REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CONSTITUTIONAL PETITION NO. 19 OF 2020

(FORMERLY PETITION NO. 449/19 CONSTITUTIONAL AND

HUMAN RIGHTS DIVISION-MILIMANI LAW COURTS NAIROBI)

IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL

RIGHTS AND FREEDOMS OF CONSTITUTIONAL VALUES AND PRINCIPLES

AND

IN THE MATTER OF ARTICLE 1,2,10,22,23,27,47,50 AND 232 OF THE

CONSTITUTION OF KENYA 2010, AS READ WITH THE COUNTY GOVERNMENT ACT,

THE FAIR ADMNISTRATIVE ACTIONS ACT, THE PUBLIC APPOINTMENT

(COUNTY ASSEMBLIES APPROVAL) ACT AND ALL OTHER

ENABLING PROVISIONS OF THE LAW

AND

IN THE MATTER BETWEEN

COUNTY ASSEMBLY OF KITUI.....PETITIONER

VERSUS

THE GOVERNOR, KITUI COUNTY GOVERNMENT.....1ST RESPONDENT

JOSHUA KIMWETICH CHEPCHIENG.....2ND RESPONDENT

AND

THE KITUI COUNTY GOVERNMENT.....1ST INTERESTED PARTY

THE PUBLIC SERVICE COMMISSION.....2ND INTERESTED PARTY

R U L I N G

1. Before me, is an application by the Respondents/Applicants by way of a **Notice of Motion** dated **22nd March, 2021,** asking for the following reliefs/Orders: -

i. Spent

ii. Spent

iii. Spent

iv. That this Hon. Court be pleased to review, vary and/or set aside the judgement and/or orders of the Hon. Court made on 15th March, 2021 and substitute the same with an order for compliance with the Constitution and Statute referred to in the Petition herein, within some timelines to be stipulated in the order.

v. That this court be pleased to grant any other order as it may deem necessary and/or fit to grant.

vi. Cost of this application.

2. The applicants have made this application on the following grounds: -

a. That on 11th November, 2019, the Petitioner filed the Petition herein, seeking orders that the appointment of the 2nd Respondent as the Kitui County Secretary was illegal and unconstitutional.

b. That the Petition was heard before this Hon. Court and judgement was delivered on 15th March, 2021 in favour of the Petitioner.

c. That the Applicants are aggrieved by the judgement and are seeking to stay the judgement.

d. That the Applicants are also praying that this court be pleased to review the judgement with a view to maintaining the status quo.

e. That if the judgement is executed, the Applicants stand to suffer irreparable harm and that there is new evidence that was never presented during trial.

f. That the 2nd Respondent holds office of County Secretary legally under ***Section 44 of the County Government Act*** *and he is not in office illegally.*

g. That he was seconded from the office of the President pursuant to ***Section 42 of the Public Service Commission Act.***

h. That the County Secretary the 2nd Respondent herein, is in charge of all schedules and activities of the County Government of Kitui and his absence in the County will paralyze all County activities and operations.

i. That the County Secretary has executed crucial contracts for the county of Kitui in both domestic and international forums. Some of the international contracts that he has executed are between the County Government of Kitui and the National Government.

j. That the 2nd Respondent/Applicant has further executed international contracts regarding mining of minerals in Kitui County, the contracts herein, will be jeopardized if the 2nd Respondent/Applicant is not in office.

k. That if the appointment of the 2nd Respondent/Applicant and the services that he rendered for the County Government of Kitui are declared null and void, the County Government will be in crisis and will experience a lot of unnecessary chaos and multiplicity of suits against the County Government of Kitui.

l. That the Applicant/Respondents pray that Conservatory orders be granted herein, by the Honourable Court as provided for under ***Article 23(3)(c) of the Constitution of Kenya 2010*** *with a view of maintaining status quo.*

m. That it is in the interest of substantive justice and fairness and more in the interest of the residents of Kitui County that stay be granted to the applicants and review of the judgement therein, with a view to validate the irregular issues that had been pointed out by the Honourable Judge in the Judgement.

n. That review of the judgement can be done by the trial court as provided for under ***Section 80 of the Civil Procedure Act*** *and all other enabling provisions of the law.*

o. That Petitioner, stands to suffer no harm or prejudice should the orders sought herein be granted.

p. That the Applicant prays that the orders prayed for herein, be granted by this Honourable Court.

3. The Applicants have supported the above grounds with an affidavit sworn on 22nd March, 2021, by one Caroline Musango, the County Attorney to the 1st Respondent where she has reiterated the grounds listed above. The deponent adds that, the 2nd Respondent has been diligent in his duties.

4. She avers that, this court can review its judgement under ***Section 80 of the Civil Procedure Act*** adding that, the Respondent/Applicant stands to suffer irreparably unless the judgement is revised.

5. At the oral hearing of this application, the Applicants Counsels submitted that, when they came on record for the Applicants after judgement had been rendered, they discovered new facts/evidence which prompted the Applicants to make this application. When pressed to show what the evidence was, counsel for the Applicants referred me to what he termed *''local and international contracts''* but was at pains to show copies of those contracts or the nature of the same. Counsel however, insisted that the 2nd Respondent had committed the 1st Respondent in the alleged contracts and that the differences between the Petitioners and the Respondents have since been resolved and the hatchet buried. He asked this court to allow the 2nd Respondent in this petition, continue serving despite conceded fact that, his appointment had breached the Constitutional and statutory provisions.

6. The Petitioners/Respondents, have opposed this application vide grounds of opposition dated 30th March 2021.

7. The Respondents aver that, the Applicants have not adduced new evidence to warrant review, pointing out that, the affidavit of Caroline Musango has not revealed what new evidence was and which were not within their knowledge before the decree was passed after due diligence on their part.

8. The Respondents, through Learned Counsel Mr. Muinde submitted that, this court is now *fuctus officio* on the issues brought up in this application. He pointed out that, the appointment of the 2nd Respondent was declared illegal, null, void and unconstitutional.

9. The Respondent further contends that, the Applicants have not demonstrated any error or mistake apparent on the face of the record or any sufficient reasons to warrant review and ask this court to dismiss the application with costs.

10. This court has considered this application and the Response made. The Applicants have cited numerous sections of the law but basically what the Applicants have invoked are, revisionary powers of this court under ***Order 45 Rule 1 of Civil Procedure Rule*** **and** ***Section 80 of the Civil Procedure Act.***

11. ***Section 80 of the Civil Procedure Act*** provides as follows: -

> *''Any person who considers himself aggrieved: -*
>
> ***a. By a decree or order from which an appeal is allowed by the Act, but from which no appeal has been preferred, or***
>
> ***b.. By a decree or order from which no appeal is allowed by the Act, may apply for review of judgement to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit…''***

12. The provisions of ***Order 45 Rule 1*** clearly stipulate; when a party can invoke the revisionary jurisdiction of a court. It provides;

> ***''…(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.(Emphasis added).***
>
> ***(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…...''***

13. From the above provisions, it quite apparent that for an application for revision to be sustained, it has to demonstrate the following; -

> *i. A discovery of new fact or evidence which after exercise of due diligence was not either within the knowledge of the Applicant or could not be adduced at the time the decree or order was made.*
>
> *ii. A clerical mistake or error on the face of the record decree/order.*
>
> *iii. Any other sufficient cause to warrant* ***review.***

14. This court has gone through this application for review and even put the Applicants' Counsel placed me to task to really explain to this court what the new evidence was if any, but the applicants were scanty because for instance, what is being referred to international and local contracts by the applicants are the exhibits in the supporting affidavit, is headed; ***''a consultative meeting between County executive and the County Assembly from 8th December to 14th October, 2019 at SAI ROCK BEACH HOTEL & SPA MOMBASA''***. The applicants counsel was pressed to explain the nexus between a Consultative meeting and ''local and international contracts'', and all he could say was that, that was the venue where the hatchet between the Petitioners and Respondents was buried. This court found the same a bit absurd because a consultative meeting and local and international contracts are two different things. This court was also not informed prior to the trial of the petition herein about any agreement or compromise between the parties and that is why the matter went for hearing. But besides that, there is nothing placed before me which is indicative of any contracts local or international signed by the 2nd Respondents and upon which this application is premised. The Applicants have not revealed any new facts or evidence at all.

15. What is patently clear from this application is that, the applicants have not shown any discovery of a new matter or evidence which were

not within their knowledge at the time of trial because there is none. I am persuaded by the decision cited by the Respondent in Duncan Ndegwa Ndegwa & Another versus Industrial Development Bank Limited & Another [2021] eKLR, where the court reiterated that an application for review can only be made after discovery of a new matter or evidence which was not within the knowledge of the Applicant after exercise of due diligence.

16. It is clear reading from the listed grounds under paragraph 6 (g) that the applicant felt aggrieved by the decision of this court but instead of preferring an appeal to overturn the decision, they have chosen the wrong option for review when they have not met the conditions listed under ***Order 45(1) of Civil Procedure Rules***.

17. The Applicants have made an interesting and strange submissions in paragraphs (g) and (m) of their grounds upon which this application is premised, which is to ask this court to review the judgement in order to validate irregularities noted in the appointment of the Respondent. The Applicants Counsel when pressed on how can a court turn its back on clear provision of the Constitution and the statute, he stated that review should be done because of the ''***handshake***'' between the Petitioners and the Respondents. For record, the unconstitutionality of the 2nd Respondent and illegality of the appointment cannot be cured or ''**sanitized''** through ''**handshake''** or a consent, even if there was such handshake (which was not established in any event). This court cannot be asked to review its judgement to attain a result that violates the Constitution of Kenya.

18. The question of the appointment of the 2nd Respondent and the secondment from the National Government, are matters that this court fully rendered itself in its judgement. This court agrees with the Respondent that it is now functus officio in so far as the legality of the appointment of the 2nd Respondent is concerned and the attendant discharge of his duties. Obviously, the Applicants through this application, want to have a second bite at the cherry but the hands of this court are tied because the issues are *res judicata* and this court is *functus officio*.

The long and short of this is that, the application dated 22nd March, 2021 is without merit. The same is dismissed in its entirety with costs to the Respondents to be taxed or agreed.

DATED, SIGNED AND DELIVERED AT KITUI THIS 26TH DAY OF JULY, 2021.

HON. JUSTICE R. K. LIMO

JUDGE