



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO. 26 OF 2016**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

**THE ETHICS & ANTI CORRUPTION**

**COMMISSION.....1<sup>ST</sup> INTERESTED PARTY**

**ATTORNEY GENERAL** on behalf of the Chief Magistrate’s

Anti-Corruption Court, Milimani Law Courts, Nairobi .....2<sup>ND</sup> INTERESTED PARTY

**AND**

**JOSPHAT SIRMA .....EX PARTE APPLICANT**

**RULING**

1. The Applicant filed the Notice of Motion dated 30<sup>th</sup> January, 2017 under Section 1A, 1B, 3A, 99 and 100 Civil Procedure Act and Order 45, 51 and 53 Civil Procedure Rules seeking the following orders.

***(i) That the Honourable Court be pleased to review, vacate, uplift and or set aside its Ruling striking out the Ex-parte/Applicant’s Application for Judicial Review dated 18<sup>th</sup> November, 2016 herein;***

***(ii) That the costs of this application be provided for.***

2. The Application is premised on the grounds on the face of the Application plus the Applicant’s Supporting Affidavit.

Both the Respondent and the 1<sup>st</sup> Interested Party filed Grounds of Opposition to the Application.

3. **M/s Sirma** in her grounds and submissions pointed out an error at paragraph 34 of the Ruling which refers to annexures **JS4** and **JS5** as one document yet they are two different documents, namely the LPO and quotation respectively. She raised issues about the dates of meetings by the Committees; the titles of the Applicant; what the Applicant did or did not do, the mis-directions by the court; what the court ought

to have done and did not do; and finally, the role the Applicant played as a Senior Electrical Engineer and not Chief Engineer. All these are covered in the Grounds and Supporting Affidavit.

4. In opposing the application, **Mr. Ashimosi** for the Respondent relied on the grounds of opposition and submitted that the Applicant had not demonstrated the error apparent on the face of the record. Further, that any error, misdirection, whether in law or in fact is a ground for appeal and not review. He referred to the case of **Pancras T. Swai –vs- Kenya Breweries Ltd. – Civil Appeal (CA Nrb) No. 275 of 2010** and **National Bank of Kenya Ltd. –vs- Ndungu Njau (Civil Appeal No. 211 of 1996 (UR))**. Finally, he submitted that the question this Court should be asking itself is whether the final decision would be affected by the fact of the two documents being different. He urged the Court to dismiss the application for review.

5. **M/s Ocharo** for the 1<sup>st</sup> Interested Party conceded the error by the Court in considering JS4 and JS5 as one document, though that did not affect the outcome to the Application. It was her submission that the Civil Procedure Act was not applicable to Judicial Review matters and referred to the case of ***Republic – vs- Anti-Counterfeit Agency & 2 Others (supra)*** on this.

6. She submitted that in considering the grounds for Review under Order 45 Civil Procedure Rules the Court should find that the many elaborate issues of evidence listed by the Applicant cannot be reasons for Review. She urged the Court to dismiss the Application as the said Application was more of an Appeal than a Review.

7. In a rejoinder, M/s Sirma stressed that the LPO which was the contract did not have the word ***“installation”***.

8. I agree with M/s Ocharo’s submission that Judicial Review is special and is sui generis being neither civil nor criminal. It has a self-regulating process under Order 53 Civil Procedure Rules.

9. The Ruling, the subject of this Application was in respect of a Judicial Review Application. The Applicant has cited Section 99 and Section 100 Civil Procedure Act as some of the provisions on which his Application is anchored.

Section 99 Civil Procedure Act provides;

***“Clerical or arithmetical mistakes in judgements, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”***

Section 100 Civil Procedure Act provides;

***“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”***

10. All the mistakes and errors mentioned in Section 99 and 100 Civil Procedure Act are provided for under Order 45 Rule 2 (1) Civil Procedure Rules which provides;

***“45 (Rule1) (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.*

**Rule (2)** (1) *An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.*

*(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.*

*(3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.*

**Rule (3)** (1) *Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.*

*(2) Where the court is of opinion that the application for review should be granted, it shall grant the same.”*

11. Order 45 Rule 1 (1) (b) Civil Procedure Rules sets out the parameters for an Application for Review. This is for purposes of avoiding a scenario where the Review Court turns into an Appeal Court over its own Ruling or Judgment. The Court may only hear a new and important matter or evidence which was not within the knowledge of an Applicant or could not be produced by him at the time when the Order was passed.

12. Secondly, the Court may only consider a mistake or error apparent on the face of the record. On this, the record must speak for itself or by itself without much explanation.

13. Thirdly, the court may consider any other sufficient reason.

14. I am guided by the finding by the Court of Appeal in the case of National Bank of Kenya Ltd. –vs- Ndungu Njau (supra) where it held;

*“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 a 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 proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review.”*

15. The Court of Appeal in Pancras T. Swari –vs- Kenya Breweries Ltd. (2014) eKLR at paragraph 23 still on Judicial Review states thus;

*“The Applicant’s right to seek review though unfettered, could not be successfully maintained on the basis that the decision of the court was wrong either on account of wrong application of*

***the law or due to failure to apply the law at all.”***

16. Coming to the matter before me, I find that there are no clerical or arithmetical errors or mistakes in the orders pointed out by the Applicant, which would require this Court to correct.

17. Section 100 Civil Procedure Act deals with amendments to errors, defects in any proceedings in a suit. The Applicant has not raised any defect in any proceeding save for the issue of JS4 and JS5 as appears in paragraph 34 of the Ruling.

18. This Court acknowledges this to be an error apparent on the face of the record, as JS4 and JS5 are two different documents, yet the court in its Ruling considered them as one document. The court had considered JS5 to be a continuation of JS4 which is an error. I therefore amend paragraph 34 of the Ruling dated 25<sup>th</sup> January, 2016 by deleting the sentence starting;

***“A perusal.....through to the one ending with the word install the transformer”***

19. The rest of the paragraph remains unchanged.

There has been a stress on the missing word ***“Installation”*** from the document JS4. I have made a finding on this in the Ruling and will not delve into it in this Application for Review as the correction above does not affect my finding on the same.

20. I have considered all the other grounds raised in the application together with the Supporting Affidavits, Grounds of Opposition and the Submissions. I find all the grounds raised and the averments in the Supporting and Supplementary Affidavit to be attacking this Court’s findings on issues of both law and facts. As a Court dealing with review under Order 45 Civil Procedure Rules, the law does not allow me to start re-evaluating the evidence before the Court.

21. In the case of ***Pancras T. Swai –vs- Kenya Breweries (supra)*** the Court of Appeal at paragraph 29 stated thus;

***“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 functus officio and have no appellate jurisdiction.”***

22. This finding by the Court of Appeal clearly explains what a Review Court is concerned with and I am duly guided. This Court will therefore not sit on appeal in its own cause. For the above reasons, I decline to grant the prayers sought and dismiss the Application dated 30<sup>th</sup> January, 2017 with costs.

Signed, Dated and delivered this 23<sup>rd</sup> day of ***February, 2017*** at ***Nairobi***

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***HEDWIG I. ONG’UDI***

***HIGH COURT JUDGE***