REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 4 OF 2020

(AS CONSOLIDATED WITH NRB HC PET. 102, 103,106,107,110,111 OF 2020 & GARISSA PET. 3 OF 2020

IN THE MATTER OF ARTICLES;1,2,2(5),3,10,20,21,23,27,35,43,47,56,73,81,88,89(5),89(6),89(12),93(1),156,159, 160,165,174,188(2),202,203,215,216,217,218,232,25, &260 & PART 2(8) OF THE FOURTH SCHEDULE OF THE CONSTITUTION OF KENYA 2010.

IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 10,27,35,47,56,73,89,188,203 AND 216 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF; STATISTICS ACT, NO. 4 OF 2006 AND THE CENSUS POPULATION ORDER 2018

IN THE MATTER OF; STATISTICS (AMENDMENT) ACT, NO. 16 OF 2019

IN THE MATTER OF COUNTY GOVERNMENT ACT, 2012

IN THE MATTER OF; ACCESS TO INFORMATION ACT, NO. 31 OF 2016

IN THE MATTER OF; THE INDEPENDENT AND ELECTORAL AND BOUNDARIES COMMISSION ACT, NO. 9 OF 2011

IN THE MATTER OF; THE UNITED NATIONS PRINCIPLES AND RECOMMENDATIONS FOR POPULATION AND HOUSING CENSUS REVISION 3 OF 2017

IN THE MATTER OF; THE UNITED NATIONS GUIDELINES OF THE USE OF ELECTRONIC DATA COLLECTION TECHNOLOGIES IN POPULATION AND HOUSING CENSUS 2019

BETWEEN

HON ABDULLAHI BASHIR SHEIKH& 24 OTHERS.............................PETITIONERS

VERSUS

KENYA NATIONAL BUREAU OF STATISTICS................................1ST RESPONDENT

THE NATIONAL TREASURY & NATIONAL PLANNING..............2ND RESPONDENT

COMMISSION ON REVENUE ALLOCATION..................................3RD RESPONDENT

THE INDEPENDENT ELECTORAL &

BOUNDERIES COMMISSION..4TH RESPONDENT

THE ATTORNEY GENERAL..5TH RESPONDENT

RULING

Introduction

1. On 29th June, 2020 after hearing the petitioner's application for interim orders, this court issued the following orders:

> **i. The petitioners vide their appointed IT experts and under the supervision of the Garissa High Court via the Deputy Registrar of the court shall be allowed by the Bureau access to central server and the tablets/devices which were used to collect data during the 2019 Kenya Population and Housing Census exercise between 28/8/2019 to 31/8/2019 for the areas in issue namely: Mandera West, Banisa, Lafey, Mandera East and Mandera North Sub-Counties, Garissa Township, Balambala, Lagdera and Dadaab sub counties, Eldas, Tarbaj, Wajir East, Wajir West and Wajir North sub Counties.**
>
> **ii. The petitioners will appoint the IT experts either jointly (one for each County) in issue as they may agree but not to exceed a maximum of 3 and will team up with the Deputy Registrar of Garissa High Court in gathering the data (in figures of people enumerated) in the devices/tablets and the bureau central servers for the areas in issue(i) above in the next 30 days.**
>
> **iii. A joint report by the petitioner's IT experts and the Garissa High Court Deputy Registrar on the exercise and figures gathered of people enumerated areas in issue as captured in tablets/devices and central servers accessed shall be filled within 30 days from the date of the ruling.**

2. The 1st Respondents herein, The Kenya National Bureau of Statistics are back before the court vide an application dated 13th July, 2020 supported by an affidavit sworn by Zachary Mwangi the 1st Respondent Director General seeking the following orders:

> **1) THAT this application be certified urgent and heard exparte in the first instance**
>
> **2) THAT this Honorable Court be pleased to stay the execution of the orders issued herein on 29th June, 2020 pending the hearing and determination of this application.**
>
> **3) THAT in the alternative, this Honorable Court do determine this application prior to the execution of the orders issued herein on 29th June, 2020.**
>
> **4) THAT this Honorable Court be pleased to review and set aside its orders made on 29th June, 2020 in respect of the 1st Respondent/applicant herein.**
>
> 5) **THAT the costs of this application be provided for**.

3. The grounds in support of the instant application as enumerated by the 1st Respondent in the face of their application are that the orders issued by this court vide its ruling dated 29th June, 2020 were not the orders sought by the petitioners in their said application. And that the information that the court granted access to the petitioners does not exist in the manner envisaged by the court.

4. In addition, the applicants aver that the Court orders allowing access to the 1st Respondent servers would authorize access to information beyond the scope of the court orders, thereby infringing on the right to confidentiality of persons information, as the number of people enumerated by the 1st Respondent cannot be separated from the individual record containing personal information as each individual count is linked to an individual personal data, therefore allowing access to the 1st Respondent servers will allow statistical units to be identified, either directly through their formal identifiers such as names and addresses or indirectly through inferences to identify such as age and gender, thereby disclosing individual information , which violates the right to privacy protected under **Article 31 of the Constitution** and **Part IV of the Data Protection Act** and **section 6(1)(d) & (i) of the Access to Information Act.**

5. Further, the 1st Respondent avers that the tablets/devices used to collect data during the 2019 Kenya Population and Housing Census have been reconfigured to factory settings to allow for use by other ministries and that the whole dataset is in the central server. Therefore, the said tablets/ devices are no longer in the custody of the 1st respondent as they have been disposed of in accordance with **Public Archives and Documentation Act.**

6. Through their further affidavit sworn by Collins Omondi on 21st September, 2020, the 1st Respondent in response to the Petitioners responses to the instant application averred that the disposal of the gadgets/devices used in the 2019 KPHC was done in the ordinary cause of business and not to defeat the orders of this court, as at the time there were no conservatory orders barring the 1st Respondent from disposing of the said devices. And that **section 3(2) of the Statistics Act** gives the 1st Respondent the capacity to dispose of movable and immovable property. In this case they disposed of the gadgets as per county, starting from 001 to 047, and since the three counties of Garissa, Wajir and Mandera fall in the first 10, they have since reconfigured and disposed of their gadgets/devices.

7. Additionally, they aver that since the orders issued by the court differs from what was being sought, they allege that they were not therefore afforded an opportunity to respond to the question whether the enumerated figures can be accessed separately from the personal information of individuals as the same was not raised by the petitioners, as the two sets of data are inseparable. And that the data in the gadgets were transferred to their central servers and can be accessed as such.

8. Further, they aver that since the court declined to issue the orders as sought by the petitioner's applicants, it in essence declined the same and therefore it cannot re-issue the same in the instant application for review and therefore the application ought to fail.

9. Furthermore, they aver that implementing the court orders issued on 29th June, 2020 as they are would lead to intrusion of privacy in violation of Article 31 of the Constitution, section 6(1)(d) and (i) of the Access to Information Act and Part IV of the Data Protection Act, which is beyond the scope of the Court Orders herein. And that the issue of privacy, National security and confidentiality are not res judicata in the circumstances. In sum, they aver that it is impossible to comply with the court orders herein as the relevant tablets/devices have been reconfigured to their factory settings and disposed to other ministries for their use.

10. The 2nd Respondent supported the instant application vide an affidavit sworn by Counsel Dr. Ken Nyaundi. They supported the grounds for review raised by the 1st Respondent. He averred that the orders issued herein on 29th June, 2020 were not the one's sought by the applicants and that allowing the scrutiny herein would compromise the privacy of individuals as their private data would be exposed and that since as alluded by the 1st Respondent that the devices used have been disposed of, it is impossible in the circumstances to enforce the orders herein.

Respondents/Petitioners Responses

11. The application is opposed by the Respondents. The 1st to 8th Petitioners filed a replying affidavit sworn by Hon. Abdullahi Bashir Sheikh dated 11th September, 2020. They averred that the instant application is a ploy by the 1st Respondent to frustrate and delay the scrutiny of the tablets and central servers used in the 2019 Kenya Population and Housing Census.

12. Additionally, they aver that the 1st Respondent as from 4th December, 2019 had been aware of the petitioners request to access and scrutinize tablets deployed in the specific areas of Mandera North, Mandera West, Banisa, Lafey, Mandera East and Mandera east sub-counties, this was done vide a demand letter dated 29th November, 2019 and received by the 1st respondent on 4th December, 2019. The 1st Respondent wrote a response on 9th December, 2019 and a further demand letter was issued by the petitioners Counsel on 17th December, 2019.

13. It is the petitioners respondents case that the 1st Respondent has been aware of their request for scrutiny as early as 4th December, 2019, and that their board sat on 5th December, 2019 but failed to deliberate on their request, and that they subsequently filed the Petition herein on 12th March, 2020 and served the 1st respondent on 13th March, 2020. They contend that the 1st Respondent allegations that the tablets/devices that were used in the 2019 Kenya Population and Housing Census had been disposed of are false and meant to defeat the execution of this court orders for scrutiny pursuant to its ruling on 29th June, 2020.

14. Further, they aver that the purported meeting by the 1st Respondent on 19th May, 2020 to discuss the logistics for disposal of 2019 KPHC data is suspect, as at the time the petition herein was pending and so was their application seeking scrutiny, and that if the alleged disposal of the tablets and devices used had been the case, they would have at least brought the same to the attention of the court in their response to the petitioners application in their two affidavits of Zachary Mwangi and Mutua Kakinyi sworn on 12th June, 2020, thus the allegation that the data was erased and or reconfigured is an attempt to defeat this Court ruling, thus denying the people of Mandera , Wajir and Garissa of their rightful share of National revenue.

15. Furthermore, they averred that the data submitted to the 1st Respondent contained a section for enumerated data that did not contain personal data and therefore it is possible to scrutinize the enumerated data without breach of confidentiality under Article 31 of the Constitution and Part IV of Data Protection Act and section 6(1)(d) of the Access to Information Act. Additionally, they aver that the Public Archives and Documentation Act does not apply herein.

16. Moreover, they contend that the alleged disposal of devices used in the 2019 KPHC by the 1st Respondent is in violation of the Public Procurement Act and there is no evidence confirming that the said devices were shipped to Ghana and Botswana as alleged, and if it happened that would be act of impunity meant to defeat the petitioners claim herein.

17. The 9th to 15th Petitioners opposed the application vide an affidavit sworn by Hon. Ahmed Bashane Gaal dated 13th August, 2020. They aver that the prayers granted by this court in its ruling of 29th June, 2020 had been expressly sought by the petitioners in Petition No. 106 and 107 of 2020 at prayers No. 3,4 and 4, 5 respectively and therefore the allegations to the contrary by the 1st Respondent are false.

18. In regard to the manner of data storage, they averred that the data that was sent to the 1st Respondent servers contained summaries of the enumerated figures and therefore the allegations that the data cannot be scrutinized without accessing private data is false and meant to impede the enforcement of this court orders.

19. Additionally, they aver that the issues of privacy, national security and confidentiality raised by the 1st Respondent in this application are resjudicata as the same had been litigated in this court culminating in the issuance the orders dated 29th June, 2020 and therefore this court lacks the jurisdiction to entertain the instant application, as the applicants ought to have filed an appeal and not an application for review.

20. Further, they averred that the confidentiality and secrecy issues raised by the applicant cannot defeat the principles of accountability and openness in the Constitution, and that the blanket secrecy goes against the Constitutional principles of transparency in a democratic society. And that in the circumstances the court can still impose stringent measure to ensure that scrutiny is undertaken and the right to privacy observed by limiting those who can access the data.

21. Furthermore, they aver that the information and data in possession of the 1st Respondent must have been stored and not destroyed by the said reconfiguration of tablets and devices and that in any case the 1st respondent had received sufficient notice from the petitioners of their intention to scrutinize the data vide their demand letters received on 2nd and 4th December, 2019 and therefore any disposal of data that may

have been undertaken by the 1st Respondent as alluded in their affidavit as from 5th December, 2019 amounts to deception and impunity which amount to illegal and conniving conduct.

22. Moreover, they averred that the instant application does not meet the threshold for review as there is no discovery of new and important matter of evidence which after the exercise of due diligence was not within the knowledge of the 1st Respondent, in this case the issue of deletion, reconfiguration and donation of the gadgets used in the 2019 KPHC was done allegedly way before the hearing of the petitioners application herein and the applicant herein deliberately did not disclose such information, hence such an averment at this stage is meant to defeat the cause of justice. Additionally, that the applicants have not demonstrated an error apparent on the face of the record, and therefore the instant application as it stands does not meet the threshold for review.

23. The 16th -21st Petitioners in response to the instant application filed their grounds of opposition dated 11th September, 2020. The grounds raised include that the instant application is incompetent as no ground for review has been revealed and that the information and reasons advanced were within their knowledge before and during the hearing the application culminating into the subject court ruling of 29th June, 2020 the subject of the instant application for review.

24. Additionally, that the 1st Respondent has failed to comply with the provisions of the Public Procurement and Disposal Act and section 7 of the Public Archives and Documentation Act and therefore cannot purport to dispose of tablets and devices as alleged in their application.

25. Further, they allege that the order of scrutiny does not violate Principle 6 of the Fundamental Principles of Official Statistics, and that Principle 2 and 7 requires the 1st Respondent to facilitate scrutiny and maintain trust of the official statistics. Furthermore, they allege that the instant application has been contrived by the applicant/1st Respondent with the intention to defeat the order for scrutiny and deny the people of Garissa the truth.

SUBMISSIONS

1st Respondent/Applicant Submissions

26. The 1st Respondent Vide their filed written submissions highlighted by Counsel Mr. Nyamodi identified three issue which they addressed. The first issue addressed by Counsel is as to whether the orders granted by this court on 29th June, 2020 were the orders sought by the Petitioners herein. In this regard they submitted that orders granted were at variance with what was sought by the petitioners and that since parties are bound by what is in their pleadings, this court lacked the jurisdiction to grants the orders herein, which are different from what was sought. In this regard they submitted that the petitioners never sought access or scrutiny of enumerated figures only as issued by the court but sought access to data in their central servers and devices and therefore they did have the opportunity to address the court on such specific fact. They relied in the following authorities**; Raila Amolo Odinga & 2 Others vs Independent Electoral and Boundaries Commissions & 2 Others(2017)eklr, Independent Electoral and Boundaries Commissions & Another vs Stephen Mutinda Mule & 3 others(2014)eklr**, **Nairobi City Council vs Thabiti Enterprises Limited(1997)Eklr** and **Ngurumani Limited vs Shompole Group Ranch & Another(2014)eklr.**

27. The second issue addressed by the 1st Respondents is whether this court has the jurisdiction to review an order of the court that is unenforceable. In this regard they submitted that the orders herein issued on 29th June, 2020 cannot be discharged by the 1st respondent as the data sought is not in the form and manner envisaged in the orders. They submitted that the 1st Respondent commenced the process of erasing data and reconfiguration of devices used in the 2019 KPHC on 24th May, 2020 and as at 16th June, 2020 the reconfiguration of 5000 devices used in County 001 to 010 including garissa(007) Wajir(008) and Mandera (009) had been completed to allow use by other ministries as explained in the further affidavit of Mr. Colins Omondi.

28. It is their submissions that the reconfiguration and disposal of the tablets and devices herein were undertaken in the ordinary process and there was no intention to defeat the petitioners claim herein. And that the data in possession of the 1st Respondent is not summaries of enumerated figures as envisaged in the Court orders issued, and allowing access to the 1st Respondent Central servers would infringe the right to privacy protected under Article 31 of the Constitution. And that the questionnaires used by the 1st Respondent were developed pursuant to the second schedule of the Statistics (Census of Population) Order, 2018 and that the same contains particulars of the persons interviewed and counted. In this regard they rely in the cases of **Aluoch Polo Aluchier vs Attorney Genera (2018)eklr, Ruth Nyambura Chuchu & 2Others vs Stephen Gathoga Chuchu Alias Stephen Mungai Githu(2015) eklr, Baldrige vs Shapiro, 455 U.S 345 (1982)** and **Mercy Nyawade vs Bankink Fraud Investigation Department & 2 others(2017)eklr.**

29. The final issue addressed by the 1st Respondents is as to whether the instant application has met the threshold for review. In this regard they refereed the court to section 80 of the Civil Procedure Act and Order 45, rule 1 of the Civil Procedure Rules, which is the legal provisions for review. It is their submission that they have provided sufficient reason for this court to review its orders herein. The basis being that it wrongly assumed jurisdiction in issuing orders not sought by the petitioners, the information sought does not exist in the manner envisage in the order, that the access to the 1st Respondent servers would entail access to information beyond the scope of the court orders and finally that it is impossible to implement the orders as the tablets / devices used in the 2019 KPHC have been reconfigured and disposed of. Therefore, they submit that the threshold for review has been met and urged the court to allow the instant application. They rely in the following cases; **Ajit Kumar Rath Vs State of Orisa & Others 9 Supreme Court Cases 596** and **Nairobi City Council vs Thabiti Enterprises Limited(supra).**

2nd Respondent Submissions

30. Vide their written submissions, the 2nd Respondent supported the instant application reiterating their grounds in support above. They submitted that the instant application has met the threshold for review envisaged under section 80 of the Civil Procedure Act and Order 45(1)

of the Civil Procedure Rules. It is their submissions that the reasons proffered by the applicant herein provide sufficient reason for this court to review its orders for scrutiny as it would be impossible to implement the orders, as the alleged devices to be scrutinized are no longer in possession of the 1st Respondent. In addition, they submitted that the arguments in respect to data privacy is not res judicata. They relied in the following authorities; **National bank of Kenya Ltd vs Ndungu Njau Nairobi Civil Appeal No. 211 of 1996(unreported), Ajit Kumar Rath vs State of Orisa & Others(supra), Sdar Mohamed vs Charan Sign and Another Civil Appeal No. 235 of 1997(1997)eklr, Official Receiver and liquidator vs Freight Forwarders Kenya Limited and Tokesi Mambili and others vs Simion Litsanga.**

9th-15th Petitioners submissions

31. Through their filed written submissions and highlighted by Counsel Mr. Ondieki, they addressed the following issues. First is whether the applicants have met the threshold for review, and in this regard they submitted that the applicants have not met the threshold for review under Order 45(1) of the Civil Procedure Rules, as they have failed to demonstrate that there is discovery of new important matter of evidence which after exercise of due diligence was not within their knowledge and therefore would not produce at the time, that they have failed to demonstrate some mistake or error apparent on the face of the record and finally failed to demonstrate that there is sufficient reason for this court to review its orders.

32. The second issue addressed is on resjudicata, where they submitted that the instant application is seeking to re-litigate issues of privacy, national security and confidentiality which had been dealt with extensively in the application before the court that was the subject of the court orders herein sought to be reviewed, and therefore the applicants ought to have filed an appeal. They referred to the affidavit of Zachary Mwangi sworn herein, which they allege raises the same issues. They submit that the 1st Respondent is engaging in an outright campaign to circumvent, mislead, delay or prevaricate, and ignore this Court orders.

33. The third issue addressed is on the applicant's allegation that the information sought does not exists in the manner envisaged by the court orders herein. In this regard they submitted that the 1st Respondent has never repudiated the petitioners assertion that the daily transmissions and the end of census transmissions to the central servers would automatically generate an aggregate summary of the census figures for each sub-location, location and sub-county, and that the summary does not contain the names or personal details of the people enumerated. It is therefore their case that the 1st Respondents does not want to avail the devices/tablets to the court and the court ought to make an inference of the same. They rely in the cases of **Julian J Robinson vs Attorney General of Jamaica (2019) JMFC FULL 04** and **Raila Amolo Odinga vs IEBC & 2 Others (2017) eklr.**

34. The fourth issue addressed is in regard to the destruction, deletion or reconfiguration of the tablets /devices used in the 2019 KPHC, where they submit that the alleged disposal and or reconfiguration of the tablets/devices used by the 1st Respondent herein were undertaken in breach of the Public Procurement and Disposal Act and that the same was undertaken while the instant proceedings were pending therefore pointing out that the sole reason for the purported disposal and reconfiguration was to defeat the instant petition and avoid implementation of any order issued by this court.

35. The final issue addressed herein is on confidentiality, where they submitted that the 1st Respondent fear on confidentiality can be cured by the court imposing stringent measures in undertaking scrutiny of data, for instance it can limit access to legal representatives, independent experts appointed by parties and judicial officers and further cemented by parties swearing an oath of secrecy. They rely in the Constitutional Court of South Africa decision **in Helen Suzman Foundation vs Judicial Service Commission (2018) ZACC 8** and **Julian J Robinson vs Attorney General of Jamaica(supra).** They urged the court to dismiss the instant application with costs.

1st-8th Petitioners and 16th-21st Petitioners Respondents submissions

36. Counsel Mr. Issa for the 1st-8th Petitioners and 16th-21st Petitioners Respondents herein in his submissions in opposition to the instant application adopted Mr. Ondieki submissions above, and further submitted that this court in issuing the orders for scrutiny did so in a very balanced manner and that the orders are valid and within the limits of the law, and that it exercised its discretion validly and that the only way to re-look at its ruling dated 29th June, 2020 is through an appeal and not the subject application for review.

37. Furthermore, Counsel submitted that the grounds advanced by the 1st Respondent does not support review as their annexures point that the alleged disposal and reconfiguration of the devices herein was commenced on 5th December, 2019 and undertaken during the pendency of the application for scrutiny and that since they were aware of the same, they refused to notify the court of the said position or brought it out in their responses, and that the alleged disposal is not true but a spirited attempt to hinder scrutiny.

38. Moreover, Counsel submitted that that the issue of confidentiality is well taken care of by the orders of scrutiny as only the aggregate summaries is to be scrutinized, and that issues of privacy was canvassed in the application. He referred the court to Principle 2 and 7 of the Official Statistics. In sum Counsel submitted that the alleged disposal and unavailability of data amounts to contempt of court and that the instant application ought to be dismissed with costs.

Determination

39. I have carefully considered the issues raised in the present application, the respective parties' submissions and documentation, and the main issue for determination in my view is whether the applicants have met the threshold for review of this court orders issued on 29th June, 2020.

The Law

40. The legal provisions for such an application for review are found in section 80 of the Civil Procedure Act and Order 45 rule 1(b) of

the **Civil Procedure Rules**, which provide for the requirements that must be met. The said provision states as follows:

> **"(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."**

41. Therefore, Order 45 of the Civil Procedure Rules, 2010 above is very explicit that a court can only review its orders if the following grounds exist: -

> **(a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or**
>
> **(b) There was a mistake or error apparent on the face of the record; or**
>
> **(c) There were other sufficient reasons; and**
>
> **(d) The application must have been made without undue delay.**

42. The pertinent issue for determination herein, therefore, is whether the Appellant has established any of the above grounds to warrant an order of review.

43. On the first limb, which is discovery of new evidence and important matter which was not within the knowledge of the Applicant, the Court of Appeal in **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR** held that an applicant has to show that the said information or discovery must have not been within the knowledge of the applicant:

44. In respect to the limb, which is an error apparent on the face of the record, it was described by the Court of Appeal in the case of **Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243,** as follows:

> ***"…In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."***

45. In regard to the third limb, which is any other sufficient reason, the **Court of appeal in Pancras T. Swai v Kenya Breweries Limited (supra)** noted as follows: -

> **"As repeatedly pointed out in various decisions of this Court, the words, *"for any sufficient reason"* must be viewed in the context firstly of Section 80 of the Civil Procedure Act, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order. In Sarder Mohamed v. Charan Singh Nand Sing and Another (1959) EA 793, the High Court correctly held that Section 80 of the Civil Procedure Act conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate…"**

46. The Court further noted that: -

> **"It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge**

has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are *factus officio* and have no appellate jurisdiction. The power to review decisions on appeal is vested in appellate courts. Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limps therein stated or *"for any sufficient reason."*

47. Coming to the applicant grounds herein, they allege that the orders of this court issued on 29th June, 2020 is unenforceable for the reasons that the orders issued by this Court are not the orders that were being sought by the applicants hence this court lacked the jurisdiction to issue the same, that the manner in which the information or data sought to be scrutinized does not exists in the manner the court orders envisaged and therefore enforcing the orders would amount to breach of privacy as the sought summaries of enumerated data is inseparable from personal data and finally that the devices/tablets that are to be scrutinized have been reconfigured to factory settings and disposed to other ministries.

48. On the first ground herein, the applicants allege that the orders issued were not sought by the Respondents herein, and therefore they did not have an opportunity to respond to the same, arguing that the court lacked the jurisdiction to issue the orders.

49. I find this ground as baseless, as from the applicants Petitioners respective application seeking scrutiny, they sought the scrutiny of tablets/storage devices and access to the 1st Respondent centrals servers so as to ascertain the correct figures enumerated from the contested areas. For instance, Prayer 3 of the 9th- 15th Petitioners application in this regard was framed as follows: -

> **"THAT this Honorable Court do issue an order for scrutiny under the Court's supervision of all tablets and storage chips used and deployed in all enumeration areas of …. To determine the census results transmitted to the 1st Respondent central servers"**

50. On the second ground which is that the information does not exist in the manner envisaged in the court orders herein, and that enforcing the same would infringe on the right to privacy as private data would be revealed. The critical issue in this regard is whether such information was within the knowledge of the 1st Respondent when the orders for scrutiny were being sought in the applications which were the subject of this court ruling and orders of 29th June, 2020.

51. It is apparent to this court that such a fact was within the knowledge of the 1st Respondent and it was incumbent upon them to inform the court of such a fact, as nothing prevented them from bringing up the issue to this court, thus making such revelation suspect as alluded by the Respondents.

52. They have averred that the process of disposal of the tablets/gadgets commenced vide a board meeting of the 1st Respondent on 5th December, 2019. And proceeding through May and June, 2020. This ground in my view lacks merit as they were well aware that the gadgets were needed for scrutiny, and they ought to have at least taken measure as such.

53. In respect to the ground of privacy or confidentiality of private data in possession of the 1st Respondent, it is apparent to me that the same was one of the issues that were alive before the court when the orders for scrutiny herein were being sought.

54. I agree with the Respondents position that such issue was critically considered by this court in its ruling delivered on 29th June, 2020 and in issuing the impugned orders herein, it made orders to the effect that only summaries of the enumerated figures were to be revealed for scrutiny.

55. However, the applicants are now alleging that the data in question is inseparable and therefore this court ought to review its decision. This Court equally considered this issue, and in my view, it would be surprising that in undertaking the population census the 1st Respondent did not in its columns for information include a column for summarized enumerated figures only minus the attachment of persona information. The respondents attached filed forms attests as much.

56. On the final ground that the tablets/devices that were used had been disposed of and therefore impossible to enforce the orders as they are, this court notes that even though the applicant commenced the alleged disposal of the said tablets/devices during the pendency of this suit, it had an obligation to this court and the parties herein to disclose the unavailability of the same devices.

57. It matters not that there was no preservatory orders to bar their disposal or interference. It would appear to this court that the allegation now that the same devices were disposed is an afterthought. There is no demonstration via evidence of the delivery of the devices to the beneficiaries of the donation of the same devices. The court is expected to believe the applicants affidavit without more. This court is not inclined to do so.

58. Nonetheless, the 1st Respondent avers that it transferred the data in the tablets to their central servers. If that be so, then why decline to show petitioners the enumerated figures via their IT experts as ordered by this court on 29/6/2020?

<u>Conclusion</u>

59. The Court of Appeal in **<u>Mahinda vs. Kenya Power & Lighting Co. Ltd [2005] 2 KLR 418</u>** expressed itself in this regard as follows:

> **"The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would**

open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made."

60. In this case, it is apparent to me that the applicants seem to be reopening their arguments in regard to the Respondents application which was the subject of this court ruling delivered on 29th June, 2020. The lengthy focus on the issue of privacy and confidentiality tells it all. Guided by the above Court of Appeal decision, this court ought to only review its orders with a view to giving effect to its intention and noting or correcting an error that is apparent.

61. In view of the foregoing this court is not inclined to interfere with its orders made on 29/6/2020.

62. Therefore, the, the court makes the following orders;

i) The application dated 13th July, 2020 is dismissed.

ii) The period for the implementation of the orders made by this court on 29/6/2020 is extended to the extent that the 30days for doing so runs from the date of this ruling.

iii) ***Costs in the main cause.***

DATED, DELIVERED AND SIGNED AT GARISSA THIS 28TH DAY OF OCTOBER, 2020.

....

C. KARIUKI

JUDGE