



Pubs, Entertainment And Restaurants Association of Kenya & 2 others v National Assembly & 5 others; Kenya Association of Manufacturers (Interested Party) (Petition 24, E491 & E403 of 2021 (Consolidated)) [2024] KEHC 10396 (KLR) (26 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10396 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
PETITION 24, E491 & E403 OF 2021 (CONSOLIDATED)
LN MUGAMBI, J
AUGUST 26, 2024**

BETWEEN

**PUBS, ENTERTAINMENT AND RESTAURANTS ASSOCIATION OF KENYA 1ST PETITIONER
MWAURA KABATA 2ND PETITIONER
KENYA HUMAN RIGHTS COMMISSION 3RD PETITIONER**

AND

**NATIONAL ASSEMBLY 1ST RESPONDENT
THE COMMISSIONER GENERAL KENYA REVENUE AUTHORITY ... 2ND RESPONDENT
CABINET SECRETARY TREASURY AND NATIONAL PLANNING ... 3RD RESPONDENT
THE ATTORNEY GENERAL 4TH RESPONDENT
THE CABINET SECRETARY, ENERGY 5TH RESPONDENT
ENERGY AND PETROLEUM REGULATORY AUTHORITY ... 6TH RESPONDENT**

AND

THE KENYA ASSOCIATION OF MANUFACTURERS INTERESTED PARTY



RULING

Introduction

1. There are two applications coming up for ruling, namely:
 - a) the contempt of court application which is contained in the Notice of Motion dated 7th January 2022 by the 1st petitioner (Application 1) and;
 - b) the review application that is contained in the Notice of Motion dated 10th January 2022 by the 2nd respondent (Application 2).

Application 1

2. The 1st petitioner filed the contempt of court application against the 2nd respondent alleging disobedience of this Court's orders. Accordingly, the 1st petitioner sought the following reliefs:
 - i. Spent.
 - ii. Pending interpartes hearing and determination of this application, this Court be pleased to Order that the status quo order remains as in its order dated 15th December 2021 pending further directions on 26th January 2022.
 - iii. Pending interpartes hearing and determination of this application, this court be pleased to stay and or suspend the enforcement of Legal Notice 217 of 2021 in so far as it seeks to adjust the inflation rate for Excise Duty as in its order dated 15th December 2021.
 - iv. This Court be pleased to cite the 2nd respondent herein for contempt of this Court's orders dated 10th June 2021.
 - v. This Court be pleased to issue a sufficient custodial sentence as against the 2nd respondent or in the alternative a commensurate penal fine for contempt of Court.
 - vi. This Court be pleased to quash the impugned adjusted rates of inflation of excise duty as at 20th December 2021 and order a refund for the same forthwith.
 - vii. This Court be pleased to order that the respondents be restrained from adjusting the inflation rates of Excise Duty in the purported enforcement of Legal Notice No.217 of 2021.
 - viii. The costs of this application be provided for.

1st Petitioner's Case

3. The 1st petitioner through its Chairperson, Michael Muthami deposed that this Court on 15th December 2021 pronounced that the status quo order dated 19th November 2021 would be maintained. Mr. Muthami asserted that the gravamen of the Court's order was communicated to the 2nd respondent through its counsel in a follow up letter dated 17th December 2021 highlighting the need for compliance.
4. However, in total disregard of this direction, it is deposed that the 2nd respondent proceeded to effect adjustment of the excise duty in line with Legal Notice 217 of 2021 with the due date being 20th



December 2021. In consequence, he averred that the 1st petitioner's members and members of the public were forced to pay the excise duty at the rate suspended by the Court in the said Order.

5. Mr. Muthami, averred that the 2nd respondent in further contempt filed an application dated 21st December 2021 purportedly seeking further clarification of the Court Order dated 15th December 2021 yet the same had been elucidated by the Court on the material day before all the parties counsel. It is the petitioner's case therefore that the 2nd respondent has continually and blatantly disregarded this Court's order hence should not be granted audience by this Court until the contempt is purged.

Application 2

6. The 2nd respondent in its application seeks a review of the cited Court Orders dated 19th November 2021 and further clarified on 17th December 2021. Consequently, the 2nd respondent seeks the following relief that:
 - i. Spent.
 - ii. The Court be pleased to find that the 2nd respondent is unable to comply with the order dated 19th November 2021 and extended by this Court on 15th December 2021.
 - iii. There be a stay of orders issued on 19th November 2021 and clarified on 17th December 2021 pending the hearing and determination of this application.
 - iv. This Court be pleased to set aside the orders issued on 19th November 2021 and extended on 17th December 2021 in its entirety.
 - v. The costs of this application be provided for.

2nd Respondent's Case

7. The 2nd respondent through its officer, Benard Kirui deposed that it was incapable of complying with the stated Court Order since the same was premised on a failure by the Court to appreciate a number of facts elucidated herein below.
8. For context, Mr. Kirui informed that the 2nd respondent pursuant to Section 10 of the *Excise Duty Act* published Legal Notice No.217 of 2021 on adjustment of excise duty on 2nd November 2021. In line with Section 11(2) of the *Statutory Instruments Act*, the 2nd respondent submitted the Legal Notice to the Clerk of the National Assembly on 8th November 2021 for tabling before the Parliament. He noted that Section 23 of the Act provides that a statutory instrument is deemed to come into operation on the date specified in the instrument or if no such date is specified, then on the date of its publication in the Gazette subject to annulment where applicable. In this case, the impugned Notice was published on 2nd November 2021 hence came in force on that date.
9. He deposed therefore that when the Court issued the status quo order on 19th November 2021, the status quo that existed as at that date was that the Legal Notice was in effect in view of Section 23 of the *Statutory Instruments Act*. He notified that the Court Order refers to the effective date as 20th December 2021 which is incorrect. This is because the Court misunderstood the enactment date of the impugned Legal Notice to be 20th December 2021 in view of Section 35 of *Excise Duty Act, 2015* which was in erroneous in law and fact.
10. He explained the reason to be, Section 35 of the Act provides for filing of tax returns not enactment of a Legal Notice which is provided for under Section 10 of the Act. He further deposed that the



Court in issuing the cited Court Order, failed to appreciate that the National Assembly acceded to the implementation of the Legal Notice on 24th November 2021.

11. In like manner, the 2nd respondent deposed that as at 19th November 2021 when the Order was issued, it had complied with the dictates of Article 10 of *the Constitution* and Section 5 of the *Statutory Instruments Act* and further exercised its discretion with an appreciation of the status of the pending case in Nairobi High Court Constitution Petition No. E374 of 2021 before enacting the impugned Legal Notice.
12. In the circumstances, Mr. Kirui contended that the said Court Order has calamitous consequences and is contrary to Article 201 of Constitution. He equally stressed that the government would lose a lot of revenue which cannot be recovered owing to the nature of the excise duty which is a consumption tax. He implored that unless the stated Court order is set aside the 2nd respondent stands to be cited for contempt.

Responses to the Petitioner's Application

2nd Respondent's Case

13. In opposition to the petitioner's application dated 7th January 2022, the 2nd respondent filed a replying affidavit dated 21st January 2022 sworn by the Benard Kirui. The content of the affidavit highlighted and reiterated the 2nd respondent's case as captured in its application and affidavit dated 10th January 2022.

2nd Petitioner's Case

14. In support of the petitioner's application, the 2nd petitioner filed his replying affidavit dated 11th January 2022. He deposed that the status quo orders were premised on the 2nd respondent's Counsel submission that the effective date or coming into force of the impugned Legal Notice was 20th December 2021. That being the case, he contended that the 2nd respondent's unwillingness to obey the Court Order was made apparent when it proceeded to effect the adjustment of the excise duty in accordance with the impugned Legal Notice.
15. He averred that soon after, the 2nd respondent vide an application dated 22nd December 2021 sought stay of orders of the status quo orders whilst seeking clarification of the same. He emphasized that this was despite this Court on the 19th November 2021 and 15th December 2021 issuing the status quo orders in the presence of counsel for all the parties. Nonetheless, the 2nd respondent ignored compliance of the said court orders and in fact went ahead and effected the changes in the impugned Legal Notice on its iTax System and Simba System. Inevitably, Mr. Kabata accentuated that the 2nd respondent, headed by Mr. James Githii Mburu should be cited for contempt of this Courts orders.

Responses to the 2nd Respondent's Application

16. There are no responses to the 2nd respondent's application in the file or CTS.

1st Petitioner's Submissions

17. In support of its application and in opposition to the 2nd respondent's application, the 1st petitioner through Okwach and Company Advocates filed written submissions dated 21st March 2022.



18. Counsel relying in *Samuel M. N. Mweru & Others Vs The National Land Commission And 2 Other, No. 443 of 2017* submitted that the elements that should be proved for contempt are as follows:
- “(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
 - (b) the defendant had knowledge of or proper notice of the terms of the order;
 - (c) the defendant has acted in breach of the terms of the order; and
 - (d) the defendant’s conduct was deliberate.”
19. Similar ingredients were also stated in *Amos Mathenge Kabuthu v Simon Peter Mwangi* [2015] eKLR which was cited in support. Relying on this, Counsel submitted that the Court Orders dated 19th November 2021 and extended on 15th December 2021 were clear. Furthermore, that the orders were valid and proper as were issued by a court with the requisite jurisdiction. Likewise, that both parties were in court when the orders were issued hence had sufficient notice of the order.
20. This notice was additionally reinforced by service of a letter dated 17th December 2021 to the 2nd respondent by the petitioner’s counsel. On notice, reliance was placed in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2014] eKLR where it was held that:
- “In the case of an application to commit for breach of an order, judgment or undertaking, the evidence supporting an application for committal must prove:
- Personal service of the order, judgment or undertaking duly indorsed in with a penal notice. Where a person is required to do an act, service must be made before the expiry of the time limited for doing the act but where a person is required to abstain from doing an act, the court has a discretion, which may be exercised prospectively or retrospectively, to dispense with service of the order, judgment or undertaking, if the alleged contemnor has had notice of it...”
21. Considering this, Counsel submitted that the rule of law makes it incumbent for all persons without exception, to respect court orders as such a party who knows of an order whether null or valid, regular or irregular cannot be permitted to disobey it as held in *Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 others* (2017) eKLR.
22. On whether the 2nd respondent’s application should be heard, Counsel submitted that where a party is manifestly in contempt of a court order made in competent jurisdiction, the party ought not be granted audience by the said court unless and until he or she purges the contempt. Reliance was placed in *Trusted Society of Human Rights Alliance(supra)* where it was held that:
- “It would be most dangerous to hold that suitors or their solicitors could themselves judge whether an order was null or valid; whether it was regular or irregular...A State organ or agency or person legally and duty bound to give due compliance must do so. Court orders cannot be issued in vain.”
23. Equal dependence was placed in *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] KLR 828.
24. Counsel contended that it was inexplicable that the 2nd respondent who was represented in Court by Counsel when the orders were issued, returned to allege that the orders were ambiguous. According



to Counsel, the 2nd respondent's claim is fallacious and a reprobatation of facts as the court rendered its decision after considering all the parties submissions with regard to the effective date.

2nd Petitioner's Submissions

25. The 2nd petitioner filed written submissions dated 30th May 2022 in support of the 1st petitioner's case and in opposition to the 2nd respondent's application. According to Counsel, it is undisputed that the status quo order was issued on the 19th November 2021 and subsequently extended. Equally, that the 2nd respondent sought a clarification of the said orders on 15th December 2021. From the foregoing therefore he argued that the 2nd respondent actions were a clear indication of willful, intentional and blatant disregard of the orders with no reasonable justification for failure to comply. It was underscored that the 2nd respondent's argument of lack of clarity was dishonest and an afterthought prompted by the 1st petitioner's contempt application.
26. In support reliance was placed in Civil Application No. Nai 1 of 2017 Dr. Fred Matiang'i-The Cabinet Secretary, Ministry of Interior and Coordination of National Government vs Miguna Miguna and 4 others where the Court of Appeal held that:

“When Courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities”.

27. Analogous reliance was placed in Samuel M, N Mweru & Others V National Land Commission & 2 others Miscellaneous Civil Application No. 443 of 2017 [2020]eKLR.

2nd Respondent's Submissions

28. The 2nd respondent filed two sets of submissions and a list of authorities through its Counsel, Lilian Nyaringita. The first set dated 11th May 2022 was filed in support of its application while the second set dated 16th May 2022 was filed in opposition to the petitioner's application.
29. In the first set of submissions, Counsel submitted that the impugned Legal Notice No. 217 of 2021 enacted pursuant to Section 10 of the *Excise Duty Act* was published on 2nd November 2021 and came in force on this day when it was published in the Kenya Gazette. It was noted that the gazette has full force of law as held in *Hassan Jobo and another v Suleiman Said Shaghbal and 2 others, Malindi Civil Appeal No.12 of 2013*. It was stated that the Gazette Notice has not been declared invalid or unconstitutional. This argument was anchored in Section 23 of the *Statutory Instruments Act*.
30. It is Counsel's argument that the Court misdirected itself on the effective date or commencement date to be 20th December 2021 instead of 2nd November 2021 which was the date of publication that was acceded to through gazettelement. Furthermore, Counsel argued that the Court misinterpreted Section 35 of the *Excise Duty Act* in that this Section indicates that the date for submitting an excise duty for each month is not later than the 20th day of the succeeding month. According to Counsel the Court understood this to mean the effective date which is in error hence misinterpreting the status quo at that time.



31. Counsel argued therefore that the status quo as at 19th November 2021 was that the impugned Legal Notice was already in force. Reliance was placed in Republic V National Environment Tribunal, Ex parte Palm Homes Limited and another (2013) eKLR where it was observed that:
- “In essence therefore, a status quo order is meant to preserve the subject matter as it is/existed, as at the day of making the order.”
32. Equal dependence was placed in Fatuma Abdi Jillo v Kuro Lengesen and another (2021) eKLR, Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited and another (2020)eKLR and Matrix Business Consultants Limited and 4 others v Safaricom Limited(2020)eKLR.
33. On this premise Counsel urged the Court to consider its orders dated 19th November 2021 so as to appreciate the 2nd respondent’s inability to comply with the said orders. In this regard, Counsel relied on Section 3A of the [Civil Procedure Act](#) and the case of Kenya Power and Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints (2016)eKLR where it was held that:
- “Section 3A of the [Civil Procedure Act](#) appears to have been introduced to augment the provisions of section 3, vesting in the courts inherent power to make nay orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
34. Similar dependence was also placed in Thugi River Estate Limited and another V National Bank of Kenya Limited and 3 others (2015) eKLR.
35. Opposing the petitioner’s contempt application in the second set of submissions, Counsel asserted that the petitioner’s case does not meet the threshold for grant of the contempt of court orders. Reliance was placed in Cecil Miler v Jackson Njeru and another (2017) eKLR where the threshold was outlined as follows:
- a. the terms of the order/or injunction or undertaking were clear and unambiguous and were binding on the defendants.
 - b. the defendant has knowledge of or proper notice of the terms of the order.
 - c. the defendant has acted in breach of terms of the order.
 - d. the defendant’s conduct was deliberate.”
36. Like reliance was placed in Carey v Laiken,2005 SCC 17.
37. In Counsel’s view, the terms of the order were not clear owing to the circumstances highlighted in the 2nd respondent’s case, making it difficult to comply. For this reason, Counsel submitted that the 2nd respondent did not willfully disobey the court order since there was a challenge with regard to interpretation of the Court order. Reliance was placed in Indian Airports Employees Union v Ranjan Catterjee and another (Air 1999SC 880:1999(2) SCC:537 where it was held that:
- “In order to amount to civil contempt, disobedience must be willful. If disobedience is based on the interpretation of court’s order, notification and other relevant documents, it does not amount to willful disobedience.”
38. Analogous dependence was also placed in T.M.A Pai Foundation v State of Karnatak(2002) 8 SCC 481 and Samuel M. Mweu and others v National Land Commission and 2 others(2020)eKLR.



39. Counsel as well asserted that the petitioners had not satisfied the burden of proof in proving how the 2nd respondent had committed the contempt. Equally, Counsel submitted that the petitioner’s application was incompetent because it seeks orders of stay of the impugned legal Notice in a contempt application.
40. Correspondingly, Counsel stated that the petitioner’s argument that the 2nd respondent should not be heard is not viable as it urges the Court to withhold justice on its part. Reliance was placed in *Akber Abdullah Kassam Esmail v Equip Agencies Ltd and 4 others* (2014) eKLR where the Court of Appeal held that:

“the authorities show that the purposes of showing cause why he should not be committed, a contemnor is entitled to be heard. It is noteworthy that even in *Hadkinson V Hadkinson* (supra) Lord Denning was clear enough that it is unusual for a court to refuse to hear a party to a suit and that such cause should be taken only when justified by grave considerations of public policy. The fact that a party to a suit has disobeyed an order of the court is not itself a bar to his being heard: a court could exercise its discretion to refuse to hear him if the disobedience continued to impede the cause of justice.”

Analysis and Determination

41. To issues arise for determination:
 - a. Whether the 2nd Respondent is in contempt of the Court Orders dated 19th November 2021
 - b. Whether this Court should review its Court Orders dated 19th November 2021.

Whether the 2nd Respondent is in contempt of the Court Orders dated 19th November 2021

42. The 1st petitioner’s key contention is that the 2nd respondent is in contempt of the status quo orders issued by the Court on 19/11/2021.
43. According to Concise English Dictionary, (Eleventh Edition) Status quo means the ‘existing state of affairs. Plainly speaking, it means things were to remain or be left in the state that they were as at 19/11/2021 when the Court made the order. That is, however, the point of by the parties as they do not agree is what precisely the status quo was at the time when the order of 19/11/2021 was made?
44. On 15/12/21, the Court (J.A. Makau) clarified what the order of status quo he issued on 19/11/21 meant after a prompting by Petitioners counsel in the presence of Advocates for the 4th Respondent, 2nd and 3rd Respondent, 1st Respondent and the Interested Party. He stated as follows:

“The Petitioners in these petitions are seeking Court’s clarifications on the order issued on 19/11/2021 on status quo. Under order 2, order for 19/11/2021 the Court clearly stated that in view of the fact that the effective date shall be 20/12/2020 status quo be maintained as from 19/11/2021. This meant as stated by the Respondents that the effective date of the Legal Notice No. 217 of 2021 is 20/12/2021 and not any other date earlier than 20/12/2021. This is therefore what the Court meant when it stated status quo be maintained from 19/11/2021. Any attempt to apply the Legal Notice before effective date for 20/12/2021 is therefore improper...”



45. In describing contempt of court, the Court in *Stewart Robertson v Her Majesty's Advocate* [2007] HCAC 63 explained it as follows:

“Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”

46. To find one guilty of contempt of Court, two fundamental elements must be proved, namely knowledge of the order and willful act of disobedience. As to the order of 19/11/21 there was knowledge because the 2nd Respondent was present when the order was made and clarified but given the circumstances obtaining at the time, it is necessary to interrogate the facts and determine if there was what one would refer to as ‘willful disobedience’. The question thus is, did the 2nd Respondent outrightly and willfully disobey the Court order made on 19/11/21 and clarified on 15/12/2021?

47. Section 23 (1) of *Statutory Instruments Act* provides as follows:

‘A statutory instrument shall come into operation on the date specified in that behalf in the statutory instrument or, if no date is so specified, on the date of its publication in the Gazette subject to annulment where applicable.’

48. Legal Notice No.217 of 2021 was published in the Kenya Gazette on 2nd November 2021. It means therefore that by virtue of that publication it became effective on 2/11/2021. It was tabled in Parliament on 8/11/2021. This was in line Section 11 of *Statutory Instruments Act* that required the same to be done within 7 days of publication. Once tabling was done and there was no annulment by Parliament it continued being in force and this was the case as at 19/11/21 as its operation was now a matter of law.

49. As at this point in time, legal notice no. 217 of 2021 did not require any further step to be taken by the 2nd Respondent to be operational having kicked in with effect from 2/11/2021.

50. That was the precise state of affairs even as the Court (Makau J) made the orders of 19/11/2021. Under the circumstances, can the Court thus a validly convict the 2nd Respondent for willful disobedient of the order of 19/11/2021 even as clarified on 15/12/21?

51. One, it is not legally feasible to punish the 2nd Respondent for acts that happened prior to 19/11/2021 as implementation had begun way back from 2/11/2021. Secondly, by the time the Court was making the order of status quo, the existing state of affairs was that Legal Notice was already in operation by law as opposed to what the Court was made to believe that the legal notice was going to take effect on 20/12/2021.

52. At the time the order of status quo was made by 19/11/2021; the legal notice was in force. The 2nd Respondent could thus not have breached the order of 19/11/2021 as the process was no longer in its hands. It was in place as a result of the operation of law. The Court did not suspend the operation of the gazette notice, it simply maintained the status quo as 19/11/21 which was not impactful as operationalization had been effective since the 2/11/21.

53. I do not think in the circumstances the threshold for contempt of the Court as set out in *Samuel M. N. Mweru & Others*(supra) and cited with approval in *HMI v KBH* [2021] eKLR has been met. In this case the Court observed:

“It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove



- (i) the terms of the order,
- (ii) Knowledge of these terms by the Respondent,
- (iii) Failure by the Respondent to comply with the terms of the order.

Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated:-

"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

- a. the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- b. the defendant had knowledge of or proper notice of the terms of the order;
- c. the defendant has acted in breach of the terms of the order; and
- d. the defendant's conduct was deliberate..."

54. Although the Court was emphatic in *Republic v Kenya School of Law & 2 others Ex parte Juliet Wanjiru Njoroge & 5 others* (2015) eKLR; contempt of Court proceedings is essential for the maintenance of the rule of law and order and to ensure the authority and the dignity of the Courts is respected; this power must be exercised in clear-cut cases where deliberate disobedience has been clearly demonstrated.

55. As was cautioned by the Supreme Court in *Republic v Ahmad Abolfathi Mohammed & Another* [2018] eKLR

"This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order."

56. In the present case, I am of the view that the order of status quo was made in belief that the implementation of the legal notice number 227 of 2021 had not commenced yet it was in force and this is what made observance of the status quo problematic. There was apparent ambiguity and, in the circumstances, it is not feasible to make a finding of willful disobedience.

Whether this Court should review its Court Orders dated 19th November 2021

57. The guiding legal principles upon which Kenyan Courts make findings on grant of an order for review is explicitly provided for under Section 80 of the *Civil Procedure Act*, Cap 21 Laws of Kenya and Order 45 of the Civil Procedure Rules. These provisions provide as follows:

Section 80 - Review

Any person who considers himself aggrieved—



by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or 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.

Order 45 Rule 1

Any person considering himself aggrieved—

by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

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.

58. In the present case, the order made by the Court on 19/11/21 which indicated that the status quo be maintained meaning the Court did not at that time appreciate the legal notice was already in force by virtue of Section 23 of *Statutory Instruments Act*.

59. An application for review may be entertained for any sufficient reason as was held in *Republic v Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abulahi Said Salad* [2019] eKLR where the Court expressed itself as follows:

“30. A court can review a judgment for any other sufficient reason. In the case of *Sadar Mohamed vs Charan Signh and Another* [19] it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter. Mulla in the Code of Civil Procedure [20] (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression 'any other sufficient reason'...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement. [21]

31. I also find useful guidance in *Tokesi Mambili and others vs Simion Litsanga*[22] where they held as follows:-

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.



Where the application is based on sufficient reason it is for the Court to exercise its discretion.”

60. It is a fact that the Court did not consider the obvious implication of Section 23 (1) when making the order of status quo in respect to the gazette notice which by operation of law was already in force hence this constitutes a sufficient reason to re-examine the orders made on 19/11/2021 afresh as this situation led to indefiniteness that is how the genesis of the present controversy.
61. I am of the humble view that the order of 19/11/2021 as well as the clarification of 15/12/21 by J.A Makau J did not realize the intended objective due to its intrinsic challenge as demonstrated in the foregoing. I thus review and set aside the order. The parties should henceforth focus on the conclusion of the main petition.
62. I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF AUGUST, 2024.

.....

L N MUGAMBI

JUDGE

