



**Republic v County Executive Committee Member Finance & Economic Planning  
(County Government of Mombasa) & 3 others; Robinson Onyango Malombo t/  
a O.M Robinson Malombo & Co. Advocates (Exparte Applicant) (Judicial Review  
Application 06 of 2019) [2023] KEHC 3515 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3515 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
JUDICIAL REVIEW APPLICATION 06 OF 2019**

**OA SEWE, J**

**APRIL 27, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COUNTY EXECUTIVE COMMITTEE MEMBER FINANCE & ECONOMIC  
PLANNING (COUNTY GOVERNMENT OF MOMBASA) ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF OFFICER FINANCE (COUNTY GOVERNMENT OF  
MOMBASA) ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY ATTORNEY (COUNTY GOVERNMENT OF MOMBASA) .... 3<sup>RD</sup>  
RESPONDENT**

**COUNTY GOVERNMENT OF MOMBASA ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**ROBINSON ONYANGO MALOMBO T/A O.M ROBINSON MALOMBO & CO.  
ADVOCATES ..... EXPARTE APPLICANT**

**RULING**

1. The Notice of Motion dated 27<sup>th</sup> February 2023 was filed by the respondents pursuant to Section 1A, 1B, 3A and 63 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya as well as Section 21(4) of the *Government Proceedings Act* and Order 29 Rule 2 of the *Civil Procedure Rules*. They thereby sought orders that:

(a) Spent



- (b) Spent
  - (c) That the Court be pleased to review, vary, set aside and/or discharge the ruling delivered on 10<sup>th</sup> February 2023 and the ensuing order dated 10<sup>th</sup> February 2023.
  - (d) That the process server, Paul Odhiambo Outah, be compelled to attend court for cross-examination and thereafter, if found guilty be charged with perjury.
  - (e) That the costs of the application be provided for.
2. The application was premised on the ground that the cited public officer, Mr. Ridhwan Ayub Buhiri, was never served with the application dated 26<sup>th</sup> January 2023 as he was not in the office at the time of the alleged service. In support of the application, the respondents relied on the affidavit of Mr. Ridhwan, sworn on 27<sup>th</sup> February 2023. He deposed that he was shocked and surprised by the process server's averment he served him on 27<sup>th</sup> January 2023 at the County Government offices in Mombasa. He averred that he was not in the office on that day as he was bereaved, having lost his mother on 23<sup>rd</sup> January 2023. He added that he was away on compassionate leave and exhibited a copy of the burial permit as Annexure RAB-1 to his affidavit in proof of his assertions.
  3. In response to the application, the applicant filed a Replying Affidavit on 6<sup>th</sup> March 2023 contending that the application is nothing more than a smoke-screen to the real issue before the Court, namely that Mr. Ridhwan is in breach of the Court Order dated 28<sup>th</sup> September 2020. He further averred that Mr. Ridhwan was duly served and was aware that his attendance was required on 14<sup>th</sup> March 2023. Thus, the applicant prayed for the dismissal of the application.
  4. The application was canvassed by way of written submissions; to which end, Mr. Tajbhai relied on his written submissions dated 24<sup>th</sup> March 2023. He proposed a single issue for determination, namely, whether the application for review should be allowed and the orders sought granted. He insisted that the affidavit of service was misleading and urged that the alleged contemnor be given a fair chance to defend himself. He relied on *Shirin Amirali t/a Cefa Enterprises Ltd & another v Elimu Investments Ltd & another* [2021] eKLR and *Stephen Maina Gitbiga & 5 others v Kiru Tea Factory Company Ltd* [2020] eKLR to underscore the fact that contempt proceeding may lead to imprisonment and therefore allegations of breach of the right to fair hearing ought to be given due consideration.
  5. On his part, Mr. Gomba proposed more or less the same issue for determination, but differently put, that is to say, whether the application is meritorious. While empathizing with Mr. Ridhwan for the loss of his mother, Mr. Gomba pointed out that there is nevertheless no proof that Mr. Ridhwan was on compassionate leave as at 27<sup>th</sup> January 2023 when service was effected. In his view, instead of exhibiting the burial permit, what ought to have been produced was the leave form. On whether the respondents' have met the conditions for grant of review, Mr. Gomba made reference to *Jamii Bora Bank Ltd & another v Samuel Wambugu Ndirangu* and urged for the dismissal of the application for having fallen short of the established threshold.
  6. Mr. Gomba also submitted at length on whether the 2<sup>nd</sup> respondent can be heard before purging his contempt. He relied on *Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Coordination of National Government v Miguna Miguna & 4 others* [2018] eKLR in urging the Court to hold that the 2<sup>nd</sup> respondent does not deserve a hearing, granted his defiance of the orders of the Court. I however, have no hesitation in disregarding those arguments, as well as the response thereto by counsel for the respondents, on the ground that the Court had occasion to entertain them on 14<sup>th</sup> March 2022 and gave directions accordingly.



7. Thus, the only issue for determination is whether the respondents have made out a good case for review of the ruling and orders dated 10<sup>th</sup> February 2023. Although not specifically cited, review is governed by Section 80 of the [Civil Procedure Act](#) and Order 45 of the [Civil Procedure Rules](#), 2010. Section 80 states: 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.
8. Order 45 Rule 1 of the [Civil Procedure Rules](#), on the other hand provides that:
- (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.
  - (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.
9. Thus, in an application for review, one must prove;
- (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) 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 un-reasonable delay.
10. In the present application, the respondents have neither alleged nor demonstrated that there has been discovery of new and important matter or evidence, or that there is an error apparent on the face of the record. I note however that the impugned order was the result of ex parte proceedings held on 7<sup>th</sup> February 2023 in respect of the applicants' application dated 26<sup>th</sup> January 2023. Accordingly, the more appropriate enabling provision would be Order 51 Rule 15 of the Civil Procedure Rules, which provides for the setting aside of ex parte orders made in respect of applications.
11. In the premises, the question to pose is whether sufficient cause has been made for the setting aside of the ex parte proceedings and ruling dated 10<sup>th</sup> February 2023. The 2<sup>nd</sup> respondent has demonstrated that around the time in issue, he was bereaved, having lost his mother. He exhibited a burial permit in



proof and I do not doubt that he must have been away from the office on compassionate leave, judging by the date of death of as shown in the burial permit. It is pertinent to bear in mind the words of Lord Denning MR in *Re Breamblevale Ltd* [1969] 3 All ER 1062, at page 1063, that:

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved.”

12. For the above reasons, it is my finding that the Notice of Motion dated 27<sup>th</sup> February, 2023 is meritorious. The same is hereby allowed and orders granted as hereunder:

- (a) That the ruling delivered herein on 10<sup>th</sup> February 2023 and the ensuing order dated 10<sup>th</sup> February 2023 be and are hereby set aside.
- (b) The application dated 26<sup>th</sup> January 2023 be served forthwith for consideration inter partes.
- (c) That the costs of the application be costs in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27<sup>TH</sup> APRIL 2023**

**OLGA SEWE**

**JUDGE**

