 43991, and CR 43992, pending the hearing and determination of this Application.

- e. That costs of this application be provided for.
7. The Application was supported on the face of it, the grounds, testimonial facts and the averments made out under and the 43 Paragraphed Supporting affidavit by Zipporah Njoki Kangara, the Plaintiff/Applicant herein on 24th June, 2024 with ten (10) annexures marked as “ZNK 1 - 10”. She averred that:
- a. She instituted this suit vide a Complaint and Notice of Motion Application dated 10th July 2021, against the Defendants/Respondents seeking injunctive orders against them, their agents, assigns, friends or anyone acting through their orders or under their authority from valuating, conducting a search, charging, selling, auctioning or transferring or in any way interfering with all the properties referred to as CR.43865, CR 43991, CR 43992, CR 44515, CR 44516, situated in Mombasa and Nairobi/Block 83/672.
 - b. The matter thereafter proceeded for hearing and all parties adduced their evidence and testimonies to which the court thereafter listed the matter for Judgment on 19th March 2024.
 - c. The Judgment was delivered on 19th March 2024, to which the court determined that it did not bear the jurisdiction to determine the matter as during the pendency of the proceedings, the Plaintiff and the 3rd Defendant got divorced vide divorce proceedings filed at the Chief Magistrate’s Court being: “Mombasa Divorce Cause No. 145 of 2021 Peter Njogu Waweru – Versus - Zipporah Njoki Kangara”.
 - d. The Court reasoned that due to the said divorce, the cause of action and the substrata of the case changed drastically as the determination of the matter laid on the management and distribution of matrimonial property after the dissolution of the Marriage pursuant to the provisions of Sections 6 and 7 of the Matrimonial Causes Act, laws of Kenya and transferred the said suit to the High Court Family and Divorce division.
 - e. The Court erred in law and in fact in determining so as so on 14th September, 2021, the 1st, 3rd and 4th Defendants jointly entered appearance and filed a preliminary objection challenging the Court’s jurisdiction to determine the said matter. Annexed in the affidavit and marked as “ZNK - 3” was a copy of the Notice of Motion Application dated 29th June 2022.
 - f. The Preliminary Objection was dispensed away with by way of written submissions filed by the Defendants on 30th September 2021 and the Plaintiff on 4th October 2021. On 16th December 2021, the court delivered its Ruling and dismissed the Preliminary Objection stating that it lacked merit and confirmed that the court had jurisdiction to determine the matter. Annexed in the affidavit and marked as “ZNK - 4” was a copy of the Ruling and Order dated 23rd February 2022.
 - g. Following the delivery of the Judgment, she vide her representatives filed a notice of motion under a certificate of urgency dated 17th April, 2024, seeking orders for the review of the court’s Judgment. Annexed in the affidavit and marked as “ZNK - 5” was a copy of the Notice of Motion Application dated 17th April 2024).
 - h. Upon the filing of the Application, the Court on 18th April, 2024 issued its directions and ordered:-
 - a. The Notice of Motion Application dated 17th April 2024 be and is hereby certified as urgent.



- b. The Plaintiff/Applicant directed to immediately serve the application upon the Defendant/Respondent herein.
- c. There should be proof of service in accordance with the provision of Order 5 Rule 15 of the Civil Procedure Rules, 2010 filed
- d. Upon service, the Defendant/Respondent granted 14days leave to file and serve replies accordingly.
- e. There be “inter – parte” hearing on 22nd May, 2024

(Annexed in the affidavit and marked “ZNK-6” a copy of the said directions issued on 18th April 2024).

- i. The Defendants/Respondents in turn responded to the said Application vide a Preliminary Objection dated 5th May 2024 and Replying Affidavit dated 20th May 2024. (Annexed in the affidavit and marked as “ZNK - 7a & b” were copies of the Preliminary Objection dated 5th May 2024 and the Replying Affidavit dated 20th May 2024. Unfortunately, the matter was not mentioned on the said date as there was a confusion at the registry as the file was again transferred to the High Court Family division registry and upon enquiring the same, parties were advised to have it mentioned before Hon. Noelyne Akee, the Deputy Registrar Family Division to issue further directions.
- j. On 27th May, 2024, the 1st Defendant/Respondent through its representative Messrs. Oloo & Company Advocates, served her with a letter demanding the unlawful eviction of ger children and herself from the said property without issuing her with any rental alternatives. Annexed in the affidavit and marked as “ZNK - 8” was a copy of the letter dated 27th May 2024.
- k. On 29th May, 2024, her representatives responded to the said firm and stated that the said property was still the subject matter of three suits being: “Mombasa ELC Cause 136 of 2021; Zipporah Njoki Kangara – Versus - Rock and Pure Limited & 2others, Tononoka Children's Cause No. E. 189 of 2021; in the matter of: Jude Theo Waweru, Tiffany Muthoni Njogu, Taliya Wangari Njogu (suing through their next friend/ parent between Zipporah Njoki Kangara - Versus - Peter Njogu and High Court family O.S. Cause No. 2 of 2024; Zipporah Njoki Kangara – Versus - Rock and Pure Limited and 2 others”. Annexed in the affidavit and marked as “ZNK - 9” was a copy of the said letter.
- l. The property was tied to orders delivered by Tononoka court on 16th January 2023, in which Hon. Lucy Sindani directed:-
 - i. That both the Plaintiff and Defendant have equal responsibility to the subject minors herein.
 - ii. The parties to have joint legal custody of the subject minors
 - iii. The Plaintiff/ mother to have physical/ actual custody of the subject minors, to live and care for them in their current residence (family house in Utange) with the Defendant/ father having unlimited access to the children while in Mombasa but not to interfere with their schooling and during half of the school holidays.
 - iv. The children to continue staying with their mother in their current home/ family house in Utange subject to any other court order from a matrimonial properties court



with visitation rights to the children by the Defendant at the said home in Utange but the Defendant is restrained from causing any sought of commotion during such visits.

- v. The Defendant to cater for the children's education fully in a school of his choice payable directly to the school and to the children, this include but not limited to school meals and transport and in the event the Plaintiff still insists on personal transport then she should be able to cater for it. Nothing bars the Plaintiff from chipping in on small items like stationeries when needed in between terms.
- vi. The Plaintiff to cater for food while with children, house helps and utility bills and maintenance of the house where she resides with the children, nothing bars the Defendant from doing shopping for the children when visiting them.
- vii. The parties to retain the children in their respective medical covers and to share extra medical expenses equally.
- viii. The Defendant to continue to provide for shelter through the children's current residence/ family house and parties are at liberty to apply in case of change of circumstances.
- ix. Clothing needs to be shared equally in any event not less than twice in a year, purchased directly to the children not less than twice a year by each party.
- x. Both parties to provide entertainment while with the children.
- xi. This being a matter brought on behalf of the children each party to cater for his/her own costs

Annexed in the affidavit and marked as "ZNK - 10" was a copy of the said Judgement.

- m. The said orders do bind the 3rd Defendant/Respondent as he was aware of the Judgement delivered and the penal consequences that are attached to the said Judgement. It was unfortunate that the Defendants/Respondents were resulting to using the said unlawful and/ or unwarranted tactics to frustrate her as the 3rd Defendant/Respondent was the father to her children and equally a director of the 1st Defendant/Respondent's company. The 3rd Defendant/Respondent as a director of the said company, he had a duty to inform the company of any conflict of interests that may arise including the legal effects of unlawfully evicting her and her young children from the said property.
- n. Unfortunately, the Defendants/Respondents and their representatives, refused and/or denied to listen and/or reason with her pleas and alleged that the said orders were overtaken with events and that it was in her best interests that he vacated the said premises failure to which legal action would be taken against him and her children.
- o. On 6th June, 2024. Parties appeared before Hon. Noelyne Akee and prayed that the court lists the matter before the High Court Family Division so as to enable it issue proper directions and allow parties settle the said application.
- p. On 21st June 2024, the matter was listed before Hon. Justice Gregory Mutai who issued a mention date on 19th September 2024, and further issued directions that parties were at liberty to prosecute the said Notice of Motion application dated 17th April 2024, before the Environment and Land Court.



- q. Her representatives tried to seek orders and/or directions restraining the Defendants/ Respondents, their agents and/or representatives from unlawfully evicting and/or interfering with the properties referred to as CR 43991 and CR 43992, situated in Mombasa pending the hearing and determination of the Application and/or suit. The Defendants/Respondents being represented by Lawrence Obonyo Legal Advocates objected to the said application as they were not the authors of the aforesaid letter and/or demand and reiterated that they did not bear such instructions and that it would be a miscarriage of justice if the said orders were granted.
- r. Unfortunately, Hon Justice Gregory Mutahi, reiterated that he did not bear the jurisdiction to issue any directions in the matter as it was still active before Hon. Justice L.L Naikuni. The Court then advised the parties to raise and settle the said issue before Hon. Justice L.L. Naikuni who was still in conduct of the matter.
- s. The Defendants/Respondents were using the Court's authority to employ unwarranted methods to frustrate her and disrupt the children's best interests including unlawfully evicting herself and her children from the property in the middle of an academic year and without any consultations. The said averments further cemented the assertions that the Defendants/ Respondents were on a mission to frustrate the Plaintiff/Applicant to disown the 3rd Defendant/Respondent's children subject them to unnecessary and unhealthy circumstances. The said circumstances can hinder their development and might be an ingredient to various physiological issues including mental health concerns.
- t. Sometimes on 7th, 12th and 18th June 2024, unknown individuals entered into the suit property without authorization and began preparing it for valuation. Upon approaching the said individuals to enquire why they were trespassing on the said land, the individuals informed her that they were the Defendants/Respondents' agents and/or employees did possess legal authority to enter the land and carry out their clients' instructions.
- u. The said individuals further revealed that they had instructions to evaluate the property and confirm if the same was sufficient to sustain a charge been sought for by the Directors of the said company. The said individuals refused to issue her with further details as she was neither known to them, nor was she a member, or agent of the said company, thus the said disclosure would be a breach of duty. to them, their employers, assigns principals, investors, debtors and/ or creditors.
- v. The said individuals advised her to get in touch with her advocate on record and follow up on the same. They further reiterated that there were no court orders, caveats, cautions, encumbrances, conflict of interests or directions restricting them from issuing the said facility. The property being the subject of a number of suits including a matrimonial property cause and proceedings that might change ownership in the event the Courts find in her favor and against the Defendants/Respondents, their proxies and agents.
- w. She was an occupant of the said property will in turn accumulate the said facility as a liability which would not only hinder her ability to maintain for her children and disrupt their best interests.
- x. On the 7th, 12th, and 18th June 2024, she reported the matter to Bamburi Police station however, the said officers refused to book her complaint and advised her to employ the services of an Advocate and institute civil proceedings against the Defendant/Respondent as only a court



order can restrict him from unlawfully evicting them from, selling, charging and/or auctioning the suit property

- y. The said eviction would not only disrupt her right to own property but also disrupt the children's best interests and ability to focus in school as it may be a while before they adapt to the move and change of environment. Before a financial institution consents to disbursing a charge over an immovable property owned by the company, it is a valid requirement that the institution does confirm that all members including the directors are in conformity with the said facility.
- z. A secondary requirement and in an effort to curb future liabilities, the financial institution mandated that the Directors do issue a guarantee to ensure that they are aware of and consent to the said facility. Being that the Defendant/Respondent was a director of the said company, he was equally aware of the said liabilities including our children's and her occupation in the said property. It was only fair in the interest of justice and to protect the interest of the Honourable Court as well as the rule of law that this application be allowed.
- aa. This Honourable Court has inherent powers to prevent an abuse of Court process, punish for contempt and. grant appropriate orders geared towards protecting the dignity and authority of the Honourable Court.

V. The response by the Defendants/Respondents

- 8. While opposing the above application, the Defendants/Respondents through filing of a 19 Paragraphed Replying Affidavit sworn by Peter Njogu Waweru, the 3rd Defendant/Respondent on 25th July, 2024. He averred that: -
 - a. The Application by the Applicant for orders of stay of execution of the Judgment delivered by this Honourable court on the 19th of March 2024 and for injunctive orders to issue against them, was hopelessly misconceived, frivolous, scandalous, vexatious, embarrassing, totally devoid of merit and mala fides for the reason inter alia, that the Application is an abuse of the Court process and a waste of judicial time, and ought to be struck out.
 - b. The Current motion had been brought before this Honourable Court maliciously, in bad faith with an intention of defeating and/or derailing the cause of justice, and is an attempt to deny us from enjoying the fruits of our Judgment.
 - c. The present application offended the principle of sub - judice, in that the Applicant had filed a similar application for stay of execution and Review of Judgment dated the 17th of April 2024, and the same was yet to be heard and determined. Annexed in the affidavit and as marked as "PNW - 2" was a copy of the said application.
 - d. Judgment in this matter was entered in their favour as against the applicant on the 19th of March 2024 where the final orders as stated above.
 - e. He had suggested to the Applicant to move to a rental house and he offered to pay the rent since the company was seeking to take possession of the house where the Applicant and the children were staying, which decision he had no control over.
 - f. Due to this development, he was to provide alternative shelter for his children at a three bedroomed house of the Applicant's choosing, whose rent was not above a sum of Kenya Shillings Forty Thousand (Kshs. 40,000.00/=) as per his financial capabilities.



- g. This Honourable court is functus officio, having rendered its Judgment on February 19th of March 2024 which inter alia, directed that the suit herein be transferred to the family division of the High Court at Mombasa for purposes of disposal of the matter of administration and distribution of the properties, and therefore, as far as they were condemned, the Court has discharged all its duties with regards to the present case.
- h. A court was functus when it had performed all its duties in a particular case. The purpose of the doctrine is to provide finality, and that once proceedings were finally concluded, the court could not review or alter its decision; any challenge to its ruling on adjudication has to be taken to a higher Court on Appeal if that right was available.
- i. The matter was already spent and therefore, the orders sought in the present application could not be granted as this Honourable Court was now functus officio so far as the application was concerned.
- j. This Honourable court had finalized the proceedings in this matter and therefore does not have jurisdiction to further determine issues raised by the applicant. The scope of the directions given by the court was specific, and further, the directions given by the court did not require the parties to return to the same court. The determination by the court on the entire suit brought the whole matter to a final close, and they as the parties, were bound by court orders which require strict compliance.
- k. The present application for stay of execution and injunctive orders being issued against them did not meet and/or satisfy the minimum threshold for granting of the same since the Applicant herein was merely intent on delaying, obstructing and/or defeating the realization of the fruits of their judgment and the application was therefore devoid of merit.
- l. It would not be in the interest of justice to exercise Court's discretion and grant stay of proceedings or to grant injunctive orders as the same will only serve the purpose of delaying the case further to his detriment.
- m. The Applicant had not demonstrated the principles for consideration in the issuance of orders to stay and injunctions, i.e.
 - i. The present application never met and/or satisfy the minimum threshold since the Applicant has failed to demonstrate any prejudice danger that she is likely to suffer if the orders sought in the application are not granted.
 - ii. An application such as this was one which should in law, only succeed when principles regulating it are met. The discretion to grant this application was fettered and could not be granted merely because an application had been filed
 - iii. The present application was based on very weak reasoning, irrelevant and extraneous reasons that do not support it. Secondly, the Applicant ought to have shown that she has an arguable case. In this case, the explanation offered by the Applicant was not adequate.
- n. They therefore urged the Honourable Court to balance their interests to enjoy their Judgment as against that of the Applicant, who was keen on delaying the matter.
- o. They prayed for the dismissal of the application with costs.



VI. The Notice of Preliminary objection by the 1st, 3rd and 4th Defendants.

9. The Defendants filed a four (4) paragraphed Notice of Preliminary objection dated 25th July, 2024 raised to object to the Plaintiff's Notice of Motion dated 24th June, 2024 on the following grounds:-
 - a. That the Application by the Applicant for Orders to set aside and/ or stay execution and/ or Review this Honourable Court's Judgment given on the 24th of June 2024 was hopelessly misconceived, frivolous, scandalous, vexatious, embarrassing, totally devoid of merit and mala fides for the reason inter alia, that the Application was an abuse of the Court process and a waste of judicial time and ought to be struck out.
 - b. That the present application offended the sub judice principle in that the applicant had filed a similar application for stay of execution and review of judgment dated the 17th of April 2024, and the same was yet to be heard and determined.
 - c. That this Honourable Court was functus officio having rendered its Judgment on the 19th of March 2024, which inter alia, directed that the suit herein be transferred to the family division of the High Court at Mombasa for purposes of disposal of the matter of administration and distribution of the properties, and therefore, as far as the Defendants are condemned, the Court has discharged all its duties with regards to the present case.
 - d. That this Honourable Court had no Jurisdiction to grant further orders herein, since remitting a matter to the trial court which had become functus officio after Judgment has been rendered, flies in the face of the doctrine of functus officio.

VII. Submissions

10. On 29th July, 2024 while the Parties were present in Court, they were directed to have the Notice of Motion application dated 17th April, 2024 and 24th June, 2024 and Notice of Preliminary objection dated 25th July, 2024 be disposed of by way of written submissions. Pursuant to that on 17th September, 2024 a ruling date was reserved on 9th October, 2024 by Court accordingly.

VIII. Analysis and Determination

11. The Honourable Court has considered the applications by the Plaintiff/Applicant, the responses and the objection raised by the Defendants/Respondents and their written submissions, the relevant provision of *the Constitution* of Kenya, 2010 and the statutes.
12. For the Honourable Court to reach an informed, fair, reasonable and Equitable decision, it has condensed the subject matter into three (3) issues for its determination. These are: -
 - a. Whether the Objection by the Defendants raises pure points of law and whether it is merited by virtue of the fact the doctrine of functus officio?
 - b. Whether the Notice of Motion application dated 17th April, 2024 on the review and setting aside of the judgment by this Honourable Court delivered on 19th March, 2024 is merited?
 - c. Who bears the Costs of the Notice of Motion application dated 17th April, 2024, Notice of Motion application dated 24th June, 2024 and Notice of Preliminary objection dated 25th July, 2024?



Issue No. a). Whether the Objection by the Defendants raises pure points of law and whether it is merited by virtue of the fact the doctrine of functus officio

13. Under this substratum the Court shall determine whether the Notice of Preliminary objection was raised on pure points of law and what amounts a preliminary objection. Subsequently, it will then Juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description.
14. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
15. The above legal preposition has been made graphically clear in the now famous case of “Mukisa Biscuits – Versus - Westend Distributor Ltd [1969] EA 696”, the court observed 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 had 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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. ”.
16. The same position was held in the case of “Nitin Properties Limited – Versus - Jagjit S. Kalsi & another Court of Appeal No. 132 of 1989[1995-1998] 2EA 257” where the Court held that;

“ A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion.”
17. Similarly in the case of “United Insurance Company LTD – Versus - Scholastica A Odera Kisumu HCC Appeal No. 6 of 2005(2005) LLR 7396”, the Court held that;

“ A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed .”
18. Therefore, from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of “In the matter of Siaya Resident Magistrate Court Kisumu HCCMisc. App No. 247 of 2003” where the Court held that;

“ A Preliminary Objection cannot be raised if any facts has to be ascertained.”
19. I have further relied on the decision of “Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR”: - as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-
 - (i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.



- (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
20. Taking into account the above findings and holdings of various Courts on what amounts to a preliminary Objection, the Court now turns to the grounds raised by the Defendants/Respondents which were that the Plaintiff's Notice of Motion application dated 24th June, 2024. That the Application by the Plaintiff/Applicant seeking for Orders to set aside and/ or stay execution and/ or Review this Honourable Court's Judgment given on the 24th of June 2024 was hopelessly misconceived, frivolous, scandalous, vexatious, embarrassing, totally devoid of merit and mala fides for the reason inter alia, that the application was an abuse of the Court process and a waste of judicial time and ought to be struck out.
21. The Defendants/Respondents herein also argued that the present application offended the principles of "Sub – Judice" in that the Plaintiff/Applicant had filed a similar application for stay of execution and review of judgment dated the 17th of April 2024, and the same was yet to be heard and determined; this Honourable Court was functus officio having rendered its Judgment on the 19th of March 2024, which inter alia, directed that the suit herein be transferred to the family division of the High Court at Mombasa for purposes of disposal of the matter of administration and distribution of the properties. Therefore, as far as the Defendants/Respondents are condemned, the Court has discharged all its duties with regards to the present case and that the Court had no jurisdiction to grant further orders herein since remitting a matter to the trial court which had become functus officio after Judgment has been rendered, flies in the face of the doctrine of functus officio.
22. In this case, I am satisfied that the objection raises pure points of law in that the preliminary objection. Having said thus much, the Honourable Court shall examine the merits of the Preliminary objection by the Defendants/Respondents. Considering the nature of a Preliminary Objection, I will start by analyzing its merits first. For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit. I have already determined that the Preliminary objection was raised on pure points of law. The next thing to determine is the merits of the same.
23. As stated above grounds raised by the Defendant/Respondent were that the application by the Applicant for Orders to set aside and/ or stay execution and/or Review this Honourable Court's Judgment given on the 24th of June 2024 was hopelessly misconceived, frivolous, scandalous, vexatious, embarrassing, totally devoid of merit and mala fides for the reason inter alia, that the application was an abuse of the Court process and a waste of judicial time and ought to be struck out and that the present application offended the principles of sub judice in that the applicant had filed a similar application for stay of execution and review of judgment dated the 17th of April 2024, and the same was yet to be heard and determined.
24. Indeed, the Plaintiff/Applicant filed an application on 17th April, 2024 seeking to have the Judgment of this Court delivered on 19th March, 2024 be reviewed and consequently set aside. At the same time, the Plaintiff/Applicant went ahead and filed another application dated 24th June, 2024 seeking amongst other orders injunctive orders against the Defendants/Respondents. The question that the Court asks itself therefore is whether it has jurisdiction to hear and determine an application for temporary



injunction after it has delivered its Judgment rendering itself as to lack jurisdiction. That is for the reason that if the court was to hold that it is without jurisdiction, then it has to drop its tools as was held by Nyarangi JA, in the case of “Owners of Motor Vessel “Lilian S” – Versus - Caltex Oil (K) Ltd (1989) KLR 1” that;

“.....jurisdiction is everything, without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

25. The suit property in question as I had previously opined myself in the judgment delivered by this Court on 19th March, 2024, gives rise to matrimonial rights to property. I concluded that the dispute was not within the purview of the ELC jurisdiction. Section 13 of the Environment and Land Court Act, No. 19 of 2011 clothes this Court with original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of the ELC Act or any other law applicable in Kenya relating to environment and land. The provision of Article 162 (2) (b) of the Constitution of 2010 demarcates the jurisdiction of the ELC Court by enacting that it shall have power to hear and determine disputes:
- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private, and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land
26. The Plaintiff/Applicant has admittedly stated in her application that the property was tied to orders delivered by the Children’s Court at Totonoka, Mombasa on 16th January 2023, in which Hon. Lucy Sindani directed as stated above.
27. Clearly, this was an indication that the suit property here was alienated to being a family – matrimonial dispute which should be dealt with by the High Court in the Family Division and the not the Environment and Land Court which does not have the jurisdiction to handle matrimonial property and issue orders in that regard. Thus, I discern that on the first two grounds the Defendants/ Respondents succeed.
28. Further, the Defendants/Respondents raised objection on the ground that this Honourable Court was functus officio having rendered its Judgment on the 19th of March 2024, which inter alia, directed that the suit herein be transferred to the family division of the High Court at Mombasa for purposes of disposal of the matter of administration and distribution of the properties. Therefore, as far as the Defendants/Respondents were concerned, the Court had discharged all its duties with regards to the present case and that the Court had no Jurisdiction to grant further orders herein. To them, remitting a matter to the trial court which had become functus officio after Judgment has been rendered, flies in the face of the doctrine of functus officio.



29. Taking that the Defendants/Respondents elaborately submitted on the on the doctrine of *functus officio*, I wish to spent a little bit of time on it. It has been defined in the Black's Law Dictionary, 9th Edn. as: -

“ [having performed his or her office]” (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”

30. The Court of Appeal in the case of “Telkom Kenya Limited – Versus - John Ochanda (Suing on his Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR” held that: -

“ *Functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.”

31. Further that: -

“ The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in *Jersey Evening Post Limited vs A1 Thani* [2002] JLR 542 at 550: also cited and applied by the Supreme Court;

“ A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”

32. The Supreme Court in the case of:- “*Raila Odinga & 2 Others – Versus - Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR” cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “*The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law*” (2005) 122 SALJ 832 to the effect that: -

“ A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”



33. The doctrine of *Functus officio* is not an absolute rule. To that effect the provision of Section 99 of the *Civil Procedure Act*, Cap. 21 contemplates exceptions to the rule. It provides that: -

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

34. In the case of:- “Mombasa Bricks & Tiles Limited & 5 Others - Versus - Arvind Shah & 7 Others [2018] eKLR”, where the court observed on the doctrine of *functus officio* that:-

“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. 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 vs 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.”

35. Now applying this legal principles to this case. From the record, the Plaintiff/Applicant has moved court after Judgement has been delivered and the court has removed jurisdiction from itself seeking for injunctive orders.. The *functus officio* rule buttresses the maxim that litigation must come to end. In any event, this Honourable Court ousted the jurisdiction of the court citing the property as matrimonial property and that it should be adduced in the High Court – Family Division. There is nothing more the Court can do for the Plaintiff/Applicant unless it’s a review which will be decided on merit and on discretionary extremes. To me it’s a case where the Plaintiff/Applicant wishes to have a second bite of the cherry.

36. For this reason, therefore, I strongly hold that the Notice of Preliminary objection dated 25th July, 2024 raised in objection to the notice of Motion application dated 24th June, 2024 is found to be merited and the same is upheld. Consequently the notice of motion application dated 24th June, 2024 be and is hereby dismissed on account of the court being *functus officio*.

Issue No. b). Whether the Notice of Motion application dated 17th April, 2024 on the review and setting aside of the judgment by this Honourable Court delivered on 19th March, 2024 is merited

37. Under this Sub – heading, the main substratum is on causing the Honourable Court to consider reviewits Judgment delivered on 19th March 2024, and set aside or stay any consequential orders that arise thereto by reinstating the suit and ordering its transfer to Family Divorce Court. The Plaintiff/Applicant brought the Notice of Motion application under dint of the provision of Articles 48, 159 of *the Constitution* of Kenya 2010, Sections 1A, 1B, 3, 3A and 63 (e) of the *Civil Procedure Act* Cap 21 Laws of Kenya, Order 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules, 2010. A clear reading of these provisions indicates that the provision of Section 80 is on the power to do so while Order 45 of the Rules sets out the rules on doing it.



38. The provision of Section 80 of the *Civil Procedure Act* Cap 21 provides as follows: -

“Any person who considers himself aggrieved—’

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

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

“1. Any person considering himself aggrieved—

- (1)
 - 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.”

40. Briefly, and prior to proceeding further, the Honourable Court wishes to extrapolate on a few case law on this subject matter. 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.”

41. Additionally, 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.

42. 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.”

43. From the stated provisions, it is quite clear that the powers to cause any review, variation or setting aside a Court’s decision are discretionary in nature. Thus, the unfettered discretion must be exercised judiciously, not capriciously and reasonably. To qualify for being granted the orders for review, varying and/or setting aside a Court order under the above provisions to be fulfilled, the following ingredients, jurisdiction and scope are required.

- a. There should be a person who considers himself aggrieved by a Decree or order;
- b. The Decree or Order from which an appeal is allowed but from which no appeal has been preferred;
- c. A decree or order from which no appeal is allowed by this Act;
- d. There is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made; or
- e. On account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order.
- f. The review is by the Court which passed the decree or made the order without unreasonable delay.

44. 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.”

45. In the instant case, it is on record that, the grounds cited by the Plaintiff/Applicant for review were that the Court erred in law and in fact in making a determination that the Plaintiff/Applicant and the Defendant/Respondents had their marriage dissolved through a divorce. Thus, the property was now subject of matrimonial property distribution which was under the jurisdiction of the High Court family division and not the ELC Court. The Applicant argued that this Court had all along been aware of the existence of the divorce proceedings initiated at the Mombasa Chief Magistrate’s Court as her representatives had on 30th June 2022, filed a Notice of Motion Application dated 29th June 2022, seeking the stay of the Divorce cause proceedings pending the hearing and determination of this instant suit.

46. According to the Plaintiff/Applicant, it was evident by the said Judgment, there was an error apparent on the face of it after the court determined the matter and thereafter issued an award on costs despite pronouncing that it lacked jurisdiction to do so. This was found at paragraph 100 line 1 to 5.



47. It is now well established that the question of jurisdiction can be raised at any time including before or during the delivery of the Judgement. I reiterate that once a court pronounces that it lacks the jurisdiction to determine a matter, the court must down its tools and any orders thereafter issued by the court are considered invalid. She attested that the question of jurisdiction was visited at least twice in this suit to which the court confirmed that it had the jurisdiction to proceed with the matter.
48. The Plaintiff/Applicant further went on to argue that the Court erred in law and fact by proceeding to determine certain issues in the matter even after it pronounced that it did not bear the jurisdiction to determine the matter. The Court further erred in fact and law by striking out her Complaint dated 10th July, 2021, and asserting that she had not proved her case and thereafter awarded costs to the Defendants/ Respondents herein.
49. Discussing the scope of review, the Supreme Court of India in the case of “Ajit Kumar Rath – Versus - State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608” had this to say: -
- “the power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabilizing it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”
50. 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.
51. Further, 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.
52. 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.”
53. And, finally in the case of:- “D.J Lowe & Company Ltd – Versus - Bangué Indosuez (1998) eKLR” the Court of Appeal held that:-
- “where such a review application is based fact of discovery of fresh evidence, the court must exercise greatest of care as it is easy for a party who lost, to see the weak part of his case and the temptation to lay evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was remissness on his part in adducing all possible evidence at the hearing.”
54. From the above legal principles, I am not satisfied that the Plaintiff/Applicant has satisfied the provisions laid down by the provision of Order 45 of the Civil Procedure Rules, 2010 for the conditions of a review. Further I need to state that on the issue raised by the Plaintiff on costs. Costs are provided for under the provision of Section 27 of the *Civil Procedure Act*, Cap. 21 which provides that costs should follow the course unless the court for some good reason orders otherwise:-



27 (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.

55. In the case of:- “Republic – Versus - Rosemary Wairimu Munene, Ex-Parte Applicant – Versus - Ihururu Dairy Farmers Co-operative Society Ltd; 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.”

56. This court has the discretion to award costs even after it has ousted the jurisdiction being that the logic behind costs is that the other party paid an advocate, filed documents and maintained the suit and the running of the suit during its pendency till determination.

57. Be that as it may it is the finding of the Court that the Application by the Plaintiff/Applicant for review must fail as there was no error on the face of the record and no new material adduced by the Plaintiff/Applicant to show that this court had jurisdiction to determine the matter. To this end, this court is functus officio on any issue that touches on the suit property as it property governed by the *Matrimonial Property Act* and the suit cannot be adjudicated by the Environment and Land Court when there is a specialized division in the High Court that is clothed with the jurisdiction to subdivide matrimonial property.

Issue No. c). Who bears the Costs of the Notice of Motion application dated 17th April, 2024, Notice of Motion application dated 24th June, 2024 and Notice of Preliminary objection dated 25th July, 2024

58. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The proviso of Section 27(1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

59. In the present case, the Honourable Court reserves the discretion not to award any costs; each party to bear its own costs.



IX. Conclusion and Disposition.

60. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, the Court arrives at the following decision and make below orders: -

- a. That the Notice of Preliminary objection dated 25th July, 2024 be and is hereby found to have merit thus is allowed as the same is upheld.
- b. That the Notice of Motion application dated 17th April, 2024 be and is hereby found to have contravened the provision of Section 80 of the Civil Procedure Act, Cap. 21 and Order 45 of the Civil Procedure Rules, 2010, therefore be and hereby dismissed.
- c. That the Notice of Motion application dated 24th June, 2024 be and is hereby found to offend “the doctrine of functus officio” and thus it is hereby dismissed.
- d. That each party shall bear its own costs.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 24TH DAY OF OCTOBER 2024.

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

Ruling delivered in the presence of.

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. M/s. Choni Advocate holding brief for Mr. Derrick Odhiambo Advocate for the Plaintiff/Applicant.
- c. Mr. Lawrence Obonyo Advocate for the 1st, 2nd & 3rd Defendants/Respondents.

HON JUSTICE LL. NAIKUNI (JUDGE)

