



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC PETITION NO. 4 OF 2017**

**JACKSON MUTUA KAVILA.....PETITIONER**

**VERSUS**

**GOVERNMENT OF MAKUENI COUNTY.....1<sup>ST</sup> RESPONDENT**

**COUNTY ASSEMBLY OF MAKUENI.....2<sup>ND</sup> RESPONDENT**

**MAKUENI COUNTY SAND CONSERVATION & UTILIZATION AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion application dated 27<sup>th</sup> of May 2021 brought under Order 45 Rules 1 and 2 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law, the Applicant is seeking for the following orders: -

**1) Spent.**

**2) That there be a stay of taxation of party and party costs as sought in the Respondent's Party and Party Bill of Costs dated 23<sup>rd</sup> February 2021 pending the hearing and determination of this application.**

**3) That there be a stay of execution of this Honourable Court's decree herein pending the hearing and determination of this application.**

**4) That this Honourable Court's judgment dated 28/11/2019 be reviewed and set aside.**

**5) That upon review and setting aside of this Honourable Court's judgment dated 28/11/2019, the Petition dated 26/04/2016 and filed herein be re-heard and all matters pleaded to in the said Petition and verified/supported by the affidavit of Jackson Mutua Kavila sworn on 26/04/2016 and filed herein, as well as the applicable law, be considered and taken into account in determining the Petition on merit.**

**6) That the cost of the application be provided for.**

2. The application is premised on the grounds on the face of the application and on the supporting affidavit of the Applicant sworn on 27<sup>th</sup> of May 2021.

3. A summary of the grounds and the averments is that the Petition dated 26/04/2016 was transferred from the ELC at Machakos to the ELC at Makueni for hearing and determination. The Applicant stated that the Petition was canvassed by way of written submissions was subsequently dismissed vide the judgment delivered on 28/11/2019.

4. The Applicant further averred that as at the time of the institution of the Petition herein, there was in progress the construction of the Standard Gauge Railway which was being undertaken by the China Road and Bridge Corporation Kenya. He further averred that he was contracted by China Road and Bridge Corporation to supply large quantities of sand on a daily basis for the construction of the said railway.

5. The Applicant further averred that despite having obtained all the requisite authorization from NEMA, the Respondents denied him access to the designated sand harvesting rivers within Makueni County and impounded the fleet of lorries hired to carry the sand.

6. The Applicant further argued that the court in its judgment did not pronounce itself on the interpretation of the Constitutional provisions of the environment and natural resources on and under the ground/river and the control thereof and on the interpretation of the Fourth Schedule to the Constitution of Kenya 2010 on the functions of the National Government and County Governments with regard to the control and protection of public land under the National Government and natural resources thereon hence the need to set aside the judgment.

7. Opposed the application, Njeru Runji, the Makueni County Legal Officer vide his replying affidavit on sworn on 21<sup>st</sup> of September 2021 averred that after the Petition was heard and dismissed on 28/11/2019, the Applicant did not lodge an appeal. That subsequently, the Respondent filed a party and party bill of cost dated 23<sup>rd</sup> of February 2021 wherein the Applicant failed to file his submissions despite being granted leave by the court to do so. That after the court reserved a ruling date, the Applicant filed the instant application.

8. The Respondent averred that there was delay in filing the present application which was frivolous vexatious, an abuse of the court process and a waste of judicial time which ought to be dismissed.

## **SUBMISSIONS**

9. The application was canvassed by way of written submission. The Applicant's written submissions were filed on 16<sup>th</sup> of December 2021. Counsel for the Applicant submitted that the Applicant would suffer substantial loss if the orders of stay of execution of the bill of costs are not granted as the matter was yet to be fully disposed of. Counsel submitted that the application was filed without unreasonable delay and that the Applicant was willing to comply with any security that may be ordered by the court. To buttress his submissions, Counsel placed reliance on the following authorities: -

**1) Moses Wachira Vs Niels Bruel & 2 others (2016) eKLR.**

**2) Gichuki Kingara & Co Advocates Vs Mugoya Construion & Engineering Ltd (2010) eKLR.**

**3) HCCC No. 154 of 2004 The Board of Trustees National Hospital Insurance Fund Vs Kipkorir Titoo & Kiara Advocates.**

10. Counsel further submitted that the Applicant would suffer great substantial loss if orders of stay are not granted as he had spent a considerable amount of money to procure the requisite authorization from NEMA yet he was denied access to the designated harvesting rivers.

11. Counsel contends that the application was brought without undue delay and that the Applicant was ready to abide with any security that would be ordered by the court. In support of his submissions on this point, Counsel placed reliance on the case of **Arun C Sharma Vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others (2014) eKLR.**

12. On the issue of review and setting aside of the judgment, Counsel submitted that there was an error on the face of the record as the Honourable Court did not pronounce itself on the following issues: -

**a) The interpretation of the Constitutional provisions on environment and natural resources on and under the ground/river bed and the control thereof.**

**b) Interpretation of the Fourth Schedule of the Constitution of Kenya 2010 on the functions of the National Government and the County Governments regarding the control and protection of public land under the National Government and the natural resources thereon.**

**c) Validity/constitutionality or otherwise of the Respondent's Makueni County Sand Conservation and Utilization Act 2015 vis a vis the aforesaid provisions of the Constitution.**

To buttress his submissions, counsel placed reliance on the case of **Mumby's Food Products Limited & 2 others vs Co-operative Merchant Bank Limited Civil Appeal No 270 of 2002.**

13. The Respondent's written submission were filed on 10<sup>th</sup> November 2021. Counsel identified the following issues for the court's determination: -

**a) Whether the Petitioner has pleaded proper grounds to warrant this court to review its judgment issued on 28<sup>th</sup> of November 2019.**

**b) Whether the Petitioner has pleaded proper grounds to warrant a de novo hearing of this suit.**

**c) Who is entitled to the costs of this application.**

14. On the issue as to whether the Petitioner has pleaded the proper grounds to warrant this court to review its judgment 28<sup>th</sup> of November 2019, Counsel submitted that Section 80 of the Civil Procedure Act gives the court jurisdiction to review its judgments while Order 45 of the Civil Procedure Rules sets out the procedure and the issues that the court should consider. Counsel placed reliance in the case of **Mary Jackson Masai Vs Jackson Masai & 3 Others (2020) eKLR.**

15. On the issue as to whether the application has been made without inordinate delay, Counsel submitted that the Applicant had not given

any reason why the application was filed 2 years after the judgment was delivered. Counsel argued that the instant application was filed in order to defeat the Respondent's Party and Party Bill of Costs. Counsel maintains that there was inordinate delay in filing application which offends the spirit laid out in Article 159 of the Constitution and the overriding objectives which provides expeditious disposal of suits. To buttress his submissions counsel placed reliance on the following case: -

Ø **ICEA Lion General Insurance Company Vs Chris Ndolo Mutuku t/a Crystal Charlotte Beach Resort (2020) eKLR.**

16. On the issue as to whether there is a mistake or an error apparent on the face on the record, Counsel submitted that the Applicant had not shown any manifest or self- evident error on the judgment issued by the court. Counsel placed reliance on the case of **Republic Vs Advocates Disiplinary Tribunal Ex Parte Apollo Mboya (2019) eKLR.**

17. Counsel further submitted that the grounds upon which the application is premised, are good grounds for an appeal but not for an application for review. Reliance was placed in the case of **Republic Vs Public Procurement Administrative Review Board & 2 Others (2018) eKLR.**

18. On the issue as to whether the Petitioner has pleaded the proper grounds to warrant a de novo hearing of the suit, Counsel submitted that the doctrine of immutability of judgment stipulates that a judgment that lapses into finality becomes immutable, unalterable and may no longer be modified subject to the following exceptions: -

a) **Correction of clerical errors.**

b) **The so called nunc pro tunc enteries which cause no prejudice to any party.**

c) **Void judgments.**

d) **Whenever circumstances transpire after the finality of the decision rendering the execution unjust and inequitable.**

19. Counsel placed reliance on the following decisions in support his submissions: -

a) **Supreme Court Petition No. 3 & 4 of 2013 Raila Odinga & 2 Others Vs Independent Electoral & Boundaries Commission & 3 Others (2013) eKLR.**

b) **Supreme Court Application No. 32 of 2019 Hussein Khalid and 16 Others Vs Attorney General & 2 Others (2020) eKLR.**

20. On the issue as to which party is entitled to costs, Counsel submitted that the application before the court was malafide and intended to defeat the Respondent's attempts to realize the costs awarded after successfully litigating the Petition. Counsel argued that the Respondent had incurred costs in hiring legal counsel and other incidental costs that go hand in hand while prosecuting a suit. Counsel submitted that they should be awarded costs.

**ANALYSIS AND DETERMINATION**

21. Having considered the application, the affidavits and the rival submissions and I find that the main issue for determination is whether the judgment delivered on 28<sup>th</sup> of May 2021 can be reviewed or set aside.

22. The Petitioner instituted this Petition against the Respondents on 26<sup>th</sup> of April 2016 and sought for the following orders: -

a) **A DECLARATION THAT: The Makueni County Sand Conservation and Utilization Act 2015 in its entirety was unconstitutionally enacted by the County Assembly of Makueni, which had no constitutional authority to legislate on matters vested in the National Government and is therefore null and void.**

b) **The provisions of Makueni Sand Conservation and Utilization Act 2015, and particularly sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37 and 38 of the said Act are inconsistent with, and contravene the Constitution of Kenya and are therefore null and void.**

c) **A DECLARATION THAT: the 3<sup>rs</sup> Respondent, which is a creation of an unconstitutional County Legislation (Makueni County Sand Conservation and Utilization Act), is an unlawful entity.**

d) **A DECLARATION THAT: in purporting to implement Makueni County Sand Conservation and Utilization Act, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acted unconstitutionally.**

e) **Costs of the Petition be paid by the Respondents.**

23. The Petition was canvassed by way of written submissions. The court vide its judgment delivered on 28<sup>th</sup> of November 2019 dismissed the Petition with costs to the Respondents.

24. The law that governs applications for review is set out in Section 80 of the Civil Procedure Act and on Order 45 Rule 1 of the Civil

Procedure Rules. Section 80 of the Civil Procedure Act provides as follows: -

25. Order 45 Rule 1 of the Civil Procedure Rules provides 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 the judgment to the court which passed the decree or made the order without unreasonable delay.**

26. The provisions of Order 45 were restated by the Court of Appeal in the case of **Benjoh Amalgamated Limited & Another Vs Kenya Commercial Bank Limited (2014) eKLR** where the court held that: -

*“In the High Court both the Civil Procedure Act in section 80 and the Civil Procedure Rules in Order 45 Rule 1 confer on the court power to review. Rule 1 of order 45 shows the circumstances in which such review would be considered ranging from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High court greater amplitude for review.”*

27. Similarly, in **Republic Vs Public Procurement Administrative Review Board & 2 Others (2018) eKLR** the court held that: -

*“Section 80 gives the power of review and Order 45 sets out the rules. These rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review.”*

28. It is apparent from the above provisions that for an applicant to succeed in an application for review must satisfy the following requirements;

**a) Discovery of new and important matter or evidence which after the exercise of due diligence was not with the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made.**

**b) Existence of some mistake or error apparent on the face of the record.**

**c) Any other sufficient reason.**

**d) Application be made without unreasonable delay.**

29. In the present matter, the Applicant has not shown that there is discovery of new or important matter of evidence that the Applicant could not have placed before the court during the hearing of the petition before the judgment was delivered on 28<sup>th</sup> of May 2021.

30. As regards the first requirement, the Applicant must establish that there is an error apparent on the face of the record. The Applicant herein contends that there is an error apparent on the face of the record to review the judgment of this court. The basis of this argument is that the court did not consider all the issues and materials presented before it specifically: -

**a) The interpretation of the constitutional provisions on environment and natural resources on and under the ground/river bed and the control thereof.**

**b) Interpretation of the Fourth Schedule to the Constitution of Kenya 2010 in the functions of the National Government and county Government regarding the control and protection of public land under the National Government and the natural resources thereon.**

31. In the case of **Nyamogo & Nyamogo Vs Kogo (2001) EA 170** the court held as follows;

*“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning where there may be conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong is certainly no ground for review though it may be one for appeal.”*

32. Similarly, in the case of Timber Manufacturers and Dealers Vs Nairobi Golf Hotels (K) HCCC No. 5220 of 1992, Emukule J held that;

***“For it to be said that there is an error apparent on the face of the record, it must be obvious and self-evident and does not require an elaborate argument to be established.”***

33. The Applicant stated that the court did not consider and pronounce itself on the aforesaid issues. In a nutshell, the Applicant is of the view that the court did not apply and/or interpret the Constitution correctly. In the case of Abasi Belinda Vs Fredrick Kangwanu and Another (1963) EA 557 Bennet J aptly held as follows;

***“A point which may be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal.”***

34. The grounds laid by the Applicant do not disclose an error apparent on the face of the record but in my view the grounds for an Appeal. In the present application the Applicant has not pin pointed the errors that are apparent on the face of the record.

35. The court finds no error apparent on the face of the record of the judgment delivered on 28<sup>th</sup> of November, 2019. It is apparent that the Applicant is dissatisfied with the judgment of the court. It is my view that the Applicant ought to have filed an appeal against the judgment.

36. The court is also mandated to consider if there are sufficient reasons to review the court’s judgment. Discussing what constitutes sufficient cause for purposes of review, the Court of Appeal in the case of The Official Receiver and Liquidator Vs Freight Forwarders Kenya Ltd (2000) eKLR stated that;

***“These words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot with out at times running counter to the interest of justice limited to the discovery of new and important matter or evidence or occurring of an error apparent on the face of the record.”***

37. The applicant has not demonstrated any sufficient reason to warrant a review of the court’s judgment.

38. Finally, the Applicant must demonstrate that the application has been made without unreasonable delay.

39. The Judgment sought to be reviewed and set aside was delivered on 28<sup>th</sup> of November 2019. This Application was filed on 28<sup>th</sup> of May 2021 one and half years later. That duration is far from reasonable and the same has not been explained. In so finding, I am persuaded by the findings in the case of John Agina Vs Abdulswamad Sharif Alwi C.A Civil Appeal No. 83 of 1992, where the court stated as follows;

***“An unexplained delay of two years in making an application for review under order 44 rule 1 (now order 45 rule 1) is not the type of sufficient reason that will earn sympathy of the court.”***

40. In the end, I find that the application is devoid of merit and the same is dismissed with costs to the Respondents.

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**HON. T. MURIGI**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 20<sup>TH</sup> DAY OF APRIL, 2022.**

**IN THE PRESENCE OF: -**

Court assistant – Mr. Mohammed

Ms Munuvya holding brief for Mulekyo for the Respondent