



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

PETITION NO. 520 OF 2017

JIMI WANJIGI.....1ST PETITIONER

IRENE NZISA WANJIGI.....2ND PETITIONER

-VS-

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING NO. 3:

Introduction:

1. On 21st June, 2019, this Court delivered a judgment. So far, the judgment has not been stayed, set-aside and/or varied.
2. On 11th February, 2021, this Court found the 3rd Respondent herein in contempt of Court. The contemnor was ordered to comply with judgment, but not to date. That was *vide* Ruling No. 1.
3. On 18th November, 2021, this Court sentenced the 3rd Respondent herein, *Mr. George Maingi Kinoti*, to a 4-months' prison term for contempt of Court. That was *vide* Ruling No. 2.
4. On the same day, that is the 18th November, 2021, the 3rd Respondent, through the Hon. Attorney General, immediately filed a Notice of Appeal against the sentence. The Notice of Appeal was later withdrawn through a Notice of withdrawal dated 22nd November, 2021.
5. Upon withdrawal of the Notice of Appeal, the 3rd Respondent filed an application by way of a Notice of Motion dated 22nd November, 2021. The application was brought under a certificate of urgency.

The application:

6. The application sought the following orders: -

1. The application herein be certified as urgent and heard ex parte in the first instance.

2. This Honourable Court be pleased to stay the execution of the orders of the court made on 11 February 2021 and 18 November 2021 pending hearing and determination of this application.

3. *This Honourable Court be pleased to review, vary and or set aside its orders made on 11 February 2021 and 18th November 2021.*

4. *The costs of this application be provided.*

7. The application was made on 11 grounds. The grounds are as follows: -

1. *THAT this Honourable court on the 18th of November 2021 delivered its ruling on sentencing pursuant to an application for contempt of court wherein the 3rd Respondent was found guilty and sentenced to four months imprisonment.*

2. *THAT pursuant to the court's order of 18th November 2021, the 3rd Respondent is required to present himself to the Kenya Prison authorities within seven (7) days from the date of the said ruling.*

3. *THAT the court further directed that a Warrant of Arrest be issued against the 3rd Respondent if he fails to present himself within seven (7) days as aforesaid.*

4. *THAT the application for contempt of court was brought against the wrong parties as the custody of civilian firearms is with the Firearms Licencing Board established under Section 3 of the Firearms Act, Cap 114 of the Laws of Kenya.*

5. *THAT the respondents herein do not have any role in respect of civilian firearms as the same is the mandate of the Firearms Licencing Board.*

6. *THAT the 3rd Respondent has since written to the Honourable Attorney General instructing them to write to the Petitioner advocates and inform them to collect their firearms from the Firearms Licencing Board.*

7. *THAT by writing to the Honourable General instructing hi office to write to the Petitioner advocates advising them to inform the clients to collect their firearms from the Firearms Licencing Board, the 3rd Respondent has therefore purged the contempt herein.*

8. *THAT the Petitioner have not collected their firearms for reasons known to themselves.*

9. *THAT the Petitioner maliciously failed to disclose to this Honourable court material facts which if were disclosed, the court would have arrived at a different decision.*

10. *THAT the freedom and liberty of the 3rd Respondent is at stake and if the application herein is not heard and orders granted within 7 days as prayed, the 3rd Respondent will suffer irreparable loss and damage.*

11. *THAT it is only fair and just that the orders of this Honourable court made on the 11th February 2021 for contempt of court and 18th November 2021 for sentencing be set aside, varied and/or reviewed.*

8. Further, the application was supported by the affidavit sworn by the contemnor, Mr. George Kinoti on 19th November, 2021.

9. The application was opposed by the Petitioners through a Replying Affidavit sworn by Mr. Jimi Wanjigi, the 1st Petitioner, on 24th November, 2021.

10. On Court's directions, the application was heard *inter-partes* on 25th November, 2021. The Applicant was represented by Miss Mwangi, Counsel, who was led by Mr. Miller, Counsel. Mr. Otieno appeared for the Petitioners.

11. In urging the Court to allow the application, the Applicant posited that there was new evidence which demonstrated misjoinder and non-joinder of parties such that the contempt proceedings were initiated against a wrong party, the Applicant herein.

12. Given the effect of contempt proceedings on the liberty of a party, the Applicant urged this Court to allow the application.

13. Counsel for the Applicant made extensive submissions in expounding on the above ground. It was submitted that the mandate of the 3rd Respondent does not include the custody of civilian firearms. According to the Applicant, all civilian firearms are under the control and custody of the Firearms Licensing Board which is a creature of Section 3 of the Firearms Act, Cap. 114 of the Laws of Kenya.

14. The Applicant deponed that when the enforcement of the judgment in this matter was brought to his attention, he immediately informed the Hon. Attorney General to inform the Petitioners to collect the firearms from the Firearms Licensing Board (hereinafter referred to as '**the Board**').

15. It was further deponed that indeed the Hon. Attorney General did so, but instead the Petitioners' Counsel visited the Board aforesaid.

16. The Applicant referred to correspondences between the various parties on the issue in buttressing the contention that he was not in possession of the firearms, but the Board. It was, therefore, submitted that the correct party to have been cited for contempt of Court was the Board and not the Applicant, hence the misjoinder.

17. The Applicant further submitted that given the steps he took to direct the Petitioners where to collect his firearms, then he indeed purged any contempt on his part.

18. An appeal was made to this Court that it considers to enjoin the Board in these proceedings for purposes of enforcement of the judgment and to discharge the Applicant who stands to suffer a prison term for no disobedience on his part or at all.

19. The Applicant also urged this Court to be live to the fact that the Petitioners had, in one of their correspondences, confirmed that the licenses had expired and requested the Board to renew them accordingly. To the Applicant, the Petitioners were using the Court system to by-pass any legal regulation under the Firearms Act by holding firearms without current licenses. The Applicant submitted that the Petitioners' conduct amounted to abuse of the judicial process and that the Court should not allow that to happen in its glare.

20. Referring to Order 45 of the Civil Procedure Rules, the Applicant submitted that he had satisfied the conditions therein and urged this Court to exercise its discretion in his favour.

21. The Applicant also made a passionate appeal to this Court not to be influenced by the newspaper reports that he had vowed to go to jail rather than to comply with the orders of this Court. He drew the attention of the Court to the events that surrounded ***Milimani High Court Judicial Review No. 163 of 2021*** which was allegedly filed on his instructions.

22. The Applicant denied ever giving such instructions for the filing of the said matter. The Court was informed that the matter was subsequently withdrawn and investigations were underway to unearth the illegalities behind it. It was the Applicant's submission that the fraudsters who filed the matter rushed to the press and the media ran reports on the basis of the wrongful information. The Applicant denied ever taking part in the alleged interview with the media. On the basis of the foregoing, the Applicant pleaded with the Court not to be persuaded by the said media reports.

23. In the end, the Applicant urged the Court to allow the Notice of Motion as prayed.

The Response:

24. The Petitioners opposed the application. They relied on a Replying Affidavit sworn by the 1st Respondent on 24th November, 2021 and a List of Authorities of even date.

25. The Petitioners traced the history of the matter and submitted that the Applicant had failed to attain the threshold for review under Order 45 of the Civil Procedure Rules.

26. It was submitted that the issues of the custody and licensing of the Petitioners' firearms were *res judicata*. According to the Petitioners, the issue of custody was settled in the judgment of this Court whereas the issue of licensing of the firearms was also determined in ***Milimani High Court Judicial Review No. 46 of 2018***. As a result, the Petitioners submitted that the issue of the non-joinder and misjoinder did not arise and cannot in any way be considered as new evidence.

27. The Petitioners also submitted that there was evidence that the Applicant seized and carried away the Petitioners' firearms. Regrettably, the Applicant failed to demonstrate how and when the firearms left his custody to the Board. They urged this Court to treat the issue of the custody of the firearms by the Board as a non-issue at the moment.

28. On the threshold for review applications, the Petitioners submitted that the Applicant is guilty of laches since one of the orders sought to be set-aside was issued in February, 2021. Since then, the Applicant has been mute.

29. The Petitioners further submitted that the application ought to fail as a result of the conduct of the Applicant. According to the Petitioners, the Applicant has deliberately and persistently ignored the orders of the Court. That, he was convicted in February, 2021 and acted like nothing had happened. When he was invited to Court to tender mitigations, he again refused to attend and instead filed an affidavit regurgitating the very issues which the Court had long settled. He also made it clear that he was not able to comply with the orders of the Court. When he was sentenced, still the Applicant did not take it as a serious matter. He was asked to surrender to prison, and as usual, he refused. The Applicant then went to the media and publicly declared that he was not going to comply with the orders of the Court. The conduct of the Applicant cumulatively taken does not demonstrate any good faith as to attract the mercies of the Court, the Petitioners posited.

30. The Petitioners in drawing a parallel of this matter to the South African Constitutional Case No. CCT 52/21 ***Jacob Gedleyihlekisa Zuma vs. Secretary of the Judicial Commission of Inquiry into allegations of State capture, corruption and fraud in the Public sector including organs of State & Others*** submitted that at least the former President surrendered to prison unlike the Applicant and that the conduct of the Applicant has bound this Court to only one option, that is to dismiss the application.

31. On the basis of the foregoing, the Petitioners prayed that the application be dismissed with costs.

Analysis:

32. Review entails a Court making a departure from its earlier finding on an issue. A Court may do so on its own motion or upon application by a party. Review is discretionary.

33. In exercising such discretion, the Court must abide by the principles established for the exercise of such powers either by the law or settled judicial precedents.

34. The power of review in the High Court is anchored in the Civil Procedure Act, Cap. 21 of the Laws of Kenya and the Civil Procedure Rules, 2010.

35. **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 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.

36. **Order 45 Rule 1** of the Civil Procedure Rules, 2010 further provides for review in the following manner: -

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.

37. Courts have severally dealt with the issue of review. The Supreme Court in Application No. 8 of 2017, **Parliamentary Service Commission -vs- Martin Nyaga Wambora & others** [2018] eKLR, quoted with approval the findings of the East Africa Court of Appeal in **Mbogo and Another -vs- Shah** [1968] EA, upon establishing the following principles: -

[31] Consequently, drawing from the case law above, particularly Mbogo and Another v Shah, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:

i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.

ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;

iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.

iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.

v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.

vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:

a) as a result, a wrong decision was arrived at; or

b) it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.

38. The Court of Appeal in Civil Appeal No. 2111 of 1996, **National Bank of Kenya vs. Ndungu Njau** observed as follows in respect of reviews applications: -

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 must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceeds on an incorrect expansion of the law.

39. The import of Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules was considered by the High Court in Miscellaneous Application 317 of 2018, **Republic -vs- Advocates Disciplinary Tribunal Ex parte Apollo Mboya** [2019] eKLR. Upon considering comparative jurisprudence, the Court crystallized the principles for consideration in reviewing its own decisions as follows:

- 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 1 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.**
- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
- ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
- x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

40. Returning to the case at hand, the Applicant relied mainly on the ground of discovery of new evidence in support of the application. According to Order 45 of the Rules, for such a ground to succeed the Applicant must demonstrate '... 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...'

41. The above requirement can be equated to the evidence referred to as 'new and compelling evidence' in Article 50(6) of the Constitution. Speaking of such evidence, the Supreme Court in **Col. Tom Martins Kibisu vs. Republic** Petition No. 3 of 2014 (2014) eKLR presented itself thus: -

[42] We are in agreement with the Court of Appeal that under Article 50(6), "new and compelling evidence" means "evidence which was not available at the trial and which despite exercise of due diligence, could not have been availed at the trial"; and "compelling evidence" implies "evidence that would have been admissible at the trial, of high probative value and capable of belief, and which, if adduced at the trial would probably have led to a different verdict." A Court considering whether evidence is new and compelling for a given case, must ascertain that it is, a prima facie, material to, or capable of affecting or varying the subject charges; the criminal trial process, the conviction entered; or the sentence passed against the accused person.

42. In this case, the new evidence is that the Applicant is not in possession of the Petitioners' firearms (hence wrongly enjoined in the proceedings), but the Board and that the Petitioners do not hold any current firearm certificates to enable them to hold any civilian firearms.

43. I will now subject the Applicant's new evidence to the foregoing criterion.

44. The judgment rendered on 21st June, 2019 dealt comprehensively with the issue of who was in possession of the Petitioners' firearms and the manner in which the said firearms were seized from the Petitioners.

45. The Court found that the 3rd Respondent had filed *Milimani Chief Magistrates Court Misc. Criminal Application No. 3352 of 2017* and obtained a search warrant. On the strength of the search warrant, the officers of the 3rd Respondent then proceeded to raid the homes of the Petitioners in Muthaiga within Nairobi County and in Malindi within Kilifi County and seized the firearms now in issue.

46. In a Replying Affidavit sworn by No. 234102 *CI Joseph Gichuki* on 23rd October, 2017 which deponent described himself as a police officer attached to the 3rd Respondent in Nairobi and one of the investigating officers, the said officer deponed at paragraph 15 as follows: -

THAT we proceeded to search the house in the presence of the above persons and recovered five (5) Pistols, two (2) Assault Rifles and six hundred and forty-six (646) rounds of ammunition of different calibres all hidden in the kitchen ceiling. An inventory was prepared and signed by the police officers as well as the Petitioners' Counsel.

47. In paragraphs 54 to 61 inclusive of the judgment, the Court dealt with the manner in which the firearms were confiscated. In the end, the Court made the following final orders: -

a) A declaration be and is hereby issued that the 1st, 2nd and 3rd Respondents breached the petitioners' fundamental rights including the right to privacy guaranteed under Article 31 of the Constitution.

b) A declaration be and is hereby issued that the 1st, 2nd and 3rd Respondents' actions of confiscating the 1st Petitioner's licensed firearms was oppressive, unfair, unreasonable, irrational, abuse of power and illegal.

c) An order is hereby issued directing the 1st, 2nd and/or 3rd Respondent's to forthwith rerun to the 1st petitioner all firearms and ammunition taken from the petitioners' residence and in particular; one pistol make smith and Wesson Serial number SW99; One Glock Pistol Serial Number UAB 630; one Assault Rifle make Mini Archer Serial Number 2013/MIII attached with a Laser Serial UAB 646; One Assault Rifle make M4CQ Serial Number CN 005433/13; One Glock 19 Pistol Serial Number URG 798 and One Glock 19 Pistol Serial Number UAB 632.

d) The Respondents do bear cost of the petition.

48. It is, therefore, a fact that the issue of who is in possession of the Petitioners' firearms was settled in the judgment. The Court found that the firearms were in possession of the 3rd Respondent. That judgment has never been set-aside, reviewed or stayed. The issue of who is in possession of the Petitioners' firearms is, hence, *res judicata*.

49. It is of further importance to note that even though the 3rd Respondent contended that the firearms were in the possession and custody of the Board, no evidence was tendered to show how and when the said firearms were moved from the 3rd Respondent to the Board. The 3rd Respondent's position ran counter what Counsel for the 3rd Respondent urged the Court to take judicial notice of. This Court was reminded that all Government communications are in writing. In this case, no evidence was produced to confirm the manner and date when the 3rd Respondent transmitted the Petitioners' firearms to the Board.

50. In view of the lack of evidence to show otherwise, it remains a fact that the Petitioners' firearms are still in the possession and custody of the 3rd Respondent. Therefore, the contention by the 3rd Respondent that it is not in possession of the firearms fails and is hereby dismissed.

51. The other issue raised by the 3rd Respondent as forming the new evidence was the allegation that the Petitioners had no valid firearm licenses to be able to possess civilian firearms. Again, the issue was settled in the judgment in this matter and in Milimani High Court Judicial Review Application No. 46 of 2018 **Republic vs. Firearms Licensing Board & Others ex parte Jimi Wanjigi**.

52. From the foregoing, it is, therefore, clear that the issues raised as forming the new evidence were actually settled by Courts and in favour of the Petitioners. The upshot is that the Applicant failed to prove that there was any new evidence as a basis for the Court to exercise its discretion in favour of the Applicant.

53. Flowing from the above, the contention of non-joinder and misjoinder of parties lack any legal leg to stand on and is for rejection.

54. I will now deal with the aspect of delay in seeking the prayers in the application. This is one of the key considerations in review applications.

55. The words used in Order 45 of the Civil Procedure Rules are that review applications ought to be filed 'without unreasonable delay'. It, hence, means that whenever such an application is filed outside a period which would ordinarily not be deemed as proximate to when the decree or order sought to be reviewed was made, then such delay must be explained.

56. In this case, one of the orders sought to be reviewed was made on 11th February, 2021. That was the order where the Applicant was found to be in contempt of Court. The review application was filed on 22nd November, 2021. The intervening period is around 9 months. In fact, the review application was filed after the Applicant was sentenced on 18th November, 2021. It is, therefore, not clear whether the Applicant would have filed the current application had he not been sentenced. I do not think so going by his conduct in the matter.

57. Be that as it may, the Applicant did not explain the delay or at all. That was so even after the matter was raised by the Petitioners both in their disposition and submissions. The upshot is that the Applicant had no explanation for the delay.

58. In Kenya, the issue of delay was, before the promulgation of the 2010 Constitution, considered in light of being one of the doctrines of equity. However, the 2010 Constitution transformed the doctrines of equity into constitutional principles under Article 10(2)(b). Henceforth, any issue of indolence is now looked through the said constitutional lenses.

59. In Civil Appeal No. 51 of 2015, **Willy Kimutai Kitilit v Michael Kibet** [2018] eKLR, the Court of Appeal defined the doctrine of equity and emphasized the need for Courts to apply it as constitutional principle under Article 10(2)(b). The learned judges observed as follows;

[24] ...By Article 10(2) (b) of the Constitution of Kenya, *equity* is one of the national values (emphasis supplied) which binds the courts in interpreting any law (Article 10(1)(b)). Further, by Article 159(2)(e), the Courts in exercising judicial authority are required to protect and promote the purpose and principles of the Constitution.

[25] The word *equity* broadly means a branch of law denoting fundamental principles of justice. It has various meanings

according to the context but three definitions from *Black's Law Dictionary, Ninth Edition* will suffice for our purpose:

- 1.
2. *The body of principles constituting what is fair and right.*
3. *The recourse to principles of justice to correct or supplement the law as applied to particular circumstances ---*
4. *The system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law (together called "Law" in the narrower sense) when the two conflict*

60. In appreciating the elevation equity was given by the Constitution, the Appellate Judges made the following remarks: -

Thus, since the current Constitution has by virtue of Article 10(2)(b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board.

61. The Applicant having failed to explain the 9 months' delay comes into conflict with Article 10(2)(b) of the Constitution.

62. Having said so, I believe the foregoing discourse is sufficient to dispose of the application.

Disposition:

63. Flowing from the above discussion and the findings thereof, this Court now makes the following final orders: -

(a) The Notice of Motion dated 22nd November, 2021 is hereby dismissed with costs.

(b) The orders of this Court made on 18th November, 2021 continue to remain in force.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2021

A. C. MRIMA

JUDGE

Ruling No. 3 virtually delivered in the presence of:

Mr. Willis Otieno, Counsel for the Petitioners.

Mr. Miller and **Miss Mwangi**, Counsel for the 3rd Respondent.

Miss. Mwangi, Counsel for the 1st, 3rd and 4th Respondents.

Elizabeth Wanjohi – Court Assistant