REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 203 OF 2016

IN THE MATTER OF ARTICLES 2 (1), 3 (1), 10, 19, 20, 21, 22, 27, 159, 165, 232 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 10, 20, 21, 27 (10 AND 232 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 6, 6B & 11 OF THE KENYA INFORMATION AND COMMUNICATIONS ACT

BETWEEN

ADRIAN KAMOTHO NJENGA……..…....PETITIONER

VERSUS

CABINET SECRETARY, MINISTRY OF INFORMATION,

COMMUNICATION AND TECHNOLOGY.....RESPONDENT

AND

COMMUNICATIONS AUTHORITY

OF KENYA.....1ST INTERESTED PARTY

PAUL KUKUBO.....2ND INTERESTED PARTY

MUGAMBI NANDI.....3RD INTERESTED PARTY

DAVID CHERUIYOT KITUR.....4TH INTERESTED PARTY

LEVI OBONYO OWINO.....5TH INTERESTED PARTY

CHRISTOPHER GUYO HUKA.....6TH INTERESTED PARTY

PATRICIA W. KIMAMA.....7TH INTERESTED PARTY

KENTICE L. TIKOLO.....8TH INTERESTED PARTY

RULING

1. By a notice of motion dated 15th May 2017 expressed under the provisions of Articles **2 (1), 3 (1), 10, 19, 20, 21, 22, 27, 159, 165, 232** and **259** of the Constitution of Kenya**,** 2010 and Sections **1A, 1B, 3A** and **80** of the Civil Procedure Act[1], the Petitioner (hereinafter referred to as the applicant) moved this court seeking orders *to review the judgement and or set aside the orders made on 24th February 2017.*

2. The core ground is are that the judgement did *not take into account fundamental matters of law* during the proceedings and that no determination was made with regard to the mandatory provisions of section 1 (2) of the First Schedule to the Kenya Information and Communications Act which dictates that the members of the first Interested Party's be appointed at different times so that the respective expiry dates of their terms of office shall fall at different times.

3. The applicant is an advocate of the High court of Kenya. He represented himself in court. He urged the court to consider the *"overriding objective"* under Sections **1A & 1B** of the Civil Procedure Act.[2] He urged the court to be guided by purposive interpretation of the constitution. He cited *National Bank of Kenya Limited vs Ndingu Njau*[3] and urged the court allow the application.

4. The Respondents and interested party's opposition to the application is premised on the grounds *inter alia* that the application is misplaced, bad in law, and does not disclose any apparent error apparent on the face of the record, that the applicant ought to exercise his right of appeal and that the grounds relied upon are issues of law and fact and cannot be addressed by way of review and that there is unexplained delay in filing the application.

5. Two key issues distil themselves for determination in this case:-

> *i. Whether the applicant has satisfied the grounds for review.*
>
> *ii. Whether the circumstances of this case are of such a nature as to warrant this court to invoke the overriding objective of the Civil Procedure Act**[4]** (Sections **1A & 1B and article 159 (2) (d)** of the Constitution of Kenya 2010.*

6. It is important to distinguish grounds of appeal and grounds for review. To my discernment, the grounds cited by the applicant qualify to be grounds of appeal and not grounds for review. In the case of *National Bank of Kenya Ltd vs Ndungu Njau*[5] cited by the applicant the court held:-

> *"In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose."(Emphasis added).*

7. **Bennet J** was in my humble view correct in *Abasi Belinda vs Fredrick Kangwamu and another***[6]** when he held that:-

> *"a point which may be a good ground of appeal may not be a good ground for review and an erroneous view of evidence or law is not a ground for review though it may be a good ground for*

appeal"

8. Also of useful guidance is the following excerpt from the judgement in the above cited case of *National Bank of Kenya Ltd vs Ndungu Njau***[7]**where **Kwach R.O, Akiwumi A. M. & Pall G. S, JJA** stated:-

> *"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 a ground for review."*

9. At this juncture, I find it is necessary to examine the provisions of Section **80** of the Civil Procedure Act[8] and Order **45** Rule **1** of the Civil Procedure Rules, 2010. In my view, the High Court has a power of review, but such said power must be exercised within the framework of Section **80** Civil Procedure Act[9] and Order **45** Rule **1**.[10]

10. Section **80** of the Civil Procedure Act[11] provides as follows:-

> ***80.*** *Any person who considers himself aggrieved-*
>
> ***(a)****by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*
>
> ***(b)****by a decree or order from which no appeal is allowed by this Act,*
>
> *May apply for a review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.*

11. Order **45** Rule **1** of the Civil Procedure Rules, 2010 provides as follows:-

> ***45*** *Rule* ***1 (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 review of judgement to the court which passed the decree or made the order without unreasonable delay."*

12. Section **80** gives the power of review and Order **45** sets out the rules. The rules in my view restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; ***(a)*** *discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;* ***(b)*** *on account of some mistake or error apparent on the face of the record, or* ***(c)*** *for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.*

13. The reasons offered are pure grounds of law and do not fall within the scope of the grounds set out in Order **45** Rule **1**. Discussing the scope of review, the Supreme Court of India in the case of *Ajit Kumar Rath vs State of Orisa& Others*[12] had this to say:-

"the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule"

14. A similar view was held in the case of *Sadar Mohamed vs Charan Signh and Another***[13]** where it was held that:-

"Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter)."

15. **Mulla** in the *Code of Civil Procedure***[14]** (writing on Order **47** Rule **1** of the Civil Procedure Code of India), (the equivalent of our Order **45** Rule **1**), states that *the expression 'any other sufficient reason'*.....means *a reason sufficiently analogous to those specified in the rule*. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out....., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.[15]

16. I also find useful guidance in the decision of **Kwach, Lakha** and **O'kubasu JJA** in the case of *Tokesi Mambili and others vs Simion Litsanga*[16]delivered on 28th March 2003 where they held as follows:-

i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.(Emphasis added)

ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.

17. It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 45, Rule 1. In connection with the limitation of the powers of the court under Order 45 Rule 1, while dealing with similar jurisdiction available to the High Court while seeking to review the orders the Indian Supreme Court[17] has made the following pertinent observations:-

"Now it is also to be kept in view that in the impugned judgment, the Division Bench of the High Court has clearly observed that they were entertaining the review petition only on the ground of error apparent on the face of the record and not on any other ground. So far as that aspect is concerned, it has to be kept in view that an error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions."

18. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review.

19. The power of **review** is available only when there is an **error appare**nt on the **face** of the **record.** The judgment the subject of this application does not suffer any such **error apparent** on the **face** of the **record**. The issues raised are matters touching on the courts finding, interpretation and application of the law. Such matters can only be challenged by way of appeal.

20. I emphasize that **review** proceedings are not an appeal. The **review** must be confined to **error apparent** on the **face** of the **record** and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible.[18]

21. Also, I am not persuaded that the reasons offered by the applicant amounts to *'sufficient reason'* within the meaning of the rules cited above nor is it *analogous* or *ejusdem generis* to the other reasons stipulated in Order **45** Rule **1.** My finding is fortified by the holding in the case of *Evan Bwire vs Andrew Nginda***[19]**where the court held that *'an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh.*

22. Further, no explanation has been offered to explain why it took more than two months to file the application. Perhaps, it's important to recall the last sentence of Order **45** Rule **1 (1) (b**) which reads '…….*may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.'*

23. In my view, delay must be explained at all times. It is improper for an applicant to file an application over two months late and opt to offer no explanation at all. **Mwera J** in the case of *Godfrey Ajuang Okumuvs Nicholas Odera Opinya***[20]** held *inter alia* that *'an aggrieved party seeking a review of a decree or order on whatever basis must apply without unreasonable delay.'*

24. In the case of *Abdulraham Adam Hassan vs National Bank of Kenya Ltd***,[21]**an unexplained delay of **three months** was found to be unreasonable. Similarly, in the case of *Kenfreight (E.A.) Limited vs Star East Africa Company Limited*[22]**Onyango Otieno J** (as he then was) found a delay of **three months** to be unreasonable and disallowed an application for review. While in *Mbogo Gatuiku vs A.G***.[23], Mwera J** emphasising on the need to file applications for review without delay remarked that *'even a delay of a day or two calls for an explanation'*.

25. In view of my findings herein above that the grounds offered do not fall within the scope for review, and that no sufficient reason has been offered nor has the over two months delay been explained, this application fails on those grounds.

26. Since the applicant invoked the provisions of the sections **1 A** & **1 B** of the Civil Procedure Act, I find it necessary to consider the *"overriding objective"* under the said provisions and also Article **159 (2) (d)** of the Constitution of Kenya 2010.

27. Before I examine the said provisions I find it fit to recall with approval the words of **Justice Hancox** in *Githere vs Kimungu***[24]** where he stated that *"the relation of rules of practice to the administration of justice is intended to be that of a handmaid rather than a mistress and that the Court should not be too far bound and tied by the rules, which are intended as general rules of procedure, as to be compelled to do that which will cause injustice in a particular case."*

28. Commenting on the same subject, the **Hon. Mr. Justice Robert Makaramba**, judge of the High Court Tanzania stated *"the inherited common law adversarial system with its attendant English practice and procedure has always been at the centre of public criticism for contributing to delays in the dispensation of justice together with its attendant procedural technicalities."****[25]***

29. Procedural laws refer to rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties.[26] It was this strictness of having due regard to the rules of Civil Procedure that occasioned the loss of many legitimate claims by plaintiffs thus denying them access to justice.

30. The overriding concept however came to cure this. **Michael Howard**[27] defines the Overriding Objective *"as a principle from the civil procedure rules. The purpose of the overriding objective is for the civil litigation and dispute resolution process to be fair, fast and inexpensive. The principle is that each case should be treated proportionately in relation to size, importance and complexity of the claim*

and the financial situation of the parties. The courts must consider the overriding objective when they make rulings, give directions and interpret the civil procedure rules."

31. The double O's in the phrase Overriding Objectives are what coined what is today famously known as the term Oxygen Principle. In *Hunker Trading Company Limited vs Elf Oil Kenya Limited,***[28]**perhaps the first case to be grounded on the new provisions the Appellate Jurisdiction Act (Sections **3A** and **3B)**, it was held that section **1A** of the Civil Procedure Act came in to provide facilitation of just, expeditious and proportionate resolution of civil disputes in Kenya as the overriding objective of the Act. The courts' duty in performing such mandate under section **1B** of the Civil Procedure Act are:-

> *(a) The just determination of the proceedings,*
>
> *(b) The efficient disposal of the business of the Court,*
>
> *(c) The efficient use of the available judicial and administrative resources,*
>
> *(d) The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties,*
>
> *(e) The use of suitable technology.*

32. Article **159 (2) (d)** of the Kenya Constitution 2010 propounds that in exercising judicial authority, the courts and tribunals shall administer justice without undue regard to technicalities of procedure.

33. Considering the above provisions which introduced the oxygen principle, in *Kamani vs Kenya Anti-Corruption Commission*[29] the court drew comparisons to the *Wolf reforms* which introduced similar provisions in England in 1998 by way of the Civil Procedure Rules and further considered the English case of *Bigizi vs Bank Leisure*[30] in which **Lord Woolf** himself talked about the concept of overriding principle objective as follows:-

> *"Under the {Civil Procedure Rules}the position is fundamentally different. As rule **1.1** makes clear the {rules} is a new procedural code with the overriding objective of enabling the court to deal with cases justly. The problem with the position prior to the introduction of the {rules} was that often the court had to take draconian steps such as striking out the proceedings….."*

34. In the above cited case of *Kamani vs Kenya Anti-Corruption Commission***[31]**the court had this to say:-

> *"It is, accordingly, clear to us that the amendment to section 3 of the Appellate Jurisdiction Act, did not, without more, come in to sweep away the well-known and established principles of law hitherto in place before the said amendment…--------This to our understanding means sections **3A** and **3B** of cap **9** cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules made to regulate appeals to this court"**(Emphasis added)***

35. In this regard, I stand guided by the above quotation from the case of *Kamani vs Kenya Anti-Corruption Commission***[32]**that the amendments did not come *to sweep away the well-known and established principles of law hitherto in place before the said amendment, and that the said amendments cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules made to regulate conduct of cases.* I find nothing in the **overriding objective** to suggest that a an application for Review can be allowed where the grounds relied upon fall outside the scope of order 45 Rule 1 of the Civil Procedure Rules as in this case.

36. Article **159 (2) (d)** of the constitution of Kenya 2010 enjoins courts to determine cases without undue regard to technicalities. I must however point out that Article **159** of the Constitution is not a panacea for all problems. It is not lost to this court that the provisions of section **80** of the Civil Procedure Act and

Order **45** Rule 1 of the Civil Procedure Rules cited above are very clear on the grounds for Review. The applicant cannot seek refuge under Article **159 (2) (d)** of the constitution under the present circumstances in view of the mandatory and express provisions cited above.

37. Having so found as herein above stated, I find that this is not a proper case for this court to exercise its discretion in favour of the applicant and that the application before me does not satisfy the grounds for review.

38. Accordingly, the application dated 15th May 2017 is hereby dismissed with costs to the Respondent.

Orders accordingly

Signed, Delivered and Dated at Nairobi this 27th day of September 2017.

JOHN M. MATIVO

JUDGE

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[1] Cap 21, Laws of Kenya

[2] Ibid

[3] Civil Application No. 211 of 1996

[4] Ibid

[5]{1996} KLR 469 (CAK) at Page 381

[6] {1963}E.A 557, also see Chittaley&Rao in the Codev of Civil Procedure, 4th Edition, Vol 3, Page 3227.

[7] Supra

[8] Ibid

[9] Ibid

[10] See Sinha J in Union of India vs B. Valluvan, AIR 2007 SC 210; (2006) 8 SCC 686

[11] Supra

[12] 9 Supreme Court Cases 596 at Page 608

[13] {1963}EA 557

[14] Sir DinshahFardunjiMulla, The Code of Civil Procedure, 18th Edition, Reprint 2012, at Page 1147, paragraph 10 Civil Appeal No. 90 of 2001; {2001} LLR 6937 (cak)

[15] Ibid

[16]{2004} eKLR

[17]In the case of Aribam Tuleshwar Sharma v. Aribam Pishak Sharmal, speaking through Chinnappa Reddy, J., (SCC p. 390, para 3) 1 (1979) 4 SCC 389: AIR 1979 SC 1047

[18] See Meera Bhanja v. Nirmala Kumari Choudhury, (1995) 1 SCC 170

[19] Civil Appeal No. 103 of 2000, Kisumu ; {2000} LLR 8340

[20] Kisumu High Court Civil Case No. 337 of 1996

[21] Kisumu High Court Civil Case No. 446 of 2001

[22] {2002} 2 KLR 783

[23]HCCC 1983 of 1980, High Court, Nairobi.

[24] {1975-1985} E.A 101

[25] Ho. Mr. Justice Robert V. Makaramba, “Breaking the Mould; Addressing the Practical and Legal Challenges of Justice Delivery in Tanzania: Experience from the Bench, TLS, February 2012 in Arusha, Page 7

[26]Elizabeth A M, Oxford Dictionary of Law, Oxford University Press, London, 2001 at Page 1241

[27] Howard Michael, Civil Litigation and Dispute resolution: Vocabulary Series, Legal English Books Publishers, 2013

[28] {2010} eKLR

[29] Ibid

[30] PLC {1999} 1 WLR 1926

[31] Supra note 35

[32] Supra note 35