



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.59 OF 2015

BETWEEN

OKIYA OMTATAH OKOITI.....PETITIONER/APPLICANT

VERSUS

- COMMUNICATIONS AUTHORITY OF KENYA.....1ST RESPONDENT**
- FRED MATIANG'I.....2ND RESPONDENT**
- BEN NGENE GITUKU.....3RD RESPONDENT**
- FRANCIS WANGUSI.....4TH RESPONDENT**
- PETER MUTIE.....5TH RESPONDENT**
- KENNEDY NYAUNDI.....6TH RESPONDENT**
- WILBERT CHOGE.....7TH RESPONDENT**
- GRACE MUNJURI.....8TH RESPONDENT**
- HELLEN KINOTI.....9TH RESPONDENT**
- BEATRICE OPEE.....10TH RESPONDENT**
- MONICA JUMA.....11TH RESPONDENT**
- KAMAU THUGGE.....12TH RESPONDENT**
- LEVI OBONYO.....13TH RESPONDENT**
- JOSEPH THAMPATI ole MUSUNI.....14TH RESPONDENT**

HON. ATTORNEY GENERAL.....15TH RESPONDENT

AFRICAN DIGITAL NETWORK.....16TH RESPONDENT

RULING

1. The Petitioner/Applicant, Okiya Omtatah Okoiti, filed a Petition dated 27th February, 2015 against the Respondents alleging various violations of the Constitution. Before the hearing and determination of the said Petition, the 1st and 3rd to 14th Respondents filed a Notice of Preliminary Objection dated 24th February, 2015, objecting to the hearing of the Petitioner's Notice of Motion Application, as well as the Petition. The Attorney General similarly filed a Notice of Preliminary Objection dated 20th February, 2015 opposing the said Petition and Notice of Motion. Both Preliminary Objections were argued before this Court on 2nd March, 2015. The key issue that fell for determination was whether the matters raised in the Petition and Notice of Motion were *res judicata*. In a Ruling delivered on 10th March, 2015, this Court upheld the Preliminary Objections and struck off the Petition as well as the Notice of Motion. Subsequently, by a Notice of Motion Application dated 23rd March, 2015, the Petitioner/Applicant brought an Application for review by this Court of its said decision. In that Application, the Applicant prays for the following orders;

“(1) That this Honourable Court be pleased to review its finding and orders dated and delivered at Nairobi on 10th March, 2015, with regard to the striking out of the Notice of Motion application and the Petition, both dated 18th February, 2015, and set aside and substitute appropriate orders.

(2) That this Honourable Court be pleased to reinstate the Notice of Motion and the Petition, both dated 18th February, 2015, and proceed to hear and determine them on merit.

(3) That in the alternative this Honourable Court be pleased to grant such other or further orders as it shall deem fit and just for the preservation of justice and the honour of the Court regarding the nature and circumstances of this case.

(4) That costs be in the cause.”

The Applicant's Case

2. In his affidavit in support, the Applicant deponed that his Application relates to the defending of the Constitution and the enjoyment of fundamental rights and freedoms, and principles of policy secured and guaranteed by the Constitution.

3. It was his averment that the Court was wrong to ignore the fact, in cases such as the instant Petition, where the implementation of court orders results to illegal and/or unconstitutional outcomes.

4. The Applicant also stated that new and irrefutable evidence has emerged showing that the 1st to the 14th Respondents have violated **Article 47** of the **Constitution** by proceeding to set the digital switch-over date and proceeding to disconnect analogue viewers well ahead of the June, 17, 2015 international deadline, without first migrating the viewers; and that if viewers in Nairobi are in the dark as regards digital migration and are now being invited to the first ever public forum on digital migration, hardly any other Kenyan could be expected to be ready for migration. In this regard his arguments were that following this Court's unwarranted dismissal of the Petition, the 1st Respondent placed advertorials in the media inviting the people of Nairobi to a public forum on 13th March, 2015 to discuss digital migration in Kenya and that the said development confirms the Petitioner's assertions in the dismissed Petition, that the regulator violated **Articles 46 (1) (a)** and **47** of the **Constitution** by setting analogue switch off dates preceding the disconnection of viewers on the analogue platform.

5. The Applicant also argued that the litigation history as reproduced in this Court's impugned Ruling does not sustain the Respondent's preliminary objection of *res judicata* and if anything, the history confirms the Petitioner's assertions in the Petition that only matters (and not all matters as the Court wrongfully concludes) concerning broadcasting were litigated and determined by the High Court, the Court of Appeal, and the Supreme Court. That therefore, nothing concerning the rights of the viewers to receive information during the digital migration had ever been canvassed in any Court of law in Kenya. Thus according to the Applicant, juxtaposing the issues settled by the Supreme Court, concerning the imparting of information, and the issues raised in the Petition, concerning the receiving of information, it becomes crystal clear that it is conceptually impossible to arrive at the conclusion this Court made while sustaining the claim of *res judicata* bar.

6. The Applicant's case was further that the matters raised in the Petition, concerning the just compensation under **Article 40** of the **Constitution**, of viewers whose analogue Tv sets were switched off, have been rendered redundant as a result of Government policy to migrate from analogue to digital terrestrial Tv, has never been a subject of litigation in any court; the matters raised in the Petition, concerning the allocation of frequencies and its implication on the right to access information was never a subject of litigation in any court of law; and that the suitability of members of the Board of the Communications Authority to hold public office under the Constitution, in view of the allocation of frequencies in violation of the law, and the shambolic management of the digital migration, have not been a subject of litigation in any Court.

7. From the foregoing, the Applicant contended that no evidence was produced in Court supporting the finding of this Court that the Petitioner was merely seeking publicity by filing the instant Petition; was not acting in the public interest; was acting in a malicious manner; or that he is a member of the Consumers' Federation of Kenya which may have represented him in Court in prior proceedings.

8. It was thus his further argument that this Court was misled into believing that the Petitioner had participated in proceedings in matters affecting digital migration elsewhere while he only attended the Court of Appeal proceedings when Tvs had been switched off and/or threatened with a switch off during the 2014 Christmas holiday; and once the Court of Appeal issued orders that allowed the Tvs to continue broadcasting on the analogue system, he never attended Court again.

9. Based on the foregoing, he asserted that there is no way proceedings and decisions confined to the digital migration of broadcasters and their right to impart information can be held as *res judicata* to viewers from accessing the Court to seek relief for the violations of their right to receive information, and to be given just compensation of the loss of their Tv sets.

10. Additionally, that there has been no delay in bringing the present Application and that the Court did not consider evidence from South Africa which the Petitioner had placed on record to show how, unlike the Respondents herein, the authorities in that Country have exercised extreme caution to ensure that the rights of viewers are protected during the digital migration. Further, that **Article 47** of the **Constitution**, administrative action, whether following court orders or not, ought to be within the confines of the Constitution and other laws. In addition, that, in the Petition it was pleaded that the Respondents' blatant violation of the National Information and Communications Technology (ICT) Policy, gazetted on 31st March, 2006; and that the fact that the Respondents cannot use Court orders as a defense for initiating illegal and/or unconstitutional administrative action which matters this Court allegedly ignored.

11. It was further urged by the Applicant that the Court failed to distinguish between the digital migration of broadcasters and the digital migration of viewers, and that the migration of viewers must precede that of broadcasters. In this regard, he added that the Preliminary Objection was anchored on totally contested facts that required a full hearing because there was absolutely no evidence to show that matters concerning the protection of rights during the digital migration of viewers, were ever raised, let alone determined, in the cited cases. And that in any case, the Supreme Court simply made 'suggestions' where it fleetingly addressed matters affecting consumers. Additionally, that this Court having found that the questions about the 2nd to 14th Respondents' suitability to hold office was undetermined, it ought not to have concluded that the Petitioner simply sued those parties to avoid *res judicata*.

12. The Applicant further argued that the conclusion reached by the Court that the Notice of Motion and the Petition were an abuse of court process, was an error apparent on the face of the record and in respect of which this Court ought to act, even *suo moto*, to review the said orders. That although he has fined and served the parties with a Notice of Appeal against the contested Ruling the intended Appeal has not yet been heard, and so this Court has unfettered powers and jurisdiction to grant the orders now sought.

13. In conclusion, was his case that *res judicata* fails when the record before the Honourable Court is examined objectively and with a proper framing of issues would show there is enough material before this Court to grant the orders sought and further, that this Court has unfettered powers and jurisdiction to make the said orders. That it is also mete and just, for the purposes of justice and equity and the overarching purpose of constitutional integrity and rule of law and that the balance of convenience favours the granting of the orders sought.

The Attorney General's Case

14. While opposing the Application, the Attorney General filed Grounds of Opposition dated 25th March, 2015 which are as follows; i.e. that;

“(a) There is no new evidence availed by the Applicant to warrant the orders of review sought and the exhibit ‘OOO2’ annexed to the affidavit of the applicant does not amount to new evidence for purposes of review.

(b) The Application is based on an utter misrepresentation.

(c) The Application is manifestly and fatally defective and ought to be struck out with costs.

(d) The Application is unmerited, frivolous, vexatious and an abuse of the process of the court and ought to be struck out with costs.”

The 1st, 3rd to 14th Respondents' Case

15. While opposing the Application, he also filed Grounds of opposition dated 25th March, 2015 and it was his contention that the Applicant, having filed a Notice of Appeal against the entire decision of this Court, had ensured that the right of review is no longer available to him.

16. Further, that without prejudice to the foregoing, he has not satisfied the conditions set in **Order 45** of the **Civil Procedure Rules, 2010** for review because the new and compelling evidence being relied on is not relevant to the present proceedings and the Applicant he merely challenges the Court's appreciation of facts and law as presented by the parties in their submissions during the hearing of the Preliminary Objection. That if this Court exercises its powers of review in the manner and on the grounds proposed by the Applicant, it will be sitting on appeal of its own decision and therefore usurping the appellate jurisdiction of the Court of Appeal.

17. He also submitted that this Court should take judicial notice of the fact that all media houses in Kenya have now migrated to the digital platform and the analogue switch off date for the last phase was on 30th March, 2015 and as such, re-instating the Petition and having the same heard and determined would not only reverse the gains made by the regulator in the exercise of its legal mandate but will amount to an academic exercise and as such, a waste of judicial time and resources. Accordingly, it was his argument that the said Application is an abuse of the Court process and the contents thereof are scandalous and frivolous and aimed at embarrassing the Court and the same ought to be dismissed with costs.

Analysis

18. From my rendition of the submissions by the Parties, the key question to be addressed in the instant

Application is whether this Court should allow the Application for review and therefore grant the orders sought and reproduced elsewhere. Before I determine this key question, I must dispose off a preliminary issue raised by the 1st and 3rd to 14th Respondents that the right of review is no longer available to the Applicant owing to the fact that he has filed a Notice of Appeal.

19. This question has been well settled by the courts in the recent past and I would do no better than to reproduce the dictum by the Court in **Wananchi Group Limited vs Communication Commission of Kenya and Others, High Court Petition No. 98 of 2012** where it was pointed out that:

“A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including rule 79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed..”

Therefore despite the lodging of a notice of appeal the court has jurisdiction to entertain an application for review... An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 and the inclusion of a memorandum of appeal.” (Emphasis added)

20. In that context, I do not see any reason to depart from the reasoning given by the named Court in the above case and as such, I reject the contention by the Respondents that the right to apply for review no longer subsists.

21. Having so stated, what is the Law Relating to Review? Whereas the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** do not make provisions for the High Court to review its decisions made under the Bill of Rights, a plain reading and purposive interpretation of the Constitution gives this Court the powers to review its decision. This is because **Article 22** as read with **Article 159 (2) (d)** mandates this Court to act where there is a need to do so without undue regard to technicalities. That is why in **Anders Bruel t/a Queenscross Aviation vs Kenya Civil Aviation Authority and Another [2013] eKLR**, the Court considered the provisions of **Articles 22 and 159 (2) (d)** of the **Constitution** and the learned Judge expressed the view that;

“My understanding of these provisions is that even if there is no specific provision in the Rules allowing the court to review its decision, should the court find that a case has been made out for review of its decision, then it would be duty bound to review its decision”

22. In the **Wananchi Group Limited vs Communication Commission of Kenya** case (*supra*) the Court endorsed the position that;

“[17] It is indeed true that the court held in the Anders Bruel case that even though there are no provisions directly providing for review of decisions in constitutional petitions, on the basis of the provisions of Article 22 and 159(2)(d), the Court is duty bound, should sufficient reasons be established, to review its decision.”

23. I agree and would add that I am inclined to seek recourse in the **Civil Procedure Act** and the Rules contemplated therein. **Section 80** of the Civil Procedure Act provides as follows;

“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

judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

24. **Order 45 Rule 1(1)** which is largely *pari materia* with the above **Section 80** stipulates that;

“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.”

25. The powers of the Court in regard to applications for review are outlined under **Order 45 Rule 3** which provides that;

“(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 the opinion that the application for review should be granted, it shall grant the same: provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.”

26. A plain reading of the above provisions would show that for an application for review to succeed, an Applicant must demonstrate three things:

1. That there is a discovery of a 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/her at the time when the decree was passed or the order made; or
2. On account of some mistake or error apparent on the face of the record; or
3. For any other sufficient reason.

Further, as I understand it is not necessary for a party to prove the existence of all the three grounds and that proof of only one ground is sufficient to warrant the Court to entertain an application for review.

27. On what amounts to an error or omission on the face of the record, the Court of Appeal in **National Bank of Kenya Limited vs Ndungu Njau (Civil Appeal No.211 of 1996 (unreported))** rendered the position 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 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.”

28. As regard “sufficient reason” and “discovery of new evidence” the Court of Appeal in **Pancras T. Swai vs Kenya Breweries Limited**, Civil Appeal No.275 of 2010 made the observation that:

“As repeatedly pointed out in various decisions of this Court, the words, “for any sufficient reason” must be viewed in the context firstly, of Section 80 of the Civil Procedure Act, Cap 21, which confers an unfettered right to apply for review and secondly, on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order. In Sarder Mohamed vs Charan Singh Nand Sing and Another (1959) EA 793, the High Court correctly held that Section 80 of the Civil Procedure Act conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate. In Shanzu Investments Limited vs Commissioner for Lands (Civil Appeal No. 100 of 1993) this Court with respect, correctly invoked and applied its earlier decision in Wangechi Kimata and Another vs Charan Singh (C.A. No. 80 of 1985) (unreported) wherein this Court held that;

“any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the Civil Procedure Act; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”

[30] The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 (now Order 45 in 2010 Civil Procedure Rules) relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the Court is deemed to be alive to.” (Emphasis added)

(See also **Barclays Bank of Kenya Ltd vs Abdi Abshir Warsame and Darare Transporters Limited** [2006] eKLR; and **Ndirangu vs Commercial Bank of Africa** [2002] 2 KLR. 603.)

29. Further to the above, in **Francis Origo and Another vs Jacob Kumali Mungala (C.A. Civil Appeal No.149 of 2001 (unreported))**, the High Court dismissed an application for review because the Applicants did not show that they had made discovery of any new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the Applicants had filed an appeal which was struck out before the filing of the Application for review. The Court in that case stated thus;

“Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant’s application for review. We have therefore no option but to dismiss this appeal with costs to the respondent.”

30. Applying the above principles to the present Application for Review, the Applicant, as can be discerned from his pleadings mainly challenges the various conclusions reached by this Court in its decision pertaining to the question of *res judicata*. I also note that his submissions revolve around the

actions of the Respondents pursuant to the decision reached by this Court in regard to the Petition that he had filed. This in his view constitutes “**new evidence**”.

31. Further, he argued that the conclusion reached by the Court that the Notice of Motion and the Petition were an abuse of Court process, was an “**error apparent on the face of the record**”. In that regard and to my mind, what constitutes “**new evidence**” is that evidence which is completely new and was unavailable to either party to the litigation at the time a decision was made. As the Rules outlined herein demand, such evidence must be that which even if due diligence was exercised, it could still not be discovered or adduced before the Court at the time.

32. On the other hand, “**an error apparent on the face of the record**” denotes a glaring mistake that appears on the record and as it was held by the Court in the **National Bank of Kenya case (supra)**, the error or omission must be self-evident and should not require an elaborate argument to be established.

33. In addition, **Serengeti Road Services vs CRDB Bank Limited [2011] 2EA 395** the court remarked that;

“There is no clear definition of what amounts to an error on the face of the record since it would vary on the facts of every case. An error on the face of the record, however, is one that must be such as can be seen by one who runs and reads, that is an obvious and patent mistake and not something that can be established by a long drawn process of reading on points on which there may be conceivably two opinions.”

34. Juxtaposing the Applicant’s argument against the requirements of the law, I am unable to reach the conclusion that a case for review has been established. I hold so bearing in mind the reasons that I have just given and further that the Applicant herein is merely challenging the conclusion reached by the Court in its earlier decision. It appears to me therefore that the Applicant is basically challenging the merits of the decision under the guise of an application for review. In that regard, I can do no better than to reiterate the position in the **Francis Origo case (supra)** that an alleged erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Furthermore, I must point out that the exhibit marked “**000-2**” largely relied on by the Applicant does not amount to new evidence that warrants the grant of the orders he is seeking herein.

35. Having so said, I was initially of the mind that there may have been a good case for review but as I have shown above, the law is on the side of the Respondents. In addition, the whole issue of digital migration is behind us and Kenya has moved away from anything other than a digital platform. No practical purpose would therefore be served in re-opening the subject of this Petition even if I had been minded to review my earlier decision.

36. Having so said, and having reflected on the question, the order that the Petitioner should pay costs to the 1st to 14th Respondents upon the Petition being struck out was an error. The Petition was brought in the interests of the wider public and any reference to the Petition having been actuated by self glory was misplaced. In the event, I will review my orders to the extent that the orders for costs be set aside and each party ought to bear its own costs.

37. Lastly, I owe the Parties my profound apologies for the delay in delivery of this Ruling due to exigencies of my judicial duties in this Court and elsewhere.

38. Based on my above analysis, I am inclined to dismiss the Application for Review save for the order that each Party shall bear its costs of the Petition, the Notice of Motion dated 18th February 2015 and the present Application as well as the Preliminary Objection dated 18th February 2014 and so that this matter may come to an end subject to the Applicant’s right to pursue his appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JANUARY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Petitioner present

Miss Okimamu for 1st Respondent and 13th – 14th Respondents

Mr. Sekwe for 15th Respondents

Order

Ruling duly delivered.

A copy of this Ruling to be supplied to Parties.

ISAAC LENAOLA

JUDGE