



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**PETITION NO. 24 OF 2015**

**THE PRINCIPAL SECRETARY, STATE DEPARTMENT OF PLANNING,**

**MINISTRY OF DEVOLUTION AND PLANNING.....1<sup>ST</sup> APPLICANT/ RESPONDENT**

**THE PRINCIPAL SECRETARY,**

**MINISTRY OF FINANCE & NATIONAL TREASURY ....2<sup>ND</sup> APPLICANT/ RESPONDENT**

**VERSUS**

**PETER O. NYAKUNDI & 68 OTHERS.....RESPONDENT/ PETITIONER**

**RULING**

1. In a Petition dated 07/05/2015, the Petitioners herein sued the Respondents for alleged violations of their constitutional rights — including the anti-discrimination clause in Article 27 of the Constitution – and asked for the following remedies reproduced here verbatim:

- a) A declaration that the Respondents' actions are in violation of Articles 10 and 232 of the Constitution.*
- b) A declaration that the Respondents have violated the Petitioners' rights guaranteed under Articles 27, 28, 29, 43 and 47 of the Constitution.*
- c) An order that the Respondents produce copies of the Level III Register of internally displaced persons registered at Saw Mill Camp – Molo and an account of the beneficiaries of the money and land allocated for the resettlement of the said internally displaced persons.*
- d) An order that the Respondents do pay Kshs. 35,000/-and allocate 2 ¼ acres to each petitioner.*
- e) An order that the Respondents do pay general damages to the Petitioners for violating their rights.*
- f) Costs of this petition.*
- g) Any other relief that this Honourable Court may deem fit and just to grant.*

2. The Petitioners prevailed in the litigation. By a judgment dated 30/09/2016, the Learned Justice M. Odero found in their favour. The disposition of the case, reproduced verbatim, was as follows:

*In conclusion, based on the foregoing, I find that:*

- (i) The Petitioners herein are victims of the 2007/2008 post-election violence who were entitled to compensation but have not been compensated.*
- (ii) The 1st Respondent [Principal Secretary, State Department of Planning, Ministry of Devolution and Planning] shall compensate the Petitioners in the same manner as it did for the other internally displaced persons (IDPs) within 90 days from the date of the judgment.*

(iii) *The Petitioners are awarded costs of this Petition.*

3. The Petitioners extracted a decree issued on 11/10/2016 which is in the exact terms as the judgment. In pertinent part it reads:

*IT IS HEREBY DECREED:*

1) *THAT the Petitioners herein are victims of the 2007/2008 post-election violence who were entitled to compensation but have not been compensated.*

2) *THAT the 1st Respondent [Principal Secretary, State Department of Planning, Ministry of Devolution and Planning] be and is hereby ordered to compensate the Petitioners in the same manner as it did for the other internally displaced persons (IDPs) within 90 days from the date of the judgment.*

3) *THAT the Respondents be and are hereby ordered to pay the Petitioners' costs of this Petition.*

4. The Petitioners' Counsel also went for Party and Party Costs taxation. In a ruling dated 10/10/2017, the Learned Deputy Registrar taxed the filed Bill of Costs at Kshs. 1,599,549.

5. Next, the Petitioners applied for a *Certificate of Order Against the Government* pursuant to Order 29 Rule 3 of the Civil Procedure Rules. The Learned Deputy Registrar issued one on 29/01/2018. It is important to reproduce it in its entirety. It reads thus:

*By a judgment of this Court dated the 30th day of September, 2016, it was decreed that:*

1) *THAT the Petitioners herein are victims of the 2007/2008 post-election violence who were entitled to compensation but have not been compensated.*

2) *THAT the 1st Respondent [Principal Secretary, State Department of Planning, Ministry of Devolution and Planning] be and is hereby ordered to compensate the Petitioners in the same manner as it did for the other internally displaced persons (IDPs) within 90 days from the date of the judgment.*

PARTICULARS:

a) *Payment of Kshs. 35,000/- to each Petitioner, 35,000 x69 = Kshs. 2,415,000.000.*

b) *Allocation of 2 ¼ acres of land to each Petitioner.*

3) *THAT the Respondents be and are hereby ordered to pay the Petitioners' costs which have been taxed and certified by the Registrar at Kshs. 1,599,549/= (One Million Five Hundred and Ninety-Nine Thousand, Five Hundred and Forty-Nine) only. Interest is payable on the said costs at 14% from the 10th day of October, 2017 until the date of the payment.*

6. Due to failure and/ or delay in complying with that Judgment, the Petitioners filed ***Nakuru Judicial Review No. 2 of 2019***. The Judicial Review Application seeks an order of *Mandamus* to compel the Respondents to pay the Petitioners the judgment debt of Kshs. 2,425,000, allocate each of them 2¼ acres of land and pay the Petitioners costs taxed and certified by the Registrar at Kshs. 1,599,549/- together with all accrued interest.

7. In an application dated 09/06/2020, the Respondents sought *inter alia* a stay of proceedings in the Judicial Review Cause, leave to lodge an appeal out time and a stay of execution pending the hearing of their intended appeal. The application was dismissed in its entirety, leaving the Judicial Review Cause to proceed.

8. On 03/12/2020 and after confirming that all parties had filed their submissions, judgment was set for 11/02/2021 in the Judicial Review Cause. As parties awaited judgment, the Respondents filed the application dated 12/01/2021, seeking to *inter alia* to arrest the judgment in the Judicial Review Cause and set aside Paragraph 2 of the *Certificate of Order Against the Government*.

9. The Petitioners also filed a counter-application dated 09/03/2021 seeking *inter alia* a review of the Judgment of 30/09/2016 to indicate specific figures. The two applications, by default, arrested the judgment in the Judicial Review Cause.

10. The Application dated 12/01/2021 by the Respondents seeks the following prayers:

1. *Spent*

2. *Spent*

3. *Spent*

4. *THAT the Court be pleased to review and or set aside the terms in paragraph number 2 of the Certificate of Order Against the Government.*

5. *THAT the costs of this application be in the cause.*

11. The Application is supported by the grounds on the face of it and the Affidavit dated 12/01/2021, sworn by Winnie Jebet Cheruiyot, Senior State Counsel. The Respondents' main assertion is that neither the Judgment nor the Petition specified the terms upon which other IDPs from Saw Mill in Molo were compensated and hence it was clear no award had been made in favour of the Petitioner.

12. The Respondents aver that other than the *Certificate of Order Against the Government*, there is no other pronouncement in the Judgment and in the Decree on payment of the said monies or allocation of land to the Respondents. To the Respondents, the *Certificate of Order Against the Government* is not a distinct decision and its terms must reflect and follow the Judgment, and not make and give orders that were not pronounced by the Court.

13. The Petitioners opposed the Application *vide* the Replying Affidavit dated 09/03/2021 sworn by Peter O. Nyakundi. They reject the assertion that neither the Petition nor the Judgment disclosed the decretal sum and state that the Petition and Judgment provide clearly how the other IDPs in Molo were compensated. They contend that the Respondents have not given any reason for the inordinate delay and if they were aggrieved by the *Certificate of Order Against the Government*, they would have challenged its validity immediately upon service. They therefore believe that the present application, just like the withdrawn application of 27/07/2020 is meant to frustrate their compensation.

14. They state that the Government cannot seek review and set aside paragraph 2 of the *Certificate of Order Against the Government* independently without first seeking a review of the judgment that gave rise to the Certificate of Order. To the Petitioners, the issues raised by the Respondents can only be addressed by way of Appeal and not review, for which they contend that the Respondents have not satisfied the conditions for review set out under Order 45 of the Civil Procedure Rules.

15. The Petitioners also contend that the Respondents have not shown the way the *Certificate of Order Against the Government* deviates from the Judgment of the Court and having remained in tented camps since the 2007/2008 Post Election Violence, any further delay in compensation continues to be highly prejudicial to them.

16. The Counter-Application by the Petitioners dated 09/03/2021 seeks the following orders

1. *THAT this honourable court be pleased to review the judgment delivered on 30th September 2016 to clearly order that the Petitioners should be compensated as the other Internally Displaced Persons were compensated as follows:-*

*THAT the Respondents be ordered to compensate the each of the Petitioners in the following terms:*

a. *Payment of Kshs. 10,000/= for start start-up and reconstruction of their burnt up or destroyed houses,*

b. *Payment of Kshs. 25,000/= for the reconstruction of their houses that were burnt or destroyed, and*

c. *Allocation of Land measuring 2¼ acres to each person displaced by the violence.*

d. *In the alternative to (c) above the respondents do pay each Petitioner a sum of Kshs 2,250,000 being the current cost of purchasing 2½ acres*

2. *THAT this honourable court be pleased to grant the Petitioners an appropriate remedy having found and held that their rights to fair and equal treatment under Article 27 of the Constitution had been infringed by the 1st Respondent in failing to accord them the benefit they were entitled to as victims of the post-election violence without any reasonable justification.*

3. *THAT the costs of the application be provided for.*

17. The Application is supported by the grounds on the face of it and the Affidavit of Peter O. Nyakundi dated 09/03/2021. The Petitioners says that they are seeking a review of the *Certificate of Order Against the Government* upon the realization that the government may be unable to allocate each of them 2 ¼ acres of land. As an alternative remedy, they propose that the government pay each of them the sum of Kshs. 2,250,00 which, they claim is the value of 2¼ acres of land in Molo. This is based on an estimate given by a valuer, one Kimengich Chepkosir.

18. The Petitioners' submissions are dated 04/06/2021. They submit that the problem with the Judge's finding was that it did not specify the way other IDPs were compensated. However, the Petitioners reiterate that the Petition set out the way the other IDPs were compensated, an averment which was not controverted by the Applicants through a Replying Affidavit. They cite the cases of ***Kipyator Nicholas Kiprono Biwott v George Mbuggus & Another [2000] eKLR and Phillip Tirop v Attorney General [2018] eKLR***

19. The Petitioners concede that there is an error apparent on the face of the record to wit, an unspecified manner of compensation, which error should be rectified to indicate specific manner of compensation. They reiterate that the Respondents having failed to file a Replying Affidavit or Grounds of Opposition, the Petition remained unopposed. They cite the provisions of Order 51 Rule 14 and the case of ***Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 Others [2018] eKLR.***

20. The Respondents' submissions are dated 26/04/2021. They cite the case of ***Republic v Public Administrative Review Board & 2 Others [2018] eKLR.*** They submit that the terms of review as sought by the Petitioners are beyond the ambit of review set out under Section 80 of the Civil Procedure Act and the terms of Order 45 Rule 1 of the Civil Procedure Rules. They contend that if the Learned Judge had intended to compensate the Petitioners in the manner alluded to in the Application, she would have expressly done so. Not expressly providing the same means that the compensation set out by the Petitioners was not the intention of the Court.

21. The Respondents submit further that the Petitioners' dissatisfaction with the judgment is evident since they are faulting the Court for failing to grant them the appropriate relief, awarding them 2¼ acres of land which the Respondents may not be able to settle and from them having previously filed and withdrawn a Notice of Appeal.

22. They argue that the Judge having exercised her discretion it is only proper to seek an order for review seeking a clarification of the judgment and not give the Court specific terms of compensation. To the Respondents, the Petitioners want the Court to rewrite the judgment and give specific orders.

23. They rely on the case of *Nasibwa Wakenya v University of Nairobi & Another [2019] eKLR* in support of their argument that in the absence of an error apparent on the face of the record and discovery of new evidence, there must be sufficient reason for a review. They also argue that it is impossible for the Court to review the Judgment in the terms sought by the Petitioners without looking at the Petition and the evidence, which amounts to a fresh hearing.

24. On the issue of the Certificate of Order, the Respondents are of the view that the same neither reflects the terms of the Judgment nor the extracted decree. This is because, they say, the Judge did not give specific orders as to what the Petitioners were to get.

25. They contend that neither the Petition nor the Judgment indicate that other IDPs in Molo Saw Mill area received the compensation indicated by the Petitioners. As such, that inference cannot be without proof. Lastly, they argue that the wording of Paragraph 31 of the Petition, does not indicate that the proposed compensation was the same given to IDPs in Molo Saw Mill Area and was never specifically stated in the Judgment.

26. From the two applications, there is on one hand, the Petitioners who want a review of the Judgment to essentially reflect the contents of the Certificate of Order arising from the Decree and Judgment of the Court and on the other hand, the Respondents who want part of the Certificate of Order providing for compensation to be set aside or reviewed.

27. Stripped of all technical nuances, this case presents a legal conundrum. As reproduced above, the Judgment delivered in the case ordered that "1st Respondent [Principal Secretary, State Department of Planning, Ministry of Devolution and Planning] shall compensate the Petitioners in the same manner as it did for the other internally displaced persons (IDPs) within 90 days from the date of the judgment." As the Petitioners readily concede, the judgment does not specify the manner in which the "other IDPs" were compensated. The extracted decree is faithful to this rendering of the judgment: it also does not contain any specificities of the manner of compensation. This must be because the judgment contained none. However, the *Certificate of Order Against the Government*, after reproducing the order in the judgment verbatim proceeds to add a paragraph which it describes as "particulars" and then adds the payment of Kshs. 2,415,000 as well as allocation of 2 ¼ acres of land to each Petitioner.

28. There is no doubt that these particulars are not derived from the decree. Neither are they derived directly from the judgment dated 30/09/2016. They are, to be fair, deduced from a reading of paragraph 31 of the Petition read with the second order in the judgment while utilizing a fair amount of literary licence. I say literary licence because in her analysis in the judgment the Learned Judge plainly found that the "other IDPs" had been compensated by the Government but did not make a specific finding akin to paragraph 31 of the Petition. The Court, therefore, made no specific finding on the manner the "other IDPs" had been compensated. The most the Learned Judge did was to make a finding that a compensation criterion existed and that it was knowable. As stated by the Learned Judge:

*As admitted by both parties there already exists an establishment criteria for compensation and resettlement. The Petitioners are entitled to benefit through compensation in the same terms that the other 206 IDP's from Saw Mill Molo received.*

29. As is plainly obvious, the Learned Judge did not make any finding of the criteria for compensation and resettlement actually used. It was, therefore, plainly an error for the Learned Deputy Registrar to insert in the *Certificate of Order Against the Government* the paragraph containing "particulars" which were not contained in the judgment or decree.

30. The question remains: can this Court now review the judgment to include the particulars the Petitioners now want included? It is without relish that I must make a legal finding that it would be to stretch the review jurisdiction impermissibly to do so. I say so because in the present case, as I have alluded to above, the Learned Judge did not make any specific factual findings about the manner in which the other IDPs from the Saw Mill IDP Camp had been compensated. The Court merely ordered that the Petitioners herein be compensated in like manner. To use the power of review at this juncture to make the orders the Petitioners now ask the Court to do would be a most unprocedural revision (as opposed to review) of the judgment rendered by the Court. This is because it would entail the making of factual findings not previously made in the guise of reviewing the judgment for an error apparent in the face of the record. Differently put, there is, here, no error apparent in the face of the record. There is a clear order by the Court but one which cannot be operationalized without further factual findings. Those factual findings will take the form of establishing exactly how the other "registered IDPs from the Saw Mill Molo IDP Camp" were compensated. This Court cannot make those findings in a review application as requested by the Petitioners. Indeed, it is unclear to me, without the benefit of arguments by the parties, what the appropriate probably *sui generis* (innovative) procedure could be used to resolve the conundrum presented in the case. What seems clear to me, however, is that however much one stretches the review jurisdiction, it cannot perform the function the Petitioners hope it would here.

**31. Consequently, I reluctantly must dismiss the Application dated 09/03/2021. By the same token, I must allow the Application dated 12/01/2021 to the extent that I find the Certificate of Order Against the Government contains an error, namely, the two paragraphs immediately following the inserted word "particulars". That part of the Certificate of Order Against the Government is not faithful to the decree or judgment and is hereby carved off.**

**32. Given the nature of these proceedings and the unfortunate circumstances the protagonists find themselves in, there will be no order as to costs.**

33. Orders accordingly.

**Dated and Delivered at Nakuru this 30<sup>th</sup> day of September, 2021.**

**JOEL NGUGI**

**JUDGE**

**NOTE:** This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.