



**REPUBLIC OF KENYA**

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

**ELC MISC APPLICATION NO. 17 OF 2014**

**IN THE MATTER OF AN APPLICATION BY MICHAEL GICOVI NJAGI TO APPLY FOR  
JUDICIAL REVIEW ORDERS OF CERTIORARI AGAINST THE ACTING SENIOR  
RESIDENT MAGISTRATE J.P NANDI RUNYENJES**

**AND**

**IN THE MATTER OF A DECREE DATED THE 19<sup>TH</sup> DECEMBER 2013 IN RUNYENJES  
PRINCIPAL MAGISTRATE'S COURT NO. 64 OF 2013, FELISTA GATHONI NJERU VERSUS  
MICHAEL GICOVI NJAGI**

**REPUBLIC OF KENYA.....APPLICANT**

**EX-PARTE**

**MICHAEL GICOVI NJAGI**

**VERSUS**

**J.P. NANDI**

**ACTING RESIDENT MAGISTRATE RUNYENJES .....RESPONDENT**

**AND**

**FELISTA GATHONI NJERU )**

**JOSEPH NJERU MUKUTHU).....INTERESTED PARTIES**

**JUDGMENT**

On 11th March 2016, I delivered a judgment in this case dismissing the applicant's Notice of Motion filed on 5th May 2014 seeking an order of certiorari to quash the decree issued by the Senior Resident Magistrate's Court at **RUNYENJES** in their Civil Case No. 64 of 2015 **FELISTA NJERU VS MICHAEL GICOVI**.

The applicant **MICHAEL GICOVI** has now moved this Court by his Notice of Motion dated 21st March 2016 seeking the main order that this Court sets aside and review the said judgment. The application which does not cite the law upon which it is premised is supported by the applicant's affidavit in which he refers me to the prayers sought in the Notice of Motion which I dismissed on 11th March 2016. He then depones to other issues which are really not relevant in an application such as this including urging this

Court to cancel the sub-division of land GATURI/GITHIMU/8297 into GATURI/GITHIMU/10009 and 10010 stating that it was done fraudulently.

The interested party **JOSEPH NJERU MUKUTHU** has sworn a replying affidavit in which he urges this Court to dismiss the application as it does not indicate the law on which the applicant relies, that the applicant was previously represented by a lawyer but is now acting in person without complying with the law, that there is no error, mistake or anything new to warrant the review application which is a disguised appeal.

On 7th June 2016, it was agreed that the application be canvassed by way of written submissions which have been filed.

I have considered the application and the submissions filed both by the applicant in person and by **KENNETH GITHINJI** advocate for the interested party.

Although the application does not cite the legal provision on which it is founded, it is clear from the remedies sought that reliance is placed upon ***Orders 45 and 12 of the Civil Procedure Rules*** which donate power to review and set aside judgment respectively. Notwithstanding the lapses on the part of the applicant who is acting in person, this Court will save this application in view of the clear provisions of ***Order 51 Rule 10 of the Civil Procedure Rules*** and also ***Article 159 (2) (d) of the Constitution***.

I shall first consider the application for review. But even before I do so, there are two schools of thought as to whether in fact a Court can review its judgment in a Judicial Review application as is the case herein. ***Section 8 (5) of the Land Reform Act*** states as follows:

***“Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal”.***

That would mean therefore that the only recourse an aggrieved party has following a judgment in a Judicial Review application would be to file an appeal to the Court of Appeal. That was the view that the Court of Appeal took in the case of ***BIREN AMRITLAL SHAH AND ANOTHER VS REPUBLIC C.A CIVIL APPEAL No. 186 of 2014 (2013) e K.L.R*** when it said:

***“It is therefore quite clear that appeals in respect of orders made under Judicial Review lie with the Court of Appeal. Therefore, in answering the question whether the High Court had jurisdiction to entertain a review application, we agree with the learned Judge of the High Court that, in exercising its special jurisdiction under the Law Reform Act, the High Court had no jurisdiction to review its previous order”***

However, in an earlier decision in the case of ***NAKUMATT HOLDINGS LTD VS COMMISSIONER OF VAT 2011 e K.L.R***, the Court of Appeal held that the High Court has residual powers to correct its own mistake in the exercise of its inherent jurisdiction where such a mistake is remediable by the Court. The Court of Appeal expressed itself as follows:

***“Mr. Ontweka for the respondent in his submissions to us seemed to suggest that where a law is silent on whether review is permissible, the Courts must decline jurisdiction where a review is sought. While we agree with him that judicial review is a special jurisdiction, we do not agree that in clear cases, Courts should nonetheless fold their arms and decline jurisdiction. The process of review is intended to obviate hardship and injustice to a party who is otherwise not to blame for the circumstances he finds himself in. This Court in the case we cited earlier of AGAKHAN EDUCATION SERVICES KENYA VS REPUBLIC (supra) expressed the view that review jurisdiction in cases as the present one, should be exercised sparingly and in very clear-cut cases”.***

I also take note of the decision by the Court of Appeal in ***COMMISSIONER OF LANDS AND ANOTHER VS COASTAL AQUACULTURE LTD CIVIL APPEAL No. 252 of 1996*** where it held

that:

***“If an issue arises in judicial review proceedings that is not expressly provided for in Order LIII, relevant provisions of the Civil Procedure Act or Rules can be called into aid”***

I have considered those divergent views which are all binding on me and I am inclined to follow the route taken by the Court of Appeal in the case of ***NAKUMATT HOLDINGS LTD VS COMMISSIONER OF VAT*** (supra) and ***COMMISSIONER OF LANDS VS COASTAL ADVACULTURE*** (supra) that although a Court exercising a judicial review jurisdiction is governed by powers donated by ***Order 53 of the Civil Procedure Rules***, it should nonetheless be able to review its own decisions. I am of the view that the Court should take a more liberal approach notwithstanding the provisions of ***Section 8 (3) and 8 (5) of the Land Reform Act*** which provide that orders in Judicial Review Applications are final and the only recourse is to the Court of Appeal. I say so because, to hold otherwise would fetter the Court’s inherent jurisdiction being unnecessarily fathered yet a Court of law enjoys residual powers which it should dip into to ensure that its processes are not abused. Besides, the Court would not even be able to correct obvious errors or mistakes appearing on the record. Further, that will ensure that the Courts serve substantive justice to those who approach it which is the core function of the Judiciary. I therefore hold that this Court has the jurisdiction to determine this application which I shall now address.

The power to review this Court’s orders is donated by ***Order 45 (1) of the Civil Procedure Rules*** which provide as follows:

***“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 reasons, 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”.***

The applicant moved to this Court on 21st March 2016 some ten (10) days after the judgment sought to be reviewed or set aside was delivered. There has therefore be no unreasonable delay in filing this application which is a requirement under ***Order 45 Rule 1 of the Civil Procedure Rules***. It is however clear from ***Order 45 Rule 1 Civil Procedure Rules*** that the applicant has to show that there is discovery of new and important matter or evidence which could not be produced earlier, or on account of some mistake or error apparent on the face of the record or for any other sufficient reasons. I have perused the applicant’s Notice of Motion and the supporting affidavit and it is clear to me that he has not raised any of the above grounds to warrant a review of the judgment delivered on 11th March 2016. From his supporting affidavit he is basically re-visiting his previous evidence and urging the Court to reconsider his case. That is not what an application for review under ***Order 45 (1) of the Civil Procedure Rules*** is meant to achieve. I must therefore reject that application.

The applicant also seek an order for the setting aside of this Court’s judgment dated 11th March 2016. That judgment was obtained following a full hearing in which both parties were represented. It is therefore a regular judgment. It is not an ex-parte judgment and therefore even if, as guided by the decision in ***COMMISSIONER OF LANDS VS COASTAL ADVACULTURE*** (supra), the relevant provisions of the ***Civil Procedure Act*** or rules are called into aid, I do not see what reasons this Court can possibly give to set aside the said judgment. The applicant’s only recourse is to file an appeal from that judgment.

In the circumstances, the applicant’s Notice of Motion dated 21st March 2016 seeking the review and

setting aside of this Court's judgment dated 11th March 2016 lacks merit. It is accordingly dismissed with costs to the interested parties.

**B.N. OLAO**

**JUDGE**

**19<sup>TH</sup> MAY, 2017**

Judgment dated, delivered and signed in open Court this 19<sup>th</sup> day of May 2017

Mr. Mwangi for Mr. Githinji for Respondent present

No appearance for the Applicant/his wife is present and says that his is in prison

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**19<sup>TH</sup> MAY, 2017**