



V Chokaa & Co Advocates v County Government of Mombasa (Successor of Municipal Council of Mombasa) (Environment and Land Miscellaneous Application E112 of 2022) [2024] KEELC 13490 (KLR) (18 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13490 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E112 OF 2022
LL NAIKUNI, J
NOVEMBER 18, 2024

BETWEEN

V CHOKAA & CO ADVOCATES APPLICANT

AND

COUNTY GOVERNMENT OF MOMBASA (SUCCESSOR OF MUNICIPAL COUNCIL OF MOMBASA) RESPONDENT

RULING

I. Introduction

1. This Honorable Court was tasked to make a final determination in form of a ruling emanating from this Honourable Court delivered on 11th June, 2024 onto five (5) Notice of Motion applications being ELC Miscellaneous/E080 of 2022; ELC Miscellaneous/E081 of 2022; ELC Miscellaneous/E083 of 2022; ELC Miscellaneous/E107 of 2022; and ELC Miscellaneous/E112 of 2022 respectively. Ideally, the Applicant being aggrieved by the aforesaid decision, allowing the Respondent's Preliminary Objection dated 24th February, 2024 and dismissing the Applicant's Notice of Motion dated 30th August, 2023 sought to have it set aside and/or reviewed.
2. Essentially, this was a reference emanating from a decision delivered by the Deputy Registrar, as the Taxation Master on 23rd August, 2023. For good order, although they were not consolidated, the instant application dated 26th July, 2024 was used as a lead matter and the final decision to apply "Mutatis Mutandis" to all of them. The Application was brought under the dint of Section 80 (a) of the Civil Procedure Act, Cap. 21 and Order 45 (1) (1) (a) of Civil Procedure Rules, 2010.

II. The Applicant's case

3. The Applicant sought for the following orders:-



- a. That the Orders made herein on 11th June, 2024 allowing the Respondent's Preliminary Objection dated 24th February, 2024 and dismissing the Applicant's Notice of Motion dated 30th August, 2023 be set aside and/or reviewed.
 - b. That the Cost of this Application be provided for.
4. The application herein was premised on the grounds, testimonial facts and averments made out under the 8 Paragraphed Supporting Affidavit of DR. VINCENT CHOKAA, an Advocate of the High Court of Kenya Practicing in Nairobi and Mombasa under the Law firm trading in name and style of Messrs. V. Chokaa & Co. Advocates and the Applicant herein. The affidavit herein was sworn and dated 26th July, 2024. The Applicant averred that:
- a. By an application dated 30th August, 2023, he sought to have the Judgment entered by the Deputy Registrar striking out his Bill of Cost dated 23rd November 2022 be set aside and the matter be referred back to the Deputy Registrar for Re - taxation.
 - b. When served with the said application, the Respondent filed a Preliminary objection dated 15th February, 2024 in Response to the Application.
 - c. on 11th June, 2024, ruling on the Preliminary Objection was given by this Court upholding the Respondent's Objection.
 - d. There was an error and/ or misapprehension in the said ruling as the Court treated the objection as a reference on a taxation under the Advocates (Remuneration) Order when the objection was in fact on a Deputy Registrar's powers given to a Deputy Registrar under the provisions of Order 49 of the Civil Procedure Rules, 2010.
 - e. It was necessary to review and/ or set aside the error made in view of the said misapprehension.

III. Submissions

5. On 23rd September, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application 26th July, 2024 be disposed of by way of written submissions. Pursuant to that all the parties obliged a ruling date was reserved on 18th November, 2024 by Court accordingly.

IV. Analysis & Determination.

6. I have carefully read and considered the pleadings herein by the Applicant, the filed written submissions together with the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
7. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
 - a. What are the fundamental legal principles governing review, setting aside and/or varying Court's decisions.
 - b. Whether the Notice of Motion application dated 26th July, 2024 seeking to set aside/ review orders issued on 11th June, 2024 by this Honourable Court is merited?
 - c. Who will bear the Costs of Notice of Motion application dated 26th July, 2024.



review, setting aside and/or varying Court's decisions.

8. Under this sub – heading, the main substratum of this application is for the review, setting aside and/or varying of this Court's Judgment delivered on 11th June, 2024. On quick computation, it is instructive to note that it is close to five (5) months period from the time this Court penned down the said ruling. The application by the Applicant was brought under the provisions of Section 80 (a) of the Civil Procedure Act, Cap. 21 (Hereinafter referred to as "The Act") and Order 45 (1) (1) (a) of Civil Procedure Rules, 2010 (Hereinafter referred to as "The Rules"). A clear reading of these provisions indicates that Section 80 is on the power to do so while Order 45 sets out the rules on doing it.

9. The provision of Section 80 of the Act 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.”

10. While the provision of Order 45 Rule 1 of the provides as follows: -

“ 1.

(1) Any person considering himself aggrieved—

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

11. Briefly, and prior to proceeding further, for ease of reference, 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.”

12. 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 Act conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate. Broadly speaking, in the case of “Republic – Versus - Public Procurement Administrative Review Board & 2 others [2018] e KLR” it was held: -

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds;

- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
- (b) on account of some mistake or error apparent on the face of the record, or
- (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

13. 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.

14. This Honourable Court on the said subject matter has previously stated in 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)” where it held thus:-

“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.”

ISSUE No. b). Whether the Notice of Motion application dated 26th July, 2024 seeking to set aside/ review orders issued on 11th June, 2024 by this Honourable Court is merited.

15. Under this sub – heading, the Honourable Court shall endeavor to apply these legal principles to the instant matter. From the very onset, I strong hold that the issues raised herein are healthy ingredients of appeal rather than for review by this Court. With due respect to the Applicant, from experience I have noted that often parties do make this very mistake either deliberately or out of ignorance. I will demonstrate this fact herein below.
16. Critically speaking, it is on record that the Applicant argues that in its ruling dated 11th June, 2024 this Honourable Court made a finding for the Respondent’s Preliminary objection dated 24th February, 2024 and dismissing the Applicant’s Notice of Motion dated 30th August, 2023. It is important to note that the Preliminary Objection the Applicant is talking about or rather has quoted does not exist and the one the Court upheld was dated 5th February, 2024 which was filed together with a response to the Notice of Motion application dated 30th August, 2023.
17. The Preliminary Notice by the Respondent read in verbatim:-
 - a. The claim herein is time-barred pursuant to the *Limitation of Actions Act*.
 - b. Further, that the Bill of Costs herein is null and void within the provision of Section 4 of the *Limitation of Actions Act* having been filed more than 10 years after the alleged finalization and execution of the alleged instructions, bearing in mind that the Defendant Municipal Council of Mombasa ceased to exist in 2010 upon promulgation of the new Constitution 2010 as well as the *County Governments Act* 2012 and since the relationship between the Advocate and the Client is contractual and within the provisions of Law of Contract.
18. So in that case, therefore, the Court has acknowledged that there was a preliminary objection that was raised against the Notice of Motion application dated 30th August, 2023. Thus, the Court is left with the task of examining whether there is a mistake or error on the face of the record or any sufficient reason to justify review of the Judgment herein. As already discussed in this Ruling under the provision of Section 80 of the Act and Order 45 Rule 1 of the Rules, the court may review its decision, inter alia: - on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.
19. An error or mistake apparent on the face of the record is one that is self-evident and does not require elaborate arguments to be established as was established in the case of “Paul Mwaniki – Versus – NHIF Board of Management [2020] eKLR”. Is there any such mistake or error on the face of the record? The Judgment containing the order in question was delivered on 11th June, 2024. The specific order subject of review application was on allowing the Respondent’s Preliminary Objection dated 24th February, 2024 and dismissing the Applicant’s Notice of Motion dated 30th August, 2023 and reads as follows:-
 - a. That the Notice of Motion application dated 30th August, 2023 be and is hereby dismissed for being limited by the provision of Section 4 (1) (a) of the *Limitation of Actions Act*, Cap. 22.
 - b. That the Notice of Preliminary objection dated 5th February, 2024 be and is hereby found to have merit and the same is upheld, the claim herein is time-barred pursuant to the *Limitation of Actions Act*, Cap. 22 and therefore dismissed.
20. As already stated above, this is akin to asking the court to sit on appeal of its decision and reverse it. The fact that a party believes that the court should have reached a different conclusion or that the



decision was erroneous are matters fit for appeal rather than review which is limited in scope. Notably also, on umpteenth times, Courts have held that: “the process of reasoning cannot be treated as an error apparent on the face of the record justifying the exercise of the power of review.” And that: “an erroneous order/decision cannot be corrected in the guise of exercise of the power of review.” (See the case of:- “Republic – Versus - Advocates Disciplinary Tribunal Ex Parte Apollo Mboya [2019] eKLR”).

21. Similarly, the request herein entails a re-appraisal of the evidence and re-analyzing its decision to establish whether or not the Preliminary Objection dated 5th February, 2024 and the Notice of Motion application dated 30th August, 2023 are merited which is beyond the scope or Jurisdiction of review. Accordingly, the supposedly ‘error and/ misapprehension apparent on the face of the record’ is not a misstate or error in the sense of the law for which review may be granted. In a nutshell, from the foregoing analysis points to only one thing; the application dated 11th June, 2024 by the Applicant herein does not meet the legal threshold for review under the provision of Section 80 of the Act and Order 45 of the Civil Procedure Rules. Without belaboring the point, this Court has become “functus officio” to say the very least. I dare advise the Applicant that the most appropriate legal remedy available to them is to prefer an appeal against the decision of this Court at the Court of Appeal. Hence, I hold that the said application cannot succeed thereof.

ISSUE No. c). Who will bear the Costs of Notice of Motion application dated 26th July, 2024.

22. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).
23. 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. I find this to be an appropriate case where the Court shall reserve the onus of not awarding costs.

V. Conclusion & Disposition

24. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the omnibus applications, this court arrives at the following decision and specifically makes the orders below:-
 - a. That the Notice of Motion application dated 26th July, 2024 be and is hereby found to lack merit and the same is dismissed in its entirety.
 - b. That further the Court uphold its Judgment issued on 11th June, 2024 and the decision by the Taxation Master issued on 23rd August, 2023.
 - c. That there shall be no orders as to costs.
 - d. That these orders shall apply “Mutatis Mutandis” to ELC. Miscellaneous/E080 of 2022; E081 of 2022; E0830 of 2022; and E107 of 2022 respectively.

IT IS SO ORDERED ACCORDINGLY.



RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS18THDAY OFNOVEMBER.....2024.

.....

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

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. M/s. Hadija Advocate holding brief for Dr. Chokaa Advocate for the Applicant
- c. Mr. Onduso Advocate for the Respondent.

