**Kihingo Village (Waridi Gardens) Management Limited v Attorney General & 2 others (Judicial Review E033 of 2023) [2023] KEHC 25386 (KLR) (Judicial Review) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 25386 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**JUDICIAL REVIEW**

**JUDICIAL REVIEW E033 OF 2023**

**JM CHIGITI, J**

**OCTOBER 26, 2023**

**BETWEEN**

**KIHINGO VILLAGE (WARIDI GARDENS) MANAGEMENT LIMITED ..... APPLICANT**

**AND**

**THE HONORABLE ATTORNEY GENERAL ..... 1ST RESPONDENT**

**THE REGISTRAR OF COMPANIES (BUSINESS REGISTRATION SERVICES) ..... 2ND RESPONDENT**

**JAMES NDUNGU GETHENJI ..... 3RD RESPONDENT**

**RULING**

1. The Application before this court is dated 25th May 2023 wherein the Applicant seeks orders that:
    1. Spent
    2. Spent
    3. The court be pleased to urgently review and set aside the Ruling dated 24th May 2023 and re-hear the Applicant's Notice of Motion dated 15th March 2023 on the merits on the basis of the filed submissions.
    4. The judgment be delivered on or before 15th June 2023 in accordance with Section 8 of the Fair Administrative Actions Act.
    5. Costs of this application in favour of the Applicant.
2. It is supported by the Affidavit deponed by Allen Waiyaki Gichuhi SC

**Brief background:**

3. On this court rendered a judgment that informs the application for review.

4. The issue of whether or not an applicant needs leave before moving the court for judicial review orders was at the heart of the judgment. In arriving at the decision the court analyzed the law, the evidence, the pleadings and the authorities cited by the parties.

**Applicant's Case**

5. It is the Applicant's case that Article 10(1) (a) & (b) of *the Constitution* enjoins the court to be bound by national values and principles of governance in the manner of interpreting and applying *the Constitution* and the law. The superior court is bound under Article 163 (7) of *the Constitution* to apply the law as interpreted by the Supreme Court.

6. The Applicant has set out the summary of the principles of stare decisis as espoused by the Supreme Court cases in Geoffrey M. Asanyo & 3 others v Attorney-General [2020] eKLR (Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others [2014] eKLR:

> " Article 163 (7) of *the Constitution* is the embodiment of the time-hallowed common law doctrine of stare decisis. It holds that the precedents set by this Court are binding on all other Courts in the land. The application, utility and purpose of this constitutional imperative are matters already considered in several decisions of this Court."

7. In the case of Kidero & 5 Others v. Waititu and Others, Sup. Ct. Petition No. 18 of 2014(Consolidated with Petition No. 20 of 2014) the court held thus;

> " The principle of stare decisis in Kenya unlike other jurisdictions is a constitutional requirement aimed at enhancing certainty and predictability in the legal system The Articles of establishment and jurisdiction reveal the Court's vital essence and the decisions of this Court protect settled anticipations by ensuring that *the Constitution* is upheld and enforced, and that the aspirations of the Kenyan people embodied in a system of constitutional governance are legitimized. The constitutional contours of Article 163(7) oblige this Court to settle complex issues of constitutional and legal controversy, and to give jurisprudential guidance to the lower Courts."

8. It is the Applicant's case that the Court of Appeal decision was per incuriam when it affirmed the High Court decision of Republic vs. Retirement Benefits Authority Ex parte Alex Anyona Momanyi & 6 others [2021] eKLR that was also per incuriam, instead of following the Supreme Court decisions (which it never cited or considered) when it held at paragraph 24 that leave was required under Order 53 of the *Civil Procedure Act* when proceeding under *Fair Administrative Action Act* when it held that the common law principles for leave still subsists under the 2010 Constitution and that leave was mandatorily required under section 12 of the Fair Administrative Actions Act.

9. The applicant argues that the court erred by dismissing the judicial review application for want of leave when Articles 10(2), 23(3), 47 and 50 of *the Constitution* and Section 11(1) of the Fair Administrative Actions Act specifically address the various appropriate reliefs and structural interdicts that the court can grant that are just and equitable. Reliance is placed in the Mitu Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) confirmed that structural interdicts are part of the remedies that a court could fashion to remedy a violation of fundamental rights and freedoms.

10. The court is bound by the Supreme Court decisions in John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) where it held that:

> " *The Constitution* of Kenya, 2010 and subsequent enactment of the *Fair Administrative Action Act* No 4 of 2015 have sought to allow the courts to consider certain aspects of merit when considering an application for judicial review. The High Court in Martin Nyaga Wambora v Speaker of the Senate [2014] eKLR it is clear that they - articles 47 and 50(1) - have elevated the rules of natural justice and the duty to act fairly when making administrative, judicial or quasi-judicial decisions into constitutional rights capable of enforcement by an aggrieved party in appropriate cases.

11. The Applicant cites the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR the Court held as follows;

> " However, notwithstanding our findings based on the common law principles of estoppel and res- judicata, we remain keenly aware that *the Constitution* of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law.
>
> The eminent Kenyan Professor James Thuo Gathii in "The Incomplete Transformation of Judicial Review" LI A Paper presented at the Annual Judges' Conference 2014: Judicial Review in Transformative Constitutions: The Case of the Kenya Constitution, 2010, Safari Park Hotel, August 19, 2014 warns that:
>
> "The Kenyan judiciary must guard against the development of a two-tracked system of judicial review. One that looks like the old cases influenced by the common law, on the one hand, and cases that are decided under the 2010 Constitution's principles of judicial review [on the other]. Those two tracks are likely to undermine the establishment of a vibrant tradition of judicial review as required by the 2010 Constitution." [emphasis added]

12. It also cites Saisi & 7 others v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment) the court held:

> " Post *the Constitution* of Kenya, 2010, judicial review was no longer a common law prerogative, but was entrenched in *the Constitution* to safeguard the constitutional principles, values and purposes. In particular, article 23 (3)(f) provided for the orders of judicial review as one of the available remedies concerning the enforcement of the Bill of Rights. Article 47(1) of *the Constitution* guaranteed every person the right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. Article 165(6) granted the High Court supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. In 2015, Parliament in adherence to article 47 of *the Constitution* enacted the *Fair Administrative Action Act*, No. 4 of 2014, Laws of Kenya (FAA Act). The Fair Administrative Actions Act provided the parameters of judicial review to be the power of the court to review any administrative or quasi-judicial act, omission or decision of any person, body or authority that affected the legal rights or interests of an aggrieved person. The judicial review court examined various aspects of an act, omission or decision including whether the body or authority whose decision was being challenged had done something which it had no lawful authority to do. It could have abused or misused the authority which it had. It could have departed from procedures which either by statute or at common law as a

matter of fairness it ought to have observed. As regards the decision itself it could be found to be perverse, or irrational, or grossly disproportionate to what was required. The parameters were set out extensively in section 7 of the Fair Administrative Actions Act (FAAA)."

13. In order to buttress its argument that leave is no longer required to institute judicial review, the Applicant relies on:

    a. Matagei v Attorney General; Law Society of Kenya (Amicus Curiae) (Petition 337 of 2018) [2021] KEHC 460 (KLR)

    b. Republic v Kenya Revenue Authority Ex-Parte Stanley Mombo Amuti [2018] eKLR

    c. Republic v Speaker of the Senate & another Ex parte Afrison Export Import Limited & another [2018] eKLR

    d. JJ Okwaro & Co Limited v Firearms Licensing Board [2021] eKLR In this matter, Review necessary in the face of miscarriage of justice

14. It is the Applicant's case that the court has jurisdiction to allow the review application to avoid a miscarriage of justice occasioned on the basis of a mistake and an error apparent on the face of the record as was held by the Court of Appeal in Benjoh Amalgamated Limited & Muiri Coffee Ltd v Kenya Commercial Bank Ltd [2014] eKLR that:

> " The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court)." [emphasis mine]

15. The Applicant's also cite Supreme Court in Manchester Outfitters (Suiting Division) Ltd (now known as King Wollen Mills Ltd) & another v Standard Chartered Financial Services Ltd & 2 others [2019] eKLR where it held that "the justice principle" favours limited review predicated on the basis that the object of litigation is to do justice. The court further held that the finality principle is urged on the basis of public interest as a public policy issue and is premised on the need for stability and consistency in law while the justice principle is urged on the basis of justice to the parties.

16. The Applicant also argues that the Supreme Court has re-affirmed that no leave is required under *the Constitution* in Petition No. 6 (E007) of 2022 Edwin Dande & Others v The Inspector General, National Police Service & Others where it reaffirmed that no leave is required when filing a suit seeking constitutional redress under Article 47 of *the Constitution*.

**The 1st Respondent's case:**

17. According to the 1st Respondent, the application offends the provisions of Section 8(3 &5) of the *Law Reform Act* and Order 45 of the Civil Procedure Rules 2010.

18. It argues that there is no discovery of new and important evidence which was not in possession of the applicant at the time the Judgment was delivered and that there is no error apparent on the face of the record or any other sufficient reason to warrant a Review.

19. The 1st Respondent argues that the application is actually an Appeal.

**The 3rd Responden'ts case:**

20. According to the 3rd Respondent, there is no error apparent on the face of the record or mistake, no new evidence that was not in the knowledge of the Applicant at the time when the ruling was issued that would warrant the review and setting aside of the orders issued by the Honorable Court on 24th May 2023.

21. Further, it states that the decisions which the Applicant refers to as a basis for no need of leave in judicial review proceedings are speaking to instances where prerogative orders are sought within the context of *the Constitution*. Petitions to enforce the bill of rights and the power of the Honourable Court to issue the prerogative orders in such proceedings while the present proceedings did not seek issuance of prerogative orders within a constitutional petition that would be used as a basis to assert that the matter is exempt from leave at a preliminary stage before commencing the proceedings.

22. Reliance is placed in the case of in Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR and Republic v Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abulahi Said Salad [2019] eKLR.

23. The Respondent urges the court to adopt the following principles;

    a. An erroneous order can only be corrected through an appeal and not through a review.

    b. Once the Honourable Court rendered itself on the legal question an aggrieved party can only seek to appeal.

    c. Parties having made submissions on the matter and the Learned Judge having arrived at a decision, the said decision is not open for a review.

**Analysis and Determination**

24. I have carefully considered the Application, Grounds of opposition, the replying affidavits, and respective submissions and authorities of the parties' and the following are the issues for determination;

    i. Whether the Application has fulfilled the Principles of review and setting aside of the Judgment.

    ii. Whether the Court is functus officio.

    iii. Whether the Applicant has fulfilled the Principles of review and set aside the Ruling.

25. Review of court decrees or orders is provided for within the provisions of section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 donates power to the plaintiff to move this court and equally grants jurisdiction to this court while Order 45 sets out the rules. Reviews are also pivoted on sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*. Generally, they

stipulate the objectives of the act and the overarching duties of courts. I will highlight the important provisions of the law as follows;

> " 80. 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".

26. While order 45 rule 1 (1) provides as follows:

> " 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".

27. In Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 John M. Mativo Judge (as he then was) culled out the following principles from a number of authorities which included: -

i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

ii. The expression "any other sufficient reason" appearing in Order 45 Rule I has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/ tribunal earlier.

28. I am in agreement with the finding in the case of Republic v Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abulahi Said Salad [2019] eKLR the Court held that;

> " 13. A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission is not self-evident. It requires an elaborate argument to be established.

29. In its detailed submissions dated 24th April 2023 at paragraph 11, the Applicant had submitted on the issue whether leave is necessary before commencing judicial review proceedings.

30. The court had opportunity to consider the submissions by the Applicant when it rendered itself that leave was a necessary perquisite before judicial review proceedings can be commenced.

31. Once a court has rendered itself on a matter, it should not be invited to review its finding based on how the court carried out the interpretation of the law. An aggrieved party's claim lies on appeal and I so hold.

32. The court applied its mind to the law and this cannot be equated to a mistake or error on the face of the record and there is no discovery of any new evidence that would warrant the Honourable Court to review its order under Section 80 of the *Civil Procedure Act* or Order 45 of the Civil procedure rules.

33. In any event the court is functus officio and it cannot reopen the issue of leave since to do so would be to seat on appeal.

34. In the case of Fredrick Otieno Outa v Jared Odoyo Okello & 3 others [2017] eKLR the Supreme Court laid down the principles which a Court would need to evaluate before proceeding to review its previous decisions and whether it had the power to do the same.

35. The court in Manchester Outfitters (Suiting Division) Ltd (now known as King Wollen Mills Ltd) & Another v Standard Chartered Financial Services Ltd & 2 others [2019] eKLR held as follows:

> "(53) These broad principles were further refined in the Outa case at paragraph 92 to read: 'Taking into account the edicts and values embodied in Chapter 10 of our Constitution, we hold that as a general rule, the Supreme Court has no jurisdiction to sit on appeal over its own decisions nor review its decisions other than the manner already stated at paragraph 90 above. However, in exercise of its inherent powers, this court may upon an Application by a party, or on its own motion, review, any of its Judgments, Rulings or Orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances are limited to situations where:
>
> i. The Judgment, Ruling, or Order, is obtained, by fraud or deceit;
>
> ii. The Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;
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> iii. The Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto;
>
> iv. The Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of a deliberately concealed statutory provision.

(54) What emerges from this disposition is that the Court of Appeal, being the final Court of the land before the enactment of the 2010 Constitution, did not have the residual jurisdiction to review or sit on appeal on its own matters. However, as it has emerged, the Court has since 2010, in some cases, expressed the wherewithal to exercise its inherent jurisdiction in circumstances that it deemed warranted the exercise of that jurisdiction. The latter is our position although we are cognizant of the fact that there are no constitutional or statutory provisions that allow this Court to sit on appeal or review of its own decisions as the final arbiter. We may however, as in the circumstances highlighted in both Rai 2 and Outa cases, review previous decisions and/or depart from previous judgments if the principles as set out in the two cases are satisfied. Judicial precedent necessitates that we sustain that position.

(55) In applying the same principles to this case, therefore, we note for example that the High Court, not being a Court of final determination of disputes, as was the Court of Appeal prior to 2010, has the jurisdiction to review its Judgments by dint of powers conferred by Section 80 of the *Civil Procedure Act* as read with Order 45 of the Civil Procedure Rules. It would be absurd that the Supreme Court, following the Rai and Outa decisions can review its decisions as the Apex Court while the Court of Appeal should not, in appropriate cases, exercise the same power.

(56) In the circumstances, the Nguruman decision by the Court of Appeal is not only a sound exposition of the law post 2010 but is also reasonable, pragmatic and we can but only agree with the Court of Appeal in that regard.

(57) In the end, we find no justifiable fault in the decision of the appellate Court to re-open and hear fresh the matter before it, as the previous Judgment, based on their consideration of the facts and circumstances, would be deemed as one in which the issues in context must be relooked at afresh."

**The issue of functus officio:**

36. The Supreme Court in the case of Raila Odinga & 2 others v Independent Electoral & Boundaries Commission, Ahmed Issack Hassan, Uhuru Kenyatta & William Samoei Ruto (Petition 5, 4 & 3 of 2013) [2013] KESC 8 (KLR) (Civ) (24 October 2013) (Ruling) held as follows on the doctrine of functus officio;

> " 18. We, therefore, have to consider the concept of "functus officio," as understood in law. Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832, has thus explicated this concept: "The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

19. This principle has been aptly summarized further in Jersey Evening Post Limited v A1 Thani [2002] JLR 542 at 550:"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available" [emphasis supplied]."

37. In the Court of Appeal in Benjoh Amalgamated Limited & Muiri Coffee Ltd v Kenya Commercial Bank Ltd [2014] eKLR the court held that:

> " The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice."

38. It is my finding that this court gave a decision on 24th May 2023. An aggrieved party can lodge an appeal to a superior body. This not being a court is of final resort it cannot revoke or vary its decision and I so hold.

**Disposition:**

39. The Application dated 25th May, 2023 lacks merits and the same is disallowed.

**Orders:**

The Application dated 25th May 2023 is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH OCTOBER 2023**

**.....**

**JOHN CHIGITI (SC)**

**JUDGE**