REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

PETITION NO. 3 OF 2012

MWANGI MUTAHI RUGA ……………....………………..PETITIONER

VERSUS

MUNICIPAL COUNCIL OF NYERI..............……..……RESPONDENT

JUDGMENT

On 17th October, 2012, the petitioner filed a constitutional petition in this court seeking specific orders against the respondent. That petition was heard determined on 20th February, 2014 when the court delivered its judgment; in that judgment, the court (Wakiaga, J.) held *inter alia*, that the petitioner's claim against the respondent was purely a commercial dispute which ought to have been filed by way of a plaint in a civil suit for general or special damages. The learned judge generally did not find any merit in the petitioner's petition and therefore dismissed it with costs.

Not satisfied with that decision, the petitioner lodged an application in this court on 14th March, 2014, which he styled as:-

"NOTICE OF MOTION FOR REVIEW AND DIRECTIONS UNDER ORDER 45 RULE 1 AND THE NEW CONSTITUION SECTION 22 AND ALL ENABLING SECTIONS"

In the application, the petitioner asked the court to review its "ruling" of 20th February, 2014 and give directions " *in respect of point no. 6 in its judgment."*

The application is said to be based on the grounds that:-

1. The judgment contradicts various provisions of the Constitution;

2. The judgment is not consistent with what I understand to be the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013;

3. The judgment contradicts an earlier ruling in miscellaneous application 142 of 2012;

4. The authorities the learned judge relied upon are distinguishable from the petitioner's petition; and,

5. The judgment does not state whether the appellant is at liberty to pursue his claim in an ordinary court or that the petition was disposed of with finality.

The application was supported by his own affidavit sworn on 14th March, 2014.

The application was opposed by the respondent and in that regard a replying affidavit sworn by the County Secretary of the County Government of Nyeri on 4th October, 2014 was filed on its behalf.

Although the petitioner has not specified which of the rules he is referring to when he talks of **Order 45 rule1**, it is presumed that he must be invoking the **Civil Procedure Rules** whose **Order 45 Rule 1** provides for review of judgements or orders. That order states:-

> ***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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.***

There are no provisions in the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, similar to **Order 45** of the **Civil Procedure Rules;** those rules only contemplate appeals against and not review of decisions arising from constitutional petitions. It is implied, for instance, in rule **32(1) (2)** thereof that an appeal lies from a judgment made in a constitutional petition; that rule provides:-

> ***32. (1) An appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed.***
>
> ***(2)…***

There is no suggestion in those rules that the court may review its decision either on its own motion or on an application of either of the parties in the manner an aggrieved applicant would have been done under the **Civil Procedure Rules.**

Even assuming that **Order 45** of the **Civil Procedure Rules** can properly be invoked in a constitutional petition, it is apparent that the grounds upon which the petitioner is seeking that review are nowhere near the grounds for review envisaged under those rules; as I understand **Order 45** of the Rules, an applicant for review of a decree or an order must demonstrate that:-

1. he has discovered a new and important matter or evidence which, after exercise 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

2. there is some mistake or error apparent on the face of the record; or

3. there is any other sufficient reason for review of the decree or order.

None of these circumstances have been demonstrated to obtain in the petitioner's notice of motion. The judgment or the decree which, in any event, was not attached to the application is clear in its terms; there is neither apparent nor latent error on the face of the record.

The reasons given by the petitioner cannot be deemed to be falling within the category of "any other sufficient reason" as they are largely legal grounds upon which the petitioner is challenging the decision

of this court; such grounds cannot be grounds for review even under the civil procedure rules but may be grounds for an appeal whose merits this court is not best placed to determine.

There is no doubt that appeals from the decisions of the High Court lie to the Court of Appeal; this is clear from article **164(3)** of the Constitution which states:-

> **3) The Court of Appeal has jurisdiction to hear appeals from —**
>
> **(*a*) the High Court; and**
>
> **(*b*) any other court or tribunal as prescribed by an Act of Parliament.**

It is has been noted that in constitutional petitions appeals are also implied in **rule 32** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**. If the petitioner was aggrieved by the decision of this court, these are the provisions that he should have taken advantage of and appealed to the Court of Appeal instead of appealing to the same court in an application camouflaged as an application for review.

If I have to say anything more on this issue it is only to reiterate that that the law discourages relitigating on the same issues except by means of an appeal. It is not in the interests of justice that there should be a retrial of a case which has already been tried by the same court leading to the possibility of collateral challenges to decisions and with that, the danger not only of unfairness to the parties concerned but also of bringing the administration of justice into disrepute. (see **Rondel versus Worsley (1969) I AC191 at page 251**. To sum it all, it is in the interest of justice that there should be an end to litigation-*le interest reipublicae ut sit finis litium.*

For the foregoing reasons, I find that the petitioner's application is not merited and it is hereby dismissed with costs.

Dated, signed and delivered in open court this 15th May, 2015

Ngaah Jairus

JUDGE