Bamboo Twist Limited v Tember & 14 others; National Land Commission (Interested Party) (Environment and Land Case Civil Suit 178 of 2014) [2024] KEELC 13942 (KLR) (17 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13942 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND CASE CIVIL SUIT 178 OF 2014

LL NAIKUNI, J

DECEMBER 17, 2024

BETWEEN

BAMBOO TWIST LIMITED ..... PLAINTIFF

AND

JUMA SALIM TEMBER ..... 1ST DEFENDANT

SAHA TSOMWAKA MTORO ..... 2ND DEFENDANT

GATSI GOJAMA ..... 3RD DEFENDANT

MWATSUMO SALIM MWAMJENI ..... 4TH DEFENDANT

MASOOD SALIM MWAMJENI ..... 5TH DEFENDANT

MATANO SALIM JUMA ..... 6TH DEFENDANT

ALFANI SALIM MWAMJENI ..... 7TH DEFENDANT

SHEE SALIM MWAMJENI ..... 8TH DEFENDANT

HAMISI SALIM MWAMJENI ..... 9TH DEFENDANT

MWICHANDE SALIM MWAMJENI ..... 10TH DEFENDANT

MWANAHAMI SALIM MWAMJENI ..... 11TH DEFENDANT

JOSEPH LWAMBI ..... 12TH DEFENDANT

AWALE TRANSPORTERS LTD ..... 13TH DEFENDANT

REGISTRAR OF TITLES MOMBASA ..... 14TH DEFENDANT

WILLIAM KAMITI GITHINJI ..... 15TH DEFENDANT

AND

NATIONAL LAND COMMISSION ..... INTERESTED PARTY

RULING

I. Introduction

1. This Honourable Court is tasked to make a determination of the Notice of Motion application by Awale Transporters Limited, the 13th Defendant/Applicant herein dated 18th July, 2024. It was brought under a Certificate of Urgency and the provisions of Article 159 (2) (d) of *the Constitution* of Kenya, 2010, Sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act*, Cap. 21;Orders 45 and 51 (1) of the Civil Procedure Rules, Inherent Jurisdiction of the Court and all other Enabling Provisions.

2. Upon service of the application to the Plaintiff/Respondent made responses by filing a Replying Affidavit dated sworn on 30th September, 2024. The Honourable Court shall be dealing with it indepth later on hereinunder.

II. The 13th Defendant/Applicant's case

3. The Applicant sought for the following orders:-

    a. Spent.

    b. That this Honourable Court be pleased to set aside, discharge or vary the orders made in the Ruling delivered on the 24th of June 2024 reinstating and consolidating this suit with Petition 3 of 2020.

    c. That the cost of this application be provided for.

4. The application by the Applicant was premised on the grounds, facts and testimonial facts and the averments made out under the 19 Paragraphed annexed affidavit of SALAD AWALE the Director of the 13th Defendant/Applicant herein with six (6) annextures marked as "SA 1 to SA 2B". The Applicant averred that:

    a. The Applicant was aggrieved by the ruling of the Honourable Mr. Justice L.L. Naikuni at Mombasa delivered on the 24th of June, 2024, and sought a review thereof in this instant application.

    b. The Honourable Court in its ruling failed to consider the Applicant's Supplementary Affidavit and Supplementary Submissions both dated the 18th of September 2023.

    c. He instructed his advocate on record to file the Supplementary Affidavit and Supplementary Submissions after noting that crucial information regarding this suit had not been captured in the Replying Affidavit dated 30th January 2023.

    d. The supplementary affidavit and supplementary submissions dated 18th September 2023 were served upon the Plaintiffs Advocate on 19th September 2023 via email. Annexed and marked as "SA – 1" was a copy of the email print out.

    e. The Honourable Court in its Ruling failed to consider the Applicant's Supplementary Affidavit and Supplementary Submissions both dated the 18th of September 2023. Annexed and marked as "SA - 2A" and "SA - 2B" were copies a copy of the filed Supplementary Affidavit and Supplementary Submissions dated 18th September 2023 respectively.

f. The Applicants Supplementary Affidavit and Supplementary Submissions 'contained material information and weighty evidence which would have guided the Honourable Court in determining the Plaintiff's Application for reinstating this suit and consolidating it with Petition 3 of 2020.

g. The Applicant was greatly prejudiced and stands to suffer grave injustice from the Ruling which failed to consider the Supplementary Affidavit and Supplementary Submissions.

h. The Applicants supplementary Affidavit contained material information that the Plaintiffs titles to the suit properties Titles No. MN/VI/1128, MN/VI/1129, MN/VI/1130, MN/VI/1131 and MN/VI/1132 were revoked by the National Land Commission vide Gazette Notice 6862 VOL CXIX-97 on the 17th July 2017.

i. The Applicant surrendered and relinquished all its rights and claims to the suit properties after the National Land Commission recommended the revocation of all the titles being MN/VI/1128-1132 and MN/VI/8012-8042 as the same were illegally issued over public land.

j. The Plaintiff's title to the suit properties having being revoked and the Applicant having surrendered its titles to the suit properties, there's no valid title that exists over the suit properties to be litigated upon.

k. Consequently after the revocation of its titles to the suit properties, the Plaintiff filed Petition No. 3 of 2020 (formerly Constitutional Petition No. 40 of 2017) which was pending hearing and determination before Justice Kibunja challenging the decision of the National Land Commission to revoke its titles to the suit properties.

l. There was no valid title that existed over the suit properties to be litigated upon.

m. The proper forum for the Plaintiff to litigate its case was in Petition 3 of 2020 where the Applicant and the Embassy of Rwanda had been enjoined as interested parties.

n. The subject matter of the suit having being extinguished by the revocation of the titles, the cause of action ceased to exist and therefore the same cannot be consolidated with Petition no. 3 of 2020.

o. The suit and Petition 3 of 2020 involve different parties and different causes of action and the same cannot be consolidated together.

p. The Application had been brought without undue delay and ought to be granted.

q. It was in the interest of justice that the Application be granted.

III. The Response by the Plaintiff/Respondent

5. The Plaintiff opposed the application through a 12 Paragraphed Replying Affidavit sworn by HARJI GOVIND RUDA, the Director of the Plaintiff on 30th September, 2024 where he averred that:-

a. The Plaintiff was the registered and beneficial owner parcels of land known as plots MN/VI/1128, MN/VI/1129, MN/VI/1130.MN/VI/1131, MN/VI/1132 (annexed in the affidavit and marked A) were copies of respective ownership documents).

b. The argumentsbrought out by the Applicants in their Notice of Motion are premature at best and serve only to distract this courts attention from the main issue at hand, which the court

has already determined and that is, whether the Plaintiffs Application for reinstatement had met the threshold for granting of orders of reinstatement.

c. The had already disclosed that there was a pending suit in ELC Pet No.3 of 2020 Bamboo Twist vs NLC and 3 others.

d. The Applicant failed to inform the Court that the trial court in ELC Petition no 3 of 2020 has already issued a conservatory order in the form of an injunction to restrain the Chief Land Registrar and the County Land Registrar Mombasa from revoking the Petitioners properties pending the hearing and determination of the entire Petition. Annexed in the affidavit and marked as "BI & B2" respectively a certified copy of the order and proceedings respectively.

e. To therefore assert that the subject matter of this proceedings was "extinguished" would be to mislead the Honourable Court.

f. The issue as to whether the decision to publish a gazette notice purporting to revoke the Plaintiffs titles was legally sound, was a live issue before the trial court in the civil suit of "ELC Pet no 3 of 2020 Bamboo Twist – Versus - NLC and 3 others" and therefore, inviting this court to make a finding on the issue of whether the titles were extinguished, would be to invite this Honorable court to violate the doctrine of lis pendens and trample on the fundamental rights of the Plaintiff to a full and fair hearing before an adverse determination was made regarding its constitutional right to protection of property

g. In the circumstances there was no legal basis whatsoever to disturb this Court ruling delivered on 24th June, 2024 and the Applicants application dated 18th July, 2024 ought to have been dismissed with costs to the Plaintiff.

IV. Submissions

6. On 15th October, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 18th July, 2024 be disposed of by way of written submissions and all the parties complied. Pursuant to that, by the time of penning down this Ruling, the Honourable Court would only managed to access the Submissions by the 13th Defendants/Applicant. Thus, it reserved the ruling date to 17th December, 2024 by Court accordingly.

A. The Written Submissions by the 13th Defendant/Applicant

7. The 13th Defendant/Applicant through the Law firm of Messrs. Garane & Somane Advocates filed the written submissions dated 28th October, 2024. The Learned Counsel submitted that the Applicant had filed the Application before this Honourable Court seeking the above stated orders.

8. On the background, the Learned Counsel submitted that the Applicant was aggrieved by the ruling of the Honourable Mr. Justice L.L. Naikuni at Mombasa delivered on the 24th of June 2024, and seeks a review thereof in this instant application. This matter was coming up on the 29th of July 2024 for a mention for directions and a hearing on the 12th November 2024 and the Applicant will be greatly prejudiced if this matter proceeds for hearing before this Application is heard and determined. The Honourable Court in its Ruling failed to consider the Applicant's Supplementary Affidavit and Supplementary Submissions both dated the 18th of September 2023. The Applicant's Supplementary Affidavit and supplementary submissions contained material information and weighty evidence which would have guided the Honourable Court in determining the Plaintiff's Application for reinstating the Suit and consolidating it with Petition No. 3 of 2020.

9. The Applicant was greatly prejudiced and stood to suffer grave injustice from the ruling which failed to consider the Supplementary affidavit and supplementary submissions. The Applicant's Supplementary Affidavit contained material information that the Plaintiffs titles to the suit properties Titles No.MN/VI/1128, MN/VI/1129, MN/VI/1130, MN/VI/1131 and MN/VI/1132 were revoked by the National Land Commission vide Gazette Notice 6862 VOL CXIX-97 on the 17th July 2017. The Applicant surrendered and relinquished all its rights and claims to the suit property after the National Land Commission recommended the revocation of all the titles being MN/VI/1128-1132 and MN/VI/8012-8042 as the same were illegally issued over public land.

10. The Plaintiffs title to the suit properties according to the Learned Counsel having being revoked and the Applicant having surrendered its titles to the suit properties, there's no valid title that existed over the suit properties to be litigated upon. Consequently, after the revocation of its titles to the suit properties, the Plaintiff filed Petition No. 3 of 2020 (formerly Constitutional Petition No.40 of 2017) which is pending hearing and determination before Justice Kibunja challenging the decision of the National Land Commission to revoke its titles to the suit properties.

11. There was no valid title that exists over the suit properties to be litigated upon. The proper forum for the Plaintiff to litigate its case is in Petition No. 3 of 2020 where the Applicant and the Embassy of Rwanda have been joined as interested parties. The subject matter of the suit having being extinguished by the revocation of the titles, the cause of action ceased to exist and therefore the same could not be consolidated with Petition No. 3 of 2020. This suit and Petition No. 3 of 2020 involved different causes of action and the same cannot be consolidated together. The Application was brought without undue delay and ought to be granted in the interest of justice.

12. The Learned Counsel relied on the following issues for consideration:-

    a. Whether the Applicant has established grounds for review.

    b. Whether the subject matter of the suit has been extinguished by revocation of the titles.

    c. Whether this suit ought to be re-instated.

13. On whether the Applicant had established grounds for review. The Learned Counsel averred that the power of review was provided under Section 80 of the *Civil Procedure Act*, 2010. The grounds for review were provided under Order 45 of the Civil Procedure Rules 2010.

14. Further, the Learned Counsel cited the case of:- "Republic – Versus – Public Procurement Administrative Review Board & 2 Others [2018] eKLR", it was held that:-

> " 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."

15. The Learned Counsel submitted that the ruling issued by this Honourable Court on the 24th June, 2024 constituted an error apparent on the face of the record as the ruling failed to consider the Applicant's supplementary affidavit and supplementary submissions both dated 18th September, 2024. The error was self-evident as the Ruling dated 24th June 2024 had failed to consider the Applicants Supplementary Affidavit and Supplementary Submissions both dated 18th September 2024.

16. On whether the subject matter of the suit had been extinguished by revocation of the titles. The Learned Counsel submitted that the subject matter of the suits ceased to exist when the Plaintiff's title to the suit properties Titles No. MN/VI/1128, MN/VI/1129, MN/VI/1130, MN/VI/1131 and MN/VI/1132 were revoked by the National Land Commission vide Gazette Notice 6862 VOL CXIX-97 on the 17th July 2017. Consequently after the revocation of its titles to the suit properties, the Plaintiff filed Petition No. 3 of 2020 (formerly Constitutional Petition No.40 of 2017) which was pending hearing and determination before Justice Kibunja challenging the decision of the National Land Commission to revoke its titles to the suit properties.

17. The Learned Counsel submitted that the 13th Defendant surrendered and relinquished all its rights and claims to the suit properties after the National Land Commission recommended the revocation of all the titles being MN/VI/1128-1132 and MN/VI/8012-8042 as the same were illegally issued over public land. The Plaintiff's title to the suit properties having being revoked and the 13th Defendant having surrendered its titles to the suit properties, there's no valid title that exists over the suit properties to be litigated upon.

18. The Learned Counsel contended that the subject matter of the suit having being extinguished by the revocation of the titles, the cause of action ceases to exist and therefore the same could not be consolidated with Petition no. 3 of 2020. They further submitted that the proper forum for the Plaintiff to litigate its case was in Petition 3 of 2020 where the 13th Defendant and the Embassy of Rwanda have been joined as interested parties. The subject matter of the suit was extinguished by the revocation of the titles to the suit properties and therefore no valid title to the property existed to be litigated upon.

19. On whether the suit ought to be reinstated. The Learned Counsel submitted that the factors taken into account or consideration for the purposes of reinstatement of suits were numerous and were addressed in the case of:- "Ivita – Versus – Kyumbu [1984] KLR 441" (Chesoni J), where the Court stated:

> " The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time."

20. According to the Learned Counsel the case above was then cited with approval in "Jim Rodgers Gitonga Njeru – Versus - Al-Husnain Motors Limited & 2 others [2018] eKLR" (Muchemi J), where the court said:-

> " If is my view that such would be valid considerations in an application for dismissal of suit for want of prosecution, which in this case has already been done; and it is manifest from the record that the reason why the suit was dismissed in the first place was that the Court was satisfied there was inordinate delay of 3 years for which there was no explanation."

21. The Learned Counsel submitted that the Plaintiff herein was guilty of prolonged and inexcusable delay as the Plaintiff failed to prosecute its case for nearly Seven (7) after the suit had been instituted. The Plaintiff herein was duly served as his advocates on record was served with the Notice to Show Cause. The decision by this Honourable Court to dismiss the Plaintiff's case for want of prosecution was within this Court's power as provided by Order 17 of the Civil Procedure Rules 2010 and promotes the Overriding Objectives of the Courts in civil matters as provided by Section 1A of the *Civil Procedure Act*, Cap. 21 which states that:

> " The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act".

22. The Learned Counsel further argued that the dismissal of the suit herein would not be prejudicial to the Plaintiff since there is another suit (ELC Petition no. 3 of 2020) pending before the Environment and Land Court involving the same subject matter of this suit and involving similar parties. The dismissal of the suit was wholly attributable to the cunning acts of the Plaintiff who has filed multiple suits in different courts involving the same subject matters in dispute and raising similar issues for determination which amounts to forum shopping and abuse of the court process. This tactic of filing multiple suits resulted in the Plaintiff not being able to prosecute all his cases diligently and therefore the dismissal of the suit in our opinion is merited and justified to achieve the ends of justice and to promote the overriding objectives of the *Civil Procedure Act*.

23. The Plaintiff had so far filed 3 suits including "ELC No 178 of 2014" which was dismissed for want of prosecution and "ELC Petition No. 3 of 2020" and "Constitutional Petition 219 of 2018" which involve the same subject matter, involving similar parties and raising substantially similar issues for determination. The Learned Counsel submitted that this application filed by the Plaintiff on the 1st of December 2022 was an afterthought and the same was brought after a long delay on the Plaintiffs part. The Plaintiff in Paragraph *3* his Supporting Affidavit states that his Advocate on record learnt of the dismissal of the suit on 14th July 2022 which contradicted the averments in Paragraph 6 (v) of the Notice of Motion Application which states that the Application was made without undue delay while the same was filed nearly six months (6) later after learning of the dismissal of the suit.

24. The Learned Counsel also submitted that reinstatement of a suit was at the discretion of the court, which discretion ought to be exercised in a just manner, as was held in the case of:- "Bilha Ngonyo Isaac – Versus - Kembu Farm Limited & another & another [2018] eKLR ((JN. Mulwa J)", which echoed the decision of the court in "Shah – Versus - Mbogo & Another (1967) EA 116" (Harris J), where the court stated on the matter of discretion:

> " The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberatively sought whether by evasion or otherwise to obstruct or delay the course of justice."

25. The Learned Counsel asserted that the Plaintiff had deliberately sought to obstruct or delay the course of justice by filing multiple suits in court and therefore he is not entitled to the reinstatement of the suit. On of the issues that usually confront the courts with respect to dismissal of suits for delays and the subsequent applications for reinstatement, was the need for expeditious conclusion of suits. In

"Mobile Kitale Service Station – Versus - Mobil Oil Kenya Limited & another [2004] eKLR" (Warsame J) where it was held:

> " I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/or negligence of the Plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the Defendant. The consequences must be placed on their shoulders.

26. The Learned Counsel opined that due to the extreme pressure put on the judiciary due to the backlog of case they urged this Honourable Court to dismiss the Plaintiffs application for reinstatement of the suit herein as the Plaintiff was solely to blame for failing to prosecute his case for a period of nearly seven (7) years. Reinstatement of this suit will be prejudicial to the Defendants as they will have to incur enormous legal costs to defend the multiple suits filed by the Plaintiff. According to the Learned Counsel reinstatement of a suit will hinder and delay the administration of justice as there are already multiple suits pending before different courts for determination which involve the same subject matter, involving similar parties and raising substantially similar issues for determination

27. In conclusion, based on the foregoing submissions and guided by the various authorities cited, the Learned Counsel urged the Honourable Court to dismiss the application dated 1st December, 2020 with costs to the 13th Defendant.

V. Analysis and Determination

28. I have carefully read and considered the pleadings herein, the written submissions and the cited authorities by the Learned Counsels and the relevant provisions of *the Constitution* of Kenya, 2010 and the statures. In order to arrive at an informed, just, fair and reasonable decision, the Honorable Court has crafted the following three (3) salient issues for its determination. These are:-

    a. What are the legal parameters that govern the issue of review, setting aside or varying of Court orders.

    b. Whether the Notice of Motion application date 18th July, 2024 by the Applicant has made out a case of the review and setting aside the orders made in the Ruling delivered on the 24th of June 2024 reinstating and consolidating this suit with Petition 3 of 2020?

    c. Who meets the costs of the Notice of Motion application dated 18th July, 2024?

ISSUE No. a) What are the legal parameters that govern the issue of review, setting aside or varying of Court orders.

29. Under this Sub – heading, the main substratum is on causing the Honourable Court to consider review, setting aside, varying and/or discharging orders made in the Ruling delivered by this Honourable Court on 24th June, 2024reinstating and consolidating this suit with Petition 3 of 2020. The application by the Applicant was brought under the provisions of Sections 1A,1B, 3A of the *Civil Procedure Act*, Cap. 21, Order 45 Rule 1 of the Civil Procedure Rules, 2010 & all Enabling Provisions of the Law. 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.

30. 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."

31. While the provision of Order 45 Rule 1 of the Civil Procedure Rules, 2010 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."

32. 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."

33. 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.

34. 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."

35. Courts have severally dealt with the issue of review. The Supreme Court in "Application No 8 of 2017, Parliamentary Service Commission – Versus - Martin Nyaga Wambora & others [2018] eKLR", quoted with approval the findings of the East Africa Court of Appeal in "Mbogo and another - Versus - Shah [1968] EA", upon establishing the following principles: -

(31) Consequently, drawing from the case law above, particularly Mbogo and Another v Shah, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:

i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.

ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;

iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.

iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.

v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.

vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:

a. as a result, a wrong decision was arrived at; or

b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.

36. 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.

37. 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."

ISSUE No. b). Whether the Notice of Motion application date 18th July, 2024 by the Applicant has made out a case of the review and setting aside the orders made in the Ruling delivered on the 24th of June 2024 reinstating and consolidating this suit with Petition 3 of 2020.

38. Now, the Court wishes to apply the above legal parameters into the instant case. The Learned Counsel for the Applicant submitted that the Applicant was aggrieved by the ruling of the Honourable Mr. Justice L.L. Naikuni at Mombasa delivered on the 24th of June 2024, and seeks a review thereof in this instant application.

39. This matter was coming up on the 29th of July 2024 for a mention for directions and a hearing on the 12th November 2024 and the Applicant will be greatly prejudiced if this matter proceeds for hearing before this Application is heard and determined. The Honourable Court in its Ruling failed to consider the Applicant's Supplementary Affidavit and Supplementary Submissions both dated the 18th of September 2023. The Applicant's supplementary affidavit and supplementary submissions contained material information and weighty evidence which would have guided the Honourable Court in determining the Plaintiff's Application for reinstating the Suit and consolidating it with Petition No. 3 of 2020.

40. The Applicant was greatly prejudiced and stood to suffer grave injustice from the ruling which failed to consider the Supplementary affidavit and supplementary submissions. The Applicant's Supplementary Affidavit contained material information that the Plaintiffs titles to the suit properties Titles No.MN/VI/1128, MN/VI/1129, MN/VI/1130, MN/VI/1131 and MN/VI/1132 were revoked by the National Land Commission vide Gazette Notice 6862 VOL CXIX-97 on the 17th July 2017. The Applicant surrendered and relinquished all its rights and claims to the suit property after the National Land Commission recommended the revocation of all the titles being MN/VI/1128-1132 and MN/VI/8012-8042 as the same were illegally issued over public land.

41. On the issue of reinstatement of the suit; in my previous ruling I extensively opined myself verbatim as follows:-

> "ISSUE No. a). Whether the Honourable Court ought to set aside the order that dismissed with the suit for want of prosecution and subsequent reinstatement of the suit.
>
> 27. The main substratum in this matter is whereby the Honourable Court has been called upon to set aside its own orders and thus reinstate of a suit that had already been dismissed for want of prosecution. This court is a court of law and justice. In determining the matters before it, it is guided by *the Constitution* of Kenya, the provisions of law and equity and the principles of natural justice. Given these, the Court is enjoined to give effect to the overriding objective both Sections 3(1) of the Environment and *Land Act* and 1A (1) of the *Civil Procedure Act*, that it to say, to facilitate "... the just, expeditious, proportionate and accessible resolution of disputes". That has to be done without procedural technicalities, as contemplated in the provision of Article 159 (2) (d) of *the Constitution* of Kenya 2010.
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> 28. It is the duty of the court, litigants, as well as advocates, to ensure that matters are concluded expeditiously without inexcusable delay. Sections 1A and IB, of the *Civil Procedure Act*, Cap 21, Laws of Kenya, are relevant, with regard to this and they state as follows:
>
> "1A. Objective of Act
>
> (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
>
> (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
>
> (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.
>
> 1B. Duty of Court
>
> (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
>
> (a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology."

29. The provision of Section 3A of the *Civil Procedure Act*, Cap. 21 gives the court wide discretion over matters and issues that are before it, including the question as to whether it should or should not reinstate a suit dismissed on account of unreasonable delay on the part of the parties to prosecute it. Section 3A reads:

"3A. Saving of inherent powers of court. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

30. When a party wishes to set aside an order of dismissal of suit for non-attendance or want of prosecution are guided by the provisions of Order 12 Rule 7 of the Civil Procedure Rules, 2010. It provides that:- "Where under this Order Judgement has been entered or the suit has been dismissed, the court on application may set aside or vary the Judgement or order upon such terms as may be just."

31. The main Legal pith and substance substratum for dismissal of suits for want of prosecution is founded on the Principles that litigation must be expedited, and concluded by parties who come to court for seeking justice. To assist in clearing backlogs in court and the ever-increasing over-loads restoring bad public confidence and trust on the judiciary. Upon filing of cases parties should efficiently and effectively be seen to fast track their hearing and determination. There should be no delay at all based on legal maxim – "Justice delayed is justice denied" Nonetheless, should there be any delay arising from one substantive and justifiable logistical cause or reason, the same should not be inordinate, unreasonable and inexcusable. I say so, as that would be doing grave injustice to one side or the other or both and in such circumstance, the Honorable May in its discretion dismiss the action straight away.

32. Additionally, the dismissal was pursuant to the provisions of Order 17 Rule 2 of the Civil Procedure Rules, which provides, inter alia:-

2.

1. In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show

cause why the suit dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

2. If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

3. Any party to the suit may apply for its dismissal as provided in sub-rule 1.

4. The court may dismiss the suit for non-compliance with any direction given under this Order..

33. It is trite law that the power to dismiss a suit for want of prosecution is at the discretion of the court. In the case of:- "Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium – Versus - M.D. Popat and others & another [2016] eKLR", the court stated as follows:

> "11. Nonetheless, Article 159 of *the Constitution* and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of Ivita – Versus - Kyumba [1984] KLR 441 espoused that:
>
> > "The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court."

34. As to what constitutes notice under the provision of Order 17 Rule 2, the court in "Kestem Company Limited – Versus - Ndala Shop Limited & 2 others [2018] eKLR" was of the view that it did not require service of notice:

> "Order 17 Rule 2 (1) of the Civil Procedure Rules does not require service of notice; it uses the word ''give notice''. The court may give notice of dismissal through its official website or through the cause-list.

I do find that the notice of dismissal of the suit was given through the judiciary website and cause-list prepared which to the court, was adequate notice to the parties."

35. The factors taken into account or consideration for the purpose of reinstatement of suits are numerous, and were addressed in "Ivita – Versus - Kyumbu [1984] KLR 441" (Chesoni J), where the court stated:

> "The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

36. In the case of:- "Ivita – Versus -. Kyumbu [supra]" (Chesoni J) was followed in "Jim Rodgers Gitonga Njeru – Versus - Al-Husnain Motors Limited & 2 others [2018] eKLR" (Muchemi J), where the court said:

> "It is my view that such would be valid considerations in an application for dismissal of suit for want of prosecution, which in this case has already been done; and it is manifest from the record that the reason why the suit was dismissed in the first place was that the Court was satisfied there was inordinate delay of 3 years for which there was no explanation."

37. Further in the case of "James Mwangi Gathara & another -Versus - Officer Commanding Station Loitoktok & 2 others [2018] eKLR" (Nyakundi J), the court said:

> "Before I conclude this matter, I need to bring to the attention of the plaintiff the manner in which he is pursuing his rights. In my view the proceedings in this claim seems to be focusing on interlocutory applications without addressing the main dispute which brought the parties to court in the first instance. It is time the plaintiff decides categorically whether he has a claim to be heard on the merits or continuous slumbering only to rise up when he has been stripped of certain rights during the adjudication processes. In my assessment and based on the history of this case the plaintiff is guilty of laches. I think I have said enough on this point."

38. Reinstatement of a suit is at the discretion of the court, which discretion ought to be exercised in a just manner, as was held in "Bilha Ngonyo Isaac – Versus - Kembu Farm Ltd & another & another [2018] eKLR" ((JN. Mulwa J), which echoed the decision of the court in "Shah – Versus - Mbogo & Another (1967) EA 116" (Harris J), where the court stated on the matter of discretion:

> "The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberatively sought whether by evasion or otherwise to obstruct or delay the course of justice."

39. One of the issues that usually confront the courts with respect to dismissal of suits for delays and the subsequent applications for reinstatement, is the need for expeditious conclusion of suits. In the case of:- "Mobile Kitale Service Station – Versus - Mobil Oil Kenya Limited & another [2004] eKLR" (Warsame J) where it was held:

> "I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of the Plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the Defendant. The consequences must be placed on their shoulders."

40. I am not entirely convinced by the arguments out forward by the Plaintiff that there was a non – service of the Notice to show cause to his advocate on record as a result of which as only the Attorney General appeared in court on 1st March 2022 when the matter was mentioned. But, be that it may, the Court is rather persuaded with the realization that this matter had been consolidated with ELC Civil Suit no 40 of 2015 Awale Transporters – Versus - Bamboo Twist Ltd as seen in annexture "D" which is a copy of the consolidation order by Lady Justice Amollo issued on 17th June 2015).

41. For that reason, I will accord the Plaintiff some benefit of doubt and grant it a second bite of the cherry by allowing the application, and reinstate its suit on conditions that I shall discuss further in conclusion and disposition. Therefore, I find that the Application for reinstatement is meritorious upon fulfilment on the given conditions by the Honourable Court.

42. I have examined the records and the documents the applicant claims to have filed which at the time of settling to write down the supplementary affidavit and supplementary submissions were not on record. I shall still examine them. I have examined them and what the Applicant in the supplementary affidavit contended was the fact that the Plaintiff wanted to reinstate and consolidate the suit with Petition No. 3 of 2020. In the ruling the Applicant seeks to review I extensionally expounded on the jurisdiction of consolidation donated by the provision of Section 81 (h) of the *Civil Procedure Act*, 2010 and order

11 Rule 3 of the Civil Procedure Rules. I explained that Consolidation will be ordered if there is a common question of law or fact in the suits, the reliefs or rights sought arise from the same or a series of transactions, or for any other reason such as for convenience, avoiding multiplicity of suits, expedition and in order to meet the overriding objective set out in the *Civil Procedure Act*, Cap 21 Laws of Kenya. See the case:- "John *Gakure & 148 Others – Versus - Dawa Pharmaceuticals Company Ltd CA 299 of 2007*".

43. I further went to ahead to opine that:

    48. The Applicant seeks the consolidation of ELC Petition 3 of 2020 Bamboo Twist vs National Land Commission and others. I have considered the averments in each pleading filed in the subject suits and I note as follows on the mentioned issues:-

        a) The parties are the same

        b) The Plaintiff is the same in both the suits;

        c) The interested party in this suit is the 1st Respondent in the Petition.

        d) The subject matter is similar in both suits

        e) The issues for determination are the same

    49. The grounds upon which the present application was made were inter-alia, that the suits raise a common question of law and fact, that the transactions are inter-related and it would be convenient to try all the suits together. The Motion was opposed on the grounds that the was filing multiple suits on the same suit property and the dismissal of this instant suit would not affect the others.

    50. Further, as aforesaid and based on the authorities cited above, the Court has a broad discretion to order for consolidation of suits even on its own motion and can consolidate to tie more than one action together for separate individual actions into one and get a single judgment, where the issues and witnesses are the same and the rights of the parties can be determined in one suit. (See "Tommie – Versus - La Chance 412 SO 2nd 439 (Fla 4th DCA 1982)".

    51. To support this position the Court held in the case of; "Korean United Church of Kenya & 3 Others – Versus - Seng Ha Sang (2014) eKLR" that:

        > "consolidation of suits is done for purposes of achieving the overriding objective of the *Civil Procedure Act*, that is, for expeditious and proportionate disposal of civil disputes. The main purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action."

    52. In the Court's view, it would be convenient and expedient to try all the suits together as it would obviate the multiplicity of suits. It will lead to the determination of all the issues arising in all the 2 suits at the same trial. It will be less costly and save the Court precious judicial time. As regards to the opposition to the application that the Plaintiff herein has filed multiple suits on the same suit property per se cannot be a bar to an order for consolidation. I would reiterate the foregoing here and add that, there would be no prejudice to be suffered by any of the parties herein if the consolidation sought is granted.

44. The Applicant has argued that the Plaintiff surrendered and relinquished all its rights and claims to the suit properties after the National Land Commission recommended the revocation of all the titles

being MN/VI/1128-1132 and MN/VI/8012-8042 as the same were illegally issued over public land. The Plaintiff's title to the suit properties having being revoked and the Applicant having surrendered its titles to the suit properties, there's no valid title that exists over the suit properties to be litigated upon. Consequently after the revocation of its titles to the suit properties, the Plaintiff filed Petition No. 3 of 2020 (formerly Constitutional Petition No. 40 of 2017) which was pending hearing and determination before Justice Kibunja challenging the decision of the National Land Commission to revoke its titles to the suit properties. There was no valid title that existed over the suit properties to be litigated upon. The proper forum for the Plaintiff to litigate its case was in Petition 3 of 2020 where the Applicant and the Embassy of Rwanda had been enjoined as interested parties.

45. Having considered the application, rival affidavits and submissions as well as the background of this suit and the relevant law, I am of the view the orders sought are not warranted. In view of the foregoing and having regard to the overriding objective of the *Environment and Land Court Act*, 2011 which is to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by this Act, I disincline to exercise my discretion in favour of the Applicant.Therefore, the application is dismissed with costs to the Respondent.

ISSUE No. c). Who will bear the Costs of Notice of motion application dated 18th July, 2024

46. 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 Laws of Kenya 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.

47. In the present case, the Honourable Court elects to award the Plaintiff/Respondent costs as the 13th Defendant/Applicant has failed to prove its claim in their Application.

VI. Conclusion & Disposition

48. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Clearly, the Applicant has not made out their case as per the Notice of Motion application dated 18th July, 2024.

49. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-

    a. That the Notice of Motion application dated July 18, 2024 be and is found to lack merit, thus dismissed in its entirely.

    b. That mention on 30th January, 2025 for Pre – Trial

    c. That the costs of this application are awarded to the Plaintiff/Respondent herein.

    It is so ordered accordingly.

RULING DELIEVERED THROUGH THE MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 17TH DAY OF DECEMBER 2024.

HON. MR. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

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

b. Mr. Borona Advocate for the Plaintiff/Respondent.

c. No appearance for the 1st, 2nd,3rd, 4th, 5th, 6th, 7th, 8th, n9th, 10th, 11th,12th & 13th Defendants.