



**REPUBLIC OF KENYA**

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

**JR MISC. APPLICATION NO. 576 OF 2005**

**IN THE MATTER OF APPLICATION BY KANGEMA JUAKALI ASSOCIATION AND OTHERS FOR AN ORDER OF MANDAMUS AND AN ORDER FOR PROHIBITION ALL DIRECTED TO THE CLERK (NOW ADMINISTRATOR-KANGEMA SUB-COUNTY, THE CHAIRMAN AND MEMBERS OF THE KANGEMA TOWN COUNCIL, TO SATISFY SECTION 29, 32 AND 33 OF THE PHYSICAL PLANNING ACT OF 1996 AND ALL RELEVANT LAWS AND PROVISIONS**

**REPUBLIC.....APPLICANTS**

**VERSUS**

**CLERK TO KANGEMA TOWN COUNCIL**

**MR. MICHAEL NJOGU (NOW ADMINISTRATOR KANGEMA SUB-COUNTY**

**MR. ZACHARIAH MWAURA NGATIA**

**KANGEMA TOWN COUNCIL.....RESPONDENTS**

**EX PARTE: KANGEMA JUA KALI ASSOCIATION**

**CYRUS GACHOKA MUNYIRI**

**JAMES MWANGI NJAU**

**RULING**

1. By his ruling dated 10<sup>th</sup> May, 2006, **Emukule, J** made the following orders:

**a. I affirm and declare that the Town Council of Kangema has the legal duty and obligation to convene and hold a meeting of its appropriate committee on town planning to consider, and determine the Association's application dated 14/12/2004. The Town Clerk of Kangema Town Council shall therefore convene and have such meeting held within thirty (30) days of the date of this order;**

**b. The Town Clerk shall communicate to the Association's Chairman at the Associations' registered Postal Address as well as by recorded delivery within seven (7) days of the date of such decision allocation the Association the new site described as marked 4<sup>2</sup> in the Councils meeting of 3/12/1999;**

c. **The Council shall also resolve that the title to the new site shall be issued in the name of the permanent secretary to the Treasury incorporated under Chapter 101, Laws of Kenya and on the same terms as per the lease relating to Kangema Title No. Township/102 issued on 26/11/1998 and to take effect either as of 1/10/1996 or the date of issue as the Commissioner of Lands shall decide or shall deem fit;**

d. **Pending the issue of such title the Council shall clearly demarcate, and point out to the Associations' elected officials (the Applicant herein) the beacons to the new site, and shall allow the Association's members to take over the new site (60) days from the date hereof.**

e. **The old title No. Kangema Township/102 shall be surrendered only upon the issue of the new title in terms stated in the old title save the commencement date if the Commissioner of Lands shall so decide.**

2. Vide a Notice of Motion dated 3<sup>rd</sup> February, 2016 the applicants sought the following orders:

1. **That this application be certified as urgent and the same be heard on a priority basis.**

2. **That pending the hearing and determination of this application inter partes, the honourable court be pleased to declare that the actions of the defendant herein are fraudulent and also negligence and acts in gross disobedience and contempt of the court orders issued on 10/5/2006 and should be punished by way of imprisonment for six months.**

3. **That pending the hearing and determination of this application inter partes the honourable court be pleased to declare that the said alternative plot 4(2) non-existent and order the defendant convene a town planning committee meeting to consider the applicant's application for development as applied for on 14/12/2004.**

4. **That the honourable court be pleased to declare that applicants herein be allowed occupation and erection of a perimeter fence on plot LR Kangema Township/102 with immediate effect.**

5. **That the costs of this application be borne by the defendant.**

3. After hearing the said application by a ruling delivered on 20<sup>th</sup> day of September, 2016, this Court dismissed the said application on the ground that the order which purportedly gave rise to the application for contempt was incapable of being complied with hence contempt could not be sustained.

4. The applicant has now moved this Court seeking that both that decision and the decision made on 10<sup>th</sup> May, 2006 be reviewed and that the applications dated 11<sup>th</sup> May, 2005 and the one dated 3<sup>rd</sup> February, 2016 be allowed.

5. In his grounds the applicant is aggrieved by the decision made by **Emukule, J** and alleges that the learned Judge was not an authority on matters of pollution and refused to recognise the expert opinions on the matter. It was further contended that the learned Judge failed to show when the applicant's subject land was compulsorily acquired by the government.

6. With respect to the orders issued by this Court, the same were faulted on the ground that the Court failed to address the cause of the prayer for contempt including the ground therefor.

### **Determination**

7. I have considered the issues raised in this application.

8. However 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 provides 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.”**

9. In the instant case the decisions sought to be reviewed were made on 10<sup>th</sup> May, 2006 (10 years before the instant application) and 20<sup>th</sup> September, 2016 (more than a month before the present application). No reason has been given for the delay in particular with respect to the order made on 10<sup>th</sup> May, 2006. In these proceedings, it is clear that the grant of the order reviewing the order made on 20<sup>th</sup> September, 2016 depends on the review of the decision made on 10<sup>th</sup> May, 2006.

10. It is therefore my view that the application has not been brought without unreasonable delay. A delay of 10 years in the circumstances of this case is clearly inordinate.

11. Apart from that the decision whether or not to review a Court’s decision was well captured by the Court of Appeal in **Mumby’s Food Products Limited & 2 Others vs. Co-Operative Merchant Bank Limited Civil Appeal No. 270 of 2002**, where it was held that 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 however 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 a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion. Misconstruing a statute or other provisions of the law therefore cannot be a ground for review.

12. In my view the grounds relied upon in his application ought to have been grounds for an appeal rather than review. In **Ndungu Njau vs. National Bank of Kenya Limited Civil Appeal No. 257 of 2002**, the Court of Appeal expressed itself as follows:

**“Neither in the application, its grounds or supporting affidavit nor in the instant appeal was or has been raised any important matter or evidence which was not within the knowledge of the appellant at the time the decree was passed in spite of exercise of due diligence which requires strict proof...Nor was there any submission before the Court about any mistake or error apparent on the face of the record to warrant an order of review which was sought. The error or omission on record must be self evident on the part of the court and should not require elaborate argument in order to be established... There was no reference to such mistake or error before the trial Court and the grounds of appeal in the instant appeal do not point to any such omission or error.”**

13. Similarly in **National Bank of Kenya vs. Ndungu Njau Civil Appeal No. 211 of 1996 [1995-98] 2**

EA 249, the same Court expressed itself as follows:

**“In an application for review, it is particularly necessary that the application should disclose in the body of the notice of motion the ground or grounds on which the review is being sought. Although this was, in the court’s view, a fatal omission, yet the court in the broad interest of justice, asked counsel for the appellant on which ground under Order 44 he had argued the said notice of motion in the Superior Court and he replied that he had sought the review on the ground that there was a mistake or error apparent on the face of the record of the Superior Court...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 and the error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground of review that another judge could have taken a different view of the matter. Nor can it be a ground of review that the Court proceeded on an incorrect exposition of the law and reached erroneous conclusion of the law...Misconstruing a statute or other provision of the law is not a ground for review...In the instant case the matters in dispute had been fully canvassed before the Learned Judge who made a conscious decision on the matters in controversy and exercised his discretion in favour of the Respondent. If he had reached a wrong conclusion of law, it would be a good ground for appeal but not for review. Otherwise the learned Judge would be sitting in appeal on his own judgement which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.”**

14. In the premises I find no merit in this application which is hereby dismissed with costs.

15. It is so ordered.

**Dated at Nairobi this 29<sup>th</sup> day of September, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr James Mwangi the applicant***

***CA Ooko***