REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

(Coram: Odunga, J)

PETITION NO. 19 OF 2020

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2(1), 3(1), 10, 19, 20, 21, 22, 23, 25, 27, 28, 29, 31, 40, 47, 50, 73, 157(11), 159, 165(3), 232, 258, 259 & 260 OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013.

AND

IN THE MATTER OF: SECTION 5, 45 AND 46 OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF: ALLEGED VIOLATION OF SECTION 4 OF THE OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS ACT, NO. 2 OF 2013.

AND

IN THE MATTER OF: ALLEGED VIOLATION OF SECTION 64 OF THE NATIONAL POLICE SERVICE ACT NO. 11A OF 2011.

AND

IN THE MATTER OF: VIOLATION OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015.

AND

IN THE MATTER OF: PARAGRAPHS 4(B) (1), 4(B) (2) AND 45 OF THE NATIONAL PROSECUTION POLICY

BETWEEN

ENG. GEOFFREY K. SANG..PETITIONER

-VERSUS-

THE DIRECTOR OF PUBLIC PROSECUTIONS..1ST RESPONDENT

THE DIRECTOR, DIRECTORATE OF CRIMINAL INVESTIGATIONS...........2ND RESPONDENT

THE HON. ATTORNEY GENERAL..3RD RESPONDENT

THE BOARD CHAIRMAN,

NATIONAL WATER HARVESTING & STORAGE AUTHORITY.....................4TH RESPONDENT

THE BOARD OF DIRECTORS,

NATIONAL WATER HARVESTING & STORAGE AUTHORITY....................5TH RESPONDENT

RULING

1. On 16th July, 2020, this Court delivered a Judgement in this petition in which it found that no public prosecution may be undertaken by or under the authority of either the Inspector General of Police or the Director of Criminal Investigations without the consent of the Director of Public Prosecutions. In this case it was found that there was a futile attempt by the 2nd Respondent herein to levy charges against the Petitioner without the consent of the 1st Respondent, an action which was clearly unconstitutional, unlawful, illegal, null and void.

2. Based on that finding the Court found that the attempt by the 2nd Respondent to levy charges without the consent of the 1st Respondent was stillborn and therefore could not be the basis for the removal of the Petitioner from his position. Based on the material placed before the Court, it was held that there was no basis upon which it could be found that the removal of the Petitioner or threat of his removal from his position with the 5th Respondent was informed by the subject criminal proceedings. It was the Court's view that there may well have been some reasons malicious or otherwise but the Court sitting as a constitutional court as opposed to the Employment and Labour Relations Court could not determine that issue. However, the Court found that had it been proved that the Petitioner's removal from his position was as a result of criminal proceedings instituted by the 2nd Respondent it would not have hesitated to set aside the same since that action would have been based on a decision made without jurisdiction.

3. Having considered the contents of the replying affidavit, the Court was however unable to find that there was complete dearth of reasonable grounds to undertake investigations against the Petitioner and therefore declined to give an order barring the 2nd Respondent from undertaking its investigations against the Petitioner.

4. As regards the issue of adverse publicity, the Court held that it had not been alleged that there was a risk that as a result of the adverse publicity generated by the transaction in issue, the Petitioner's right to fair trial was threatened more so as no allegation was made against the trial Court along those lines and in the Petition no orders were expressly sought against the trial Court which was yet to commence the criminal proceedings.

5. Regarding the allegation that Petitioner's mobile phone handsets and laptop and some documents were taken from his office without producing any search warrant allowing them to seize the said gadgets and take away documents, the Court held that the fairness of the trial process based on the said allegations could only be properly determined before the trial court.

6. As regards the actions taken by the 4th Respondent, in terminating the Petitioner's position, it was the Court's view that those are matters which would have been better dealt with before the Employment and Labour Relations Court rather than this Court.

7. Having considered the issues raised in the petition the Court issued the following orders:

> **a. A Declaration that the 2nd Respondent, the Director of Criminal Investigations has no power and authority to institute criminal proceedings before a Court of law without the prior consent of the Director of Public Prosecutions and any proceedings so commenced are unconstitutional, illegal, unlawful, null and void ab initio.**
>
> b. **A declaration that the intended prosecution of the Petitioner in the manner proposed by the 2nd Respondent is ultra vires the powers of the 2nd Respondent and is therefore unconstitutional and unsustainable.**
>
> **c. An order prohibiting the 2nd Respondent from instituting criminal proceedings against the Petitioner unless the same are instituted through the 1st Respondent, the Director of Public Prosecutions.**
>
> **d. The costs of this petition are awarded to the Petitioner against the 2nd Respondent.**

8. The Petitioner is back to this Court vide a Notice of Motion dated 23rd July, 2020 by which the Petitioner seeks the following orders:

> **a. This application be certified urgent and heard ex-parte in the first instance.**
>
> **b. This Honourable Court be pleased to review its judgement and orders granted on 16th July, 2020 in light of the discovery of new evidence which was not available at the time of filling the Petition and making of the orders.**
>
> **c. The judgement delivered on 16th July, 2020 be reviewed so as to include A Declaration that the 4th and 5th Respondents engaged in a malicious scheme of orchestrating the irregular and unlawful removal from office and/or revocation of appointment of the Petitioner as the Acting Chief Executive Officer of National Water Harvesting and Storage Authority.**

d. The judgement delivered on 16th July, 2020 be reviewed so as to include A Declaration that the 9th Special Full Board meeting was illegally convened and that all the resolutions passed therein are null and void.

e. The judgement delivered on 16th July, 2020 be reviewed so as to include an order of CERTIORARI to remove to this Honourable Court to be quashed the decision of the 4th and 5th Respondents to revoke the appointment of the Petitioner as the Acting Chief Executive Officer of National Water Harvesting and Storage Authority.

f. The judgement delivered on 16th July, 2020 be reviewed so as to include an Order of CERTIORARI to remove to this Honourable Court to be quashed the decision of the 4th and 5th Respondents to appoint the Acting General Manager, Corporate Services one Sharon Obonyo effective the 28th April 2020.

g. The judgement delivered on 16th July, 2020 be reviewed so as to include an order to quash the purported appointment of the Acting General Manager Corporate Services one Sharon Obonyo effective the 28th April 2020.

h. Such other, further, incidental or alternative reliefs as the Honourable Court may deem just and expedient.

i. The costs of and incidental to this Application shall abide in the outcome of the Petition herein.

9. According to the Petitioner, as at the time of the filing of the petition, the 4th and 5th Respondents had not served him and to date he has not been issued with the letter revoking his appointment as the Acting Chief Executive Officer of National Water, Harvesting and Storage Authority (the Authority). He however insisted that it was the illegal action of the 2nd Respondent that formed the basis of his removal from the said position. The Petitioner therefore averred that this new evidence was not in his possession and/or knowledge as at the time of the filing of the petition and as at the time of the delivery of the judgement.

10. According to the Petitioner he was appointed the Acting Chief Executive Officer of the Authority by the Authority's Board of Directors vide a resolution of 18th November, 2019 for a period of six months or until the appointment of a substantive holder of that office. However, by a letter dated 20th December, 2019, the Cabinet Secretary Ministry of Water & Sanitation and Immigration had approved his said appointment for a period of one commencing 18th November, 2019 to 17th November, 2020.

11. The Petitioner reiterated that since his appointment as the Board Chairman of the Authority on 20th March, 2020, the 4th Respondent has colluded with the 2nd Respondent to come up with malicious scheme of instigating his unlawful and unfair suspension, termination and/or removal from the office.

12. According to the Petitioner the resolution of the 9th Special Full Board Meeting to revoke his appointment as Acting Chief Executive Officer and his replacement with **C S Sharon Obonyo** was informed by his illegal arrest by the 2nd Respondent and this was despite the fact that the Petitioner did not take plea on the date of his arraignment.

13. In response to this application, the 1st Respondent on 5th August, 2020 filed notice of preliminary objection dated the same date in which he contended that:

1. That the present Application does not meet the requisite threshold under section 80 of the civil procedure Act and Order 45 of the civil procedure Rules which sets out the requirements for an application for review.

2. That the instant Application by the petitioner seeks to amend his pleadings and prayers to conceal the shortcomings in his petition after discovering them in the judgement delivered on 16/7/2020.

3. That there is an active suit being Nairobi ELRC petition No. 68/2020. Eng. Geoffrey Sang v/s The Chairman, Board of Directors National Water Harvesting and storage Authority and Board of Directors, National water harvesting and storage Authority and if the Orders sought by the Applicant are issued then there might be two conflicting Orders of the court.

4. That the Application is misconceived, frivolous, vexatious and an abuse of the court process.

14. Similarly, the 4th and 5th Respondents filed a Notice of Preliminary Objection on 29th July, 2020 dated 28th July, 2020 in which they raised the following objections:

1. That this Honorable Court has no Constitutional jurisdiction to hear and determine this Application because the issues raised concern employment of the Petitioner, the province of the Employment and Labour Relations Court.

2. That the issues arising in the Application are already pending before the employment court in Nairobi ELRC. Petition No. 68 of 2020: Eng. Geoffrey Sang versus The Chairman, Board of Directors National Water Harvesting and Storage Authority and Board of Directors, National Water Harvesting and Storage Authority. The matter is scheduled for judgement on 16th October 2020.

3. That the Application is an abuse of the court process, a waste of judicial time and therefore it should be dismissed with costs.

15. On behalf of the Petitioner it was submitted while reiterating the foregoing averments in the supporting affidavit that this application is premised on the discovery of new evidence and important matter which was not within the knowledge of the applicant and reliance was placed on the case of **Pancras T. Swai vs. Kenya Breweries Limited [2014] eKLR**. According to the Petitioner, the maters deposed to were not in his possession at the time of the foiling of the Petition hence the basis for the review.

16. On behalf of the Respondents it was submitted that the dispute at hand relates to the 3rd and 4th Respondents move to revoke the Applicant's appointment as an acting Chief Executive Officer and appointing **Sharon Obonyo** as the current acting Chief Executive Officer by a resolution made on 28th April 2020 at the 9th Special Full Board Meeting of the Board of Directors. Therefore, it is an employment dispute which should be determined by the Employment and Labour Relations Court. It is upon the Employment and Labour Relations Court to determine whether the Resolutions passed by the Board Members during the meeting are null and void or not.

17. It was submitted that the dispute herein touches on the terms and conditions of the employment or put in other words, it affects the relationship between the employer and the employee. It is a dispute that relates to or arises from employment between the Applicant and the 3rd and 4th Respondent. According to the Respondents, the review of the orders sought herein touch on terms and conditions of the employment or put in other words, it affects the relationship between the employer and the employee. It is a dispute that relates to or arises from employment between the Applicant and the 4th and 5th Respondent. Therefore, the matter falls under the Employment and Labour Relations Court.

18. According to the Respondents, it is clear from the judgement that *t*he issues of employment are not within the purview of this court. The matters raised in the Application are matters better dealt with by the Employment and Labour Relations Court. Therefore, the prayers sought by the Applicant if granted will be a nullity since this court lacks Constitutional jurisdiction to hear and determine the entire suit.

19. According to the Respondents, allowing the application breaches the doctrine of *res sub-judice* because the issues arising in the application are already pending before the Employment and Labour Relations Court (before Lady Justice Maureen Onyango) in ***Nairobi ELRC Petition No. 68 of 2020: Eng. Geoffrey Sang Versus the Chairman, Board of Directors National Water Harvesting and Storage Authority and the Board of Directors, National Water Harvesting and Storage Authority*** which matter is scheduled for Judgement on 16th October 2020, a fact known to the Petitioner. As a result, it is only fair that we await the outcome of the pending employment matter. According to the Respondents, the Application herein is a replica of the Petition currently pending before the Employment and Labour Relations Court. The Applicant just copy pasted the facts in that Petition to seek review orders before this Court. This shows that this Applicant lacks good faith and is only an expedition to frustrate the 4th and 5th Respondents in endless court battles.

20. In support of this submission the Respondents relied on **Republic vs. Registrar of Societies - Kenya & 2 Othesr Ex-Parte Moses Kirima & 2 Others [2017] eKLR.**

21. From the above case, it was submitted that the issues herein are perfectly litigated in **Nairobi ELRC Petition No. 68 of 2020**. The conditions mentioned above exist in both two cases and there can be no justification in having the two cases being heard parallel to each other and reliance was placed on **Kampala High Court Civil Suit No. 450 of 1993** - **Nyanza Garage vs. Attorney General** which was adopted and quoted in **ASL Credit Limited vs. Abdi Basid Sheikh Ali & Another [2019] eKLR** as well as **Thiba Min Hydro Co. Ltd vs. Josphat Karu Ndwiga (2013) eKLR**.

22. It was therefore submitted that the instant Application is an abuse of the court process, a waste of judicial time and resources and therefore it should be dismissed with costs.

23. On merits, it was submitted that the application does not meet the required threshold for review. According to the Respondents, although, Order 45 (1) of the ***Civil Procedure Rules, 2010*** is not one of the provisions applicable to Constitutions Petitions, the conditions set therein give rational parameters for review of an order of this Court adjudicating constitutional disputes and this was emphasized in ***Nairobi Constitutional Petition No. 57 of 2019: Kenya Aviation Workers Union versus Kenya Airports Authority & Others***.

24. According to the Respondents, in order to succeed in an application seeking review on the ground of discovery of new and important matter or evidence, an applicant must demonstrate the non-availability of the evidence at the time the decision sought to be reviewed was made, and that the new facts or evidence will justify the review of the decree or order and reliance was placed on **Rose Kaiza vs. Angelo Mpanju Kaiza [2009] eKLR.**

25. To succeed in an application for review, it was submitted that the Applicant must provide sufficient ground to enable the court to review its own judgement which the applicant has not done based on the case of **Evan Bwire vs. Andrew Aginda Civil Appeal No. 147 of 2006** cited in the case of **Stephen Githua Kimani vs. Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR** as well as the case of **Executive Committee Chelimo Plot Owners Welfare Group & 288 Others versus Langata Joel & 4 Others (sued as the management Committee of Chelimo Squatters Group) [2018] e KLR.**

26. According to the Respondents, while in the instant Application, the Applicant alleges that there is discovery of new evidence which was not in his possession and/ or knowledge as at the time of filing the petition on 29th April 2020 and as at the time when this Honourable Court delivered its Judgement on 16th July 2020, there is no discovery of new evidence. The alleged new evidence are facts that were well within the knowledge of the Applicant during the entire proceedings before this court and that is why the Applicant filed a Petition before the Employment Court for determination on 7th May 2020. As such, the Application herein is frivolous and is meant to waste judicial time.

27. They submitted that there is no new and important matter or evidence that could not be produced by the Applicant at the time when the Judgement was made. Indeed, all the issues raised in the present application were same ones raised when the Petition was canvassed and upon which this Court arrived at its Judgement. According to the Respondents, at the time of filing this Petition on 29th April 2020, the Petitioner had been served with a revocation letter for his CEO position in an acting capacity on 28th April 2020. The same was attached to

the 4th and 5th Respondents Replying Affidavit filed before this Court on 16th May 2020 and served on the Petitioner on 19th May 2020. The said revocation letter is annexed as EO-5.

28. The Application filed herein is meant to mislead this court. The Petition was filed on 29th April 2020 as opposed to what the Petitioner is stating at paragraph 5 of the Application that it was filed on 29th July 2020. That must have been a typographical error. It is not possible for judgement to be delivered on 16th July 2020 and the Petition to be filed on 29th July 2020.

29. I have considered the issues raised in the present application.

30. The Respondents have raised as a preliminary objection the issue of sub judice based on the fact that the issues arising in the Application are already pending before the employment court in **Nairobi ELRC. Petition No. 68 of 2020: Eng. Geoffrey Sang versus The Chairman, Board of Directors National Water Harvesting and Storage Authority and Board of Directors, National Water Harvesting and Storage Authority** which matter is scheduled for judgement on 16th October 2020.

31. Section 6 of the ***Civil Procedure Act*** provides as hereunder:

> **No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.**

32. Therefore, for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

33. The rationale for this principle was restated in Kampala High Court Civil Suit No. 450 of 1993 - **Nyanza Garage vs. Attorney General** in which the Court held that:

> **"In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits."**

34. It was therefore held in **Barclays Bank of Kenya Ltd vs. Elizabeth Agidza & 2 Others [2012] eKLR** that:

> **"…if the controversy in the subsequent suit can be conveniently and properly adjudicated upon in the previous suit, by virtue of the enactment of Sections 1A and 1B of the Civil Procedure Act, Section 6 will still apply. This is so because the overriding objective of the Civil Procedure Act is for expeditious and proportionate resolution of civil disputes between parties. My view is that the circumstances obtaining in 1953 when the Jadna Karsan –vs- Harnam Singh Bhogal was decided are completely different from the circumstances obtaining now. The circumstances obtaining at the time of the enactment of Sections 1A and 1B of the Civil Procedure Act were that there is constraint in judicial time and therefore a lot of pressure on the courts to expedite resolution of civil disputes. My view therefore is, if a substantial part of the matters in issue of controversy in the subsequent suit is covered by the previous suit, Section 6 should be invoked to save the precious judicial resources."**

35. With due respect to the Respondents for this Court to determine whether or not the conditions guiding the invocation of *sub judice* exist in these proceedings, it would be necessary for this Court to peruse the proceedings in the ELRC matter. That determination being a factual one, it cannot form the subject of a preliminary objection unless the facts are agreed. In that decision I relied on **Oraro vs. Mbaja [2005] 1 KLR 141** in which **Ojwang, J** (as he then was) expressed himself as follows:

> **"A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop… The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point…Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the applicant's instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a preliminary objection clearly out of order and, apart from amounting to a breach of**

established procedure, it had the unfortunate effect of provoking filing of the respondent's very detailed "affidavit in reply to an affidavit in support of preliminary objection", which replying affidavit was expressed to be "under protest"…The applicant's "notice of preliminary objection to representation" cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute."

36. Where facts are not agreed the issue of *sub judice* ought to be raised in a replying affidavit by exhibiting copies of the proceedings in the related suit. It must be noted that where a party raises an objection barring the Court from proceedings with a matter, the burden is upon that party to satisfy the Court that the conditions favourable to the grant of such orders do exist since the Court does not ordinarily bar a party from accessing the seat of justice without compelling reasons. It was therefore upon the Respondents to place before this Court, materials upon which the Court would be in a position to make a definite finding that in fact the issues in this application and in the said ELRC proceedings are similar or substantially the same. By choosing a short cut, the said respondents have squandered an opportunity to convince the Court based on procedurally admissible evidence that the issues in both causes are the same or are in substance the same.

37. This Court cannot be expected to call for a matter pending before a Court of concurrent jurisdiction as opposed to an inferior tribunal, peruse the same and in the secrecy of the chambers make a determination prejudicial to a party without affording the said party an opportunity of being heard on the same. To do so would amount to a violation of the principles of natural justice and that would amount to abetting an injustice.

38. As the Respondents have failed to satisfy conditions under section 6 of the ***Civil Procedure Act***, the objection must fail. Apart from that the said principle provides where it applies, the subsequent proceedings are to be stayed and not terminated unless the Court is satisfied that the action of the applicant also amounts to an abuse of the Court process. Accordingly, the preliminary objections are dismissed.

39. In order to justify the Court in granting an application for review sought by the applicant under the provisions of Order 45 rule 1(b) of the ***Civil Procedure Rules***, certain requirements must be met. The said provision states as follows:

(1) Any person considering himself aggrieved— by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or 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."

40. The Code of Civil Procedure, Volume III Pages 3652-3653 by **Sir Dinshaw Fardunji Mulla** states:

"The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure…The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper."

41. In **Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited Nairobi (Milimani) HCCC No. 532 of 2004, Okwengu, J** (as she then was) expressed herself as hereunder:

"In this case the court is being invited to review the order on the grounds that there is an error apparent on the face of the record or other sufficient reason the pleadings, in particular, the plaintiff's reply to the amended defence in which the plaintiff is alleged to have conceded that the defendant's fee policy was illegal and *contra statute* which was the basis of the Defendant's application for striking out the plaint. It is the defendant's contention that the plaintiff is bound by his pleadings and could not therefore depart from the same…It is my considered opinion that the pleadings went beyond the reply to the amended defence and to understand the matters which were in issue one has to look at the plaint *vis-à-vis* the amended defence and the reply to the amended defence. A careful reading of the ruling however, makes it clear that the court had the pleadings in mind and moreover, there is no basis for the conclusion that the court would have arrived at any different decision. The court was simply interpreting the provisions of Section 36 and 45of the Advocates Act as read with the Advocates Remuneration Order and it was not bound by any position taken by the parties. It may well be that the court was wrong in its interpretation or in the approach it took. However, that is not a matter that can be taken up on review as it is not an error apparent on the face of the record but ought to be subject of an appeal. Moreover to invite the court to set aside the order of dismissal and substitute it with an order striking out the plaint and dismissing the plaintiff's suit in effect is to invite the court to sit on appeal on its own ruling and make a complete turnaround which is not within the purview of Order 44 of the Civil Procedure Rules."

42. The Court of Appeal in **Mahinda vs. Kenya Power & Lighting Co. Ltd [2005] 2 KLR 418** expressed itself 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."

43. That is my understanding of the decision in **Evan Bwire vs. Andrew Aginda Civil Appeal No. 147 of 2006** cited in the case of **Stephen Githua Kimani vs. Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR** where the Court of Appeal held as follows:

> **"An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence."**

44. In this case the application is based on the allegation of discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the Applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made. According to the Petitioner/Applicant what has been discovered is that as at the time of the filing of the petition, the 4th and 5th Respondents had not served him and to date he has not been issued with the letter revoking his appointment as the Acting Chief Executive Officer of National Water, Harvesting and Storage Authority. Assuming that position is correct, it is clear that even now the letter revoking the Petitioner's appointment has not been issued to him. One then wonders what has been discovered since the judgement.

45. In the supporting affidavit, all the documents exhibited were in existence by the time of the judgement. In fact, none of the said documents bear a date subsequent to the filing of the petition. I associate myself with the decision of **Kuloba, J** in **Lakesteel Supplies vs. Dr. Badia and Anor Kisumu HCCC No. 191 of 1994** where he opined that:

> **"The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong…On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."**

46. Similarly, in **Tiwi Beach Hotel Ltd vs. Brown Nairobi HCCC No. 136 of 1982 [1993] KLR 595**, **Owuor, J** (as she then was) found that:

> **"…there is nothing in the affidavits which brings the application within the ambit of the rule. All the documents now attached to the affidavits are such that were in existence at the date when the judgement was entered or could have been available after the exercise of due diligence. There is no material before the Court that were not within the applicant's knowledge or could not be produced by her at the time when the decree was passed."**

47. Even then, in **Baneland Enterprises vs. NIC Bank Limited & Another Nairobi (Milimani) HCCS No. 251 of 2007, Kimaru, J** expressed himself as follows:

> **"For the court to favourably consider an application to review a decision of the court on the grounds that the applicant has made discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant at the time the original application was argued under Order 44 rule 1 of the Civil Procedure Rules, it must be satisfied that such new and important matter or evidence is of such nature that it would lead any court of law applying its mind to the facts and the law applicable to the case reach a determination that if the court which heard the original application had the advantage of the new evidence, it would have reached a different decision other than the one that was rendered. The applicant must also establish that the new and important matter or evidence was not within its knowledge after the exercise of the normal diligence required of any conscientious litigant."**

48. That was the position in **Touring Cars Ltd. & Another vs. Ashok K Makanji Civil Appeal No. 78 of 1998 [2000] 1 EA 261** where the Court of Appeal held that a party who relies on discovery of a new and important matter for the purposes of review must plead the same and that in an application for review on ground of a new and important factor the said new factor must be one which was not within the knowledge of the applicant after the exercise of due diligence.

49. In this Court's judgement the Court was clear that there was no basis upon which it could be found that the removal of the Petitioner or threat of his removal from his position with the 5th Respondent was informed by the subject criminal proceedings. It was the Court's view that there may well have been some reasons malicious or otherwise but the Court sitting as a constitutional court as opposed to the Employment and Labour Relations Court could not determine that issue. In this application the letter dated 28th April, 2020 does not disclose that the Petitioner was removed from his position due to his arrest and arraignment in Court. Nevertheless, this Court having found that the issue ought to be dealt with before the ELRC, this Court cannot under the guise of a review, in effect reverse that opinion. In **Iddi Faraj vs. Sheikh Amin Bin Musellem [1960] EA 917** it was held that:

> **“The ground of review of a decree on the discovery of new and important matter and evidence, which was not within the applicant’s knowledge, or could not be produced by him at the time the decree was passed, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, must at any rate be something which existed at the date of the decree, and the section does not authorise the review of a decree which was right when it was made on the ground of the happening of some subsequent event.”**

50. As appreciated by the Court of Appeal in **Kaiza vs. Kaiza Civil Appeal No. 225 of 2008 [2009] KLR 499**:

> **“An application for review under Order 44 rule 1 must be clear and specific on the basis upon which it is made. The motion before the Superior Court was based on the discovery of new facts. However, it is not every new fact which will qualify for interference with the judgement or decree sought to be reviewed. In the words of the rule itself, it is “....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....”. Applications on this ground must be treated with great caution and as required by rule 4(2)(b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of discovery of new evidence, it must be proved that the applicant had acted with due diligence and the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made. Where such a review is based on the fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.”**

51. In this application, the Petitioner/Applicant has failed to satisfy me that the application meets the threshold for a review.

52. In the premises, the application fails and is dismissed with costs to the 1st, 4th and 5th Respondents.

53. It is so ordered.

Read, signed and delivered at Machakos this 22nd day of October, 2020

G V ODUNGA

JUDGE

In the Presence of:

Miss Mwau for Mr Kiprono for the Petitioner

Mr Ngetich for the 1st Respondent

Miss Philip for Mr Wanyama for the 4th and 5th Respondents

CA Geoffrey