



**Bifwoli v Attorney General & 2 others (Constitutional Petition  
29 of 2017) [2022] KEELC 15082 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15082 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
CONSTITUTIONAL PETITION 29 OF 2017  
SO OKONG'O, J  
NOVEMBER 24, 2022**

**BETWEEN**

**THOMAS KHAMALA BIFWOLI ..... PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**WILLIAM NDINYA OMOLLO ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Petitioner/Applicant herein filed a suit before this court namely, Kisumu ELCC No 144 of 2012(hereinafter referred to only as “the Civil Suit”) against the Respondents herein where he sought among other orders a permanent injunction restraining the 3<sup>rd</sup> Respondent from fencing, enclosing, developing and/or encroaching onto the Petitioner’s parcel of land known as Title No Kisumu Municipality /Block 5/898 and an order that the Ministry of Lands do rectify the records and give accurate measurements in respect of the said property of 0.0493 hectares. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein who were the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively in the Civil Suit filed their defences denying the Petitioner’s claim. In the Civil Suit, the Petitioner alleged among others that the 3<sup>rd</sup> Respondent’s title to all that parcel of land known as Title No Kisumu Municipality /Block 5/899 was neither legal nor genuine. Through several letters and an application dated December 16, 2016 filed in the Civil Suit on 21<sup>st</sup> December 2016, the Petitioner (hereinafter referred to only as “the Applicant”) sought from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in that suit (the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein) copies of all documents relating to Title No Kisumu Municipality /Block 5/898 owned by the Applicant and Title No Kisumu Municipality/Block 5/899 owned by the 3<sup>rd</sup> Respondent.
2. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein filed their list and bundle of documents in the Civil Suit on March 23, 2017. The said bundle of documents comprised of certified copies of certificates of lease, certified



copies of the transfers, certified copies of the consent and certified copies of the white card for Title No Kisumu Municipality /Block 5/898 and Title No Kisumu Municipality/Block 5/899 which they hoped would satisfy the Applicant's prayer for documents in the application dated December 16, 2016 aforesaid. The Applicant was dissatisfied with the said documents that were supplied by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and referred to the same as scanty. The Applicant contented that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents deliberately and intentionally failed to disclose all the documents in their possession relating to the two properties. It is not clear from the record as to what became of the Applicant's application dated December 16, 2016 in the lower court. However, while the Civil Suit was pending, the Applicant brought this Constitutional Petition seeking the following orders;

- a. A declaration that the survey map indicating acreage for Kisumu Municipality Block 5/898 as 0.0216 hectares is a nullity the same having been based on a non-existent subdivision scheme and fraudulent certificate of lease in the name of Joseph Mungai Kariuki.
- b. A declaration that the transfer of lease from Reuben Mwithiga Thuo to Onesmas Odari is a nullity as the said transfer of lease; was not signed by both parties, stamp duty and rates were not paid, PINS, IDs, passport size photographs were not certified as required by law, was not registered in the presentation book, has no date of presentation for registration.
- c. A declaration that the Certificate of Lease in the name of Onesmas Odari is a nullity since it was fraudulently issued pursuant to a fraudulent, unlawful and unregistered transfer of lease which is incapable of transferring any interest in the said land from Reuben Mwithiga Thuo to Onesmas Odari.
- d. A declaration that the transfer from Onesmas Odari to the 3<sup>rd</sup> Respondent is a nullity as the transfer is not signed by the Land Registrar and that Onesmas Odari did not have a valid certificate of lease to transfer to anyone since Title No Kisumu Municipality Block 5/899 was never transferred to Onesmas Odari by Reuben Mwithiga Thuo in the first place.
- e. A declaration that the certificate of Lease for Title No Kisumu Municipality/ Block 5/899 in the name of the 3<sup>rd</sup> Respondent is a nullity as it was issued pursuant to a fraudulent, unlawful and unregistered documentation without inter alia, a valid and duly executed transfer of lease on record and that Onesmas Odari did not have a valid Certificate of Lease to transfer to anyone.
- f. A declaration that pursuant to Article 35 of the Constitution, the Petitioner is entitled to certified copies of all requested documents since all the requested documents constitute a public record which is disclosable.
- g. A declaration that the decision of state Counsel Ms. Essendi purporting to set aside the decision of Senior State Counsel Janet Langat is a nullity since it is a violation of Article 47 of the Constitution and section 2, 4 and 6 of the *Fair Administrative Actions Act* which inter alia requires Ms. Essendi to give notice, reasons, evidence to the Petitioner prior to making her decision of overruling that of Ms. Janet Langat.
- h. A declaration that the decision of Ms. Essendi setting aside the decision of Ms. Janet Langat declaring the 3<sup>rd</sup> Defendant's Certificate of Lease as not genuine is a nullity since it was taken after 6 months from the date the decision was made without leave of court and in violation of the law which was applicable at the time.
- i. Orders compelling the Respondents to issue reasons and full supporting documentation for the contradictory averment in relation to the said Title No Kisumu Municipality/ Block 5/899.



- j. Orders compelling the Respondents to pay damages to the Petitioner for violating the Petitioner’s constitutional rights to property.
  - k. Orders that the Respondents bear the costs of this Petition.
  - l. Such further orders and such directions as to the court deem just and appropriate in the circumstances of this case.
3. The Applicant’s petition was heard and dismissed by this court with costs to the 3<sup>rd</sup> Respondent on May 2, 2018 as lacking in merit. The court made a finding that the filing of this petition was unnecessary as it raised issues that were for determination in the Civil Suit. Following the dismissal of his petition, the Applicant filed a Notice of Appeal and an application seeking stay of proceedings and/or execution pending the hearing and determination of the appeal that he had preferred to the Court of Appeal against the dismissal of the petition. The Applicant’s application for stay was similarly dismissed by the court on April 8, 2019. The Applicant filed another application for stay in the Court of Appeal that was dismissed on October 31, 2019.
  4. On May 24, 2021; 2 years after the dismissal of his application for stay, the Applicant brought the Notice of Motion Application dated May 24, 2021 now before the court. In the application that was brought under Articles 10, 35, 47, 50,159 and 259 of the Constitution of Kenya, Sections 1A,1B and 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the *Civil Procedure Rules* the Applicant sought the following orders;
    1. Spent.
    2. That this Honourable Court be pleased to vary or set aside its order for costs made in the Judgment dated May 2, 2018.
    3. That costs in Kisumu ELC Petition No 29 of 2017 be deferred for determination within Kisumu ELC Cause No 144 of 2012 where all other prayers in Kisumu ELC Petition No 29 of 2017 are being determined.
    4. That costs of the application be provided for.
  5. The Application was brought on the grounds set out on the face thereof and on the affidavit of the Applicant sworn on May 24, 2021. The Applicant contended that this court has inherent jurisdiction to vary or set aside its own judgment/order where; the judgment is obtained by fraud, the judgment is a nullity, the judgment was obtained by misrepresentation, the judgment was entered without jurisdiction, the proceedings leading to the judgment were illegitimate and where there is a fundamental irregularity in the judgment. The Supreme Court of Nigeria’s case of *Estate Development Services v Lorien Ranching Company Limited & 799 Others* page 14 was cited in support of this ground. The Applicant contended further that this court has power to “correct, alter or supplement” its judgment/order on costs inadvertently made. The case of *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* at para 4 was cited in support of this ground.
  6. The Applicant averred that on May 2, 2018, this court rendered a judgment herein in which it differed all the prayers in the petition for determination in Kisumu ELCC No 144 of 2012(the Civil Suit) but inadvertently awarded costs to the 3<sup>rd</sup> Respondent for opposing the petition through a replying affidavit in which he annexed documents whose authenticity were yet to be determined in the Civil Suit. The Applicant contended that the documents that the 3<sup>rd</sup> Respondent had relied on herein were patently forgeries on their face and were incapable of being the basis for the award of costs. The Applicant averred that the judgment dated May 2, 2018 should be varied or set aside since it was



obtained by the 3<sup>rd</sup> Respondent through fraud or deceit on the court. The Applicant averred that the court inadvertently awarded the 3<sup>rd</sup> Respondent costs of the petition without the 3<sup>rd</sup> Respondent having pleaded or prayed for the same in his pleadings before court. The Applicant averred that on February 6, 2020, the Applicant requested in the Civil Suit for access to public information relating to Title No Kisumu Municipality/ Block 5/898 and Title No Kisumu Municipality Block 5/899 and the request was granted. The Applicant averred that the 2<sup>nd</sup> Respondent herein was ordered by consent to disclose to the Applicant and to the court the documents which the Applicant had requested for in prayer “f” of his petition herein.

7. The Applicant averred that the said consent order of February 6, 2020 confirmed that the Applicant’s request for information in the petition was merited. The Applicant averred that the court awarded the 3<sup>rd</sup> Respondent costs before first determining the merit of the case. The Applicant averred that he cannot be penalized with costs for successfully asserting among others his constitutional right to information under article 35 of the Constitution. The Applicant averred that the award of costs in a constitutional matter is itself a constitutional issue which cannot be determined without parties being heard on the issue. The Applicant averred that the parties were never heard on the issue. The Applicant averred that the court ought not to have awarded costs without first hearing the parties.
8. The Applicant averred further that the order for costs which was inadvertently made herein unfairly discriminated against the Applicant while at the same time according the 3<sup>rd</sup> Respondent preferential treatment contrary to Article 27 of the Constitution. The Applicant averred that the order for costs failed to take into account the most basic principles of law governing award of costs in constitutional matters. The Applicant averred further that the said order for costs which was inadvertently made by the court has very serious ramifications to the rule of law and access to justice by the Applicant and millions of poor Kenyans contrary to Article 48 of the Constitution. In support of this contention reliance was placed in *Biowatch Trist v The Registrar, Genetic Resources* at para 10.
9. The Applicant contended further that the order for costs which was inadvertently made by the court took into account irrelevant considerations to the detriment of the Applicant. The Applicant averred that it is settled law that if a party obtains a judgment/decision/order from a court through fraud or collusion, he cannot be allowed to say that the matter is *res judicata* and cannot be reopened. The Applicant submitted that there can also be no question of *res judicata* in a case where signs of fraud or collusion are evidently pregnant or apparent from the facts on record.
10. The Application was opposed by the 3<sup>rd</sup> Respondent through a replying affidavit sworn on August 20, 2021. The 3<sup>rd</sup> Respondent averred that he is the 3<sup>rd</sup> Defendant in the Civil Suit that is pending hearing before this court. The 3<sup>rd</sup> Respondent averred that the petition herein and the Civil Suit concerned the boundaries and title to Title No Kisumu Municipality/Block 5/899 registered in his name and Title No Kisumu Municipality/Block 5 /898 registered in the name of the Applicant. The 3<sup>rd</sup> Respondent averred that both the Applicant and he were purchasers for value of the said properties as the Applicant’s Title No Kisumu Municipality/Block 5 /898 was first registered in the name of M/s. First Permanent (East Africa) Ltd. before it was transferred to one, Joseph Munga Kariuki who sold the same to Michael Ogola Agot (the 4<sup>th</sup> Defendant in the Civil Suit) who in turn sold the same to the Applicant. The 3<sup>rd</sup> Respondent averred that Title No Kisumu Municipality/Block 5/899 was first registered in the name of M/s First Permanent (East Africa) Ltd before it was transferred to one, Reuben Mwihiga Thuo who later sold it to Onesmas Odari who in turn sold it to the 3<sup>rd</sup> Respondent.
11. The 3<sup>rd</sup> Respondent averred that the Applicant made certain allegations in the Civil Suit to the effect that the 3<sup>rd</sup> Respondent’s title to Title No Kisumu Municipality /Block 5/899 was not genuine and applied for an order to compel the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the Civil Suit to furnish him with



copies of all documents relating to Title No Kisumu Municipality/Block 5/898 and Title No Kisumu Municipality /Block 5/899. The 3<sup>rd</sup> Respondent averred that the said parties to the Civil Suit complied with the Applicant's request on March 23, 2017 when they filed their list and bundle of documents in the Civil Suit.

12. The 3<sup>rd</sup> Respondent averred that the Applicant was not satisfied with the documents supplied and filed in court by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant in the Civil Suit and brought this petition complaining that he had been denied access to public records and information in the custody and control of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein. The 3<sup>rd</sup> Respondent averred that the Applicant also complained that public records and information in the custody and control of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein were being altered and/or falsified to the prejudice of the Applicant.
13. The 3<sup>rd</sup> Respondent averred that the petition was heard on merit and dismissed with costs to the 3<sup>rd</sup> Respondent. The 3<sup>rd</sup> Respondent averred that the Applicant was dissatisfied with the said judgment and lodged a Notice of Appeal on May 16, 2018. The 3<sup>rd</sup> Respondent averred that the Applicant's application herein has not met the threshold set in Order 45 of the Civil Procedure Rules. The 3<sup>rd</sup> Respondent averred that the judgment made on May 2, 2018 sought to be reviewed is appealable and an appeal has been preferred against the same by the Applicant through the Notice of Appeal aforesaid.
14. The 3<sup>rd</sup> Respondent contended that once an Appeal has been preferred against a judgment, the judgment cannot be reviewed unless or until the Appeal has been withdrawn. The 3<sup>rd</sup> Respondent averred that there is a pending Appeal in the court of Appeal and as such this court lacks jurisdiction to entertain the present application. The 3<sup>rd</sup> Respondent averred further that the application lacks merit. The 3<sup>rd</sup> Respondent averred that the grounds in support of the application are vexatious, scandalous and defamatory and should be struck out under Order 19 Rule 6 of the Civil Procedure Rules.
15. The 3<sup>rd</sup> Respondent averred that he has never practiced fraud and that as an Advocate of this court, the allegations by the Applicant are not only vexatious but also injurious to his reputation. The 3<sup>rd</sup> Respondent averred that he did not influence the court to make the orders of May 2, 2018. The 3<sup>rd</sup> Respondent averred that the court in directing the Applicant to pay costs of the suit to him was exercising its discretion and powers under section 27 of the Civil Procedure Act. The 3<sup>rd</sup> Respondent averred that whether or not the court had good reason or sufficient grounds on which it exercised its discretion is entirely a matter for the judge who made the order to decide and another judge cannot interfere with the exercise of that discretion.
16. The 3<sup>rd</sup> Respondent averred that an issue arising for determination in the present application is whether the Applicant was pursuing personal or public interest. The 3<sup>rd</sup> Respondent averred that the Applicant was pursuing personal interest in the petition. The 3<sup>rd</sup> Respondent averred that the court found and held that the filing of the petition was frivolous and unnecessary since the issues raised by the Applicant were already before court for determination in the Civil Suit as the documents which were the subject matter of the petition had already been supplied by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in the said suit.
17. The 3<sup>rd</sup> Respondent averred that the Applicant was aware that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were the custodians of the documents he was seeking through the petition but still proceeded to join him as a party to the petition, a step which was unnecessary and vexatious. The 3<sup>rd</sup> Respondent averred that the order for costs against the Applicant was properly made since in filing the petition, the Applicant was abusing the court process.



### The Applicant's submissions:

18. The application was argued by way of written submissions. The Applicant filed his submissions on July 6, 2022 where he raised a number of issues for determination. On the issue of fraud, the Applicant cited the definition of fraud in *Black's Law Dictionary* and cited various authorities on the topic including *Bhaurao Dagdu Paralkar v State of Maharashtra and Others*, page 4.
19. The Applicant submitted that under Section 3A of the *Civil Procedure Act* and Section 47 of the *Evidence Act*, Cap. 80 Laws of Kenya, this court has inherent power acting suo motu or on application by affected party to recall, vary and/or set aside its judgment, order or ruling obtained by fraud. In support of this submission, the Applicant cited Supreme Court of India's case of *Indian Bank v Satyam Fibres (India) Pvt Ltd.* (1996 (5) SCC 550, *Tawai Limited v Eldoret Express Limited, National Land Commission (Interested Party)* (Application 9 of 2021) (2021) KESC 24 (KLR) (Civ) (3 December 2021), *Amalgamated Trustees Ltd v Associated Discount House Ltd* (2007) LPELR- 454 (SC) and *Ram Chandra Singh v Savitri Devi and Others* on 9 October, 2003 at para. 30.
20. On whether the court has a duty to recall, vary or set aside a judgment/Order obtained by fraud, the Applicant submitted that where fraud is perpetrated upon the court by a party, the court has inherent power to recall, vary, set aside a judgment, order, or ruling on its own motion or on a motion filed by an affected party. The Applicant submitted that if the fraud has been committed upon a party and as a result of that fraud the court has been misled into giving certain orders which otherwise it would not have given, then it is a fraud upon the court itself and when facts are brought to the notice of the court that a party has obtained its judgment, order or ruling by fraud, such a person cannot be allowed to remain in possession of the same with immunity and take advantage of his own fraud. In support of this submission, the Applicant relied on *Martha Karua v Hon. AG (Kenya), Lagos State Development Property Corporation & Another* (2012) LPELR -20615 (SC) pages 83-84, para. G-C, *Kalu Mark & Another v Gabriel Eke* (2004) LPELR-1841 (SC) page 24, paras CD, *Smt Garima Singh v Sri Sanjai Singh & Others* and *Rajib Panda v Lakhan Sendh Mahapatra and Others*.
21. The Applicant submitted that the 3<sup>rd</sup> Respondent obtained the judgment of May 2, 2018 through misrepresentation and suppression of material facts/evidence. The Applicant submitted that in the replying affidavit sworn by the 3<sup>rd</sup> Respondent on September 6, 2017, the 3<sup>rd</sup> Respondent misrepresented material facts and evidence to the court. The Applicant submitted that the 3<sup>rd</sup> Respondent knowingly and intentionally misled the court on oath in order to obtain the judgment.
22. The Applicant submitted that the evidence placed before the court clearly demonstrated that the 3<sup>rd</sup> Respondent knowingly obtained judgment /order for costs by deploying criminal means and in particular by knowingly filing a false affidavit which not only amounted to contempt of court and perjury but also abuse of the process of court. In support of this submission, the Applicant relied on *UP Resi Emp Co-op House B v New Okhla Indu Deve Authority...* on 7 March 2003, *Murray & Co v Ashok Kr Newatia* (2000) 2 SCC 367; AIR 2003 SC 833, *MC Mehta v Union of India* (2003) 5 SCC 376; 200 Cri LJ 2045; AIR 2003 SC 3469, *Dhananjay Sharma v State of Haryana and Others* and *M/s DR Logistics (P) Limited v Pridhvi Asset Reconstruction and Another*.
23. On whether the court inadvertently dismissed the petition herein, the Applicant submitted that the court dismissed the petition without determining any prayer on merits including prayer "f" in the petition which related to disclosure of public records relating to the disputed parcels of land and which were in the custody and control of the 2<sup>nd</sup> Respondent. The Applicant submitted that when the hearing of the Civil Suit commenced, the court and all the parties including the Respondents herein who had previously opposed the applicant's petition conceded that it was not possible to proceed with the



hearing without disclosure of all the documents requested in prayer “f” of the petition which were necessary to determine the truth and resolve the dispute between the parties. The Applicant submitted that by consent of all the parties, the court ordered disclosure of all the documents that the Applicant had requested for and this confirmed that the petition had merit and ought not to have been dismissed with costs.

24. The Applicant submitted that the court inadvertently dismissed the petition particularly prayer “f” relating to disclosure of public records on the disputed parcels of land without appreciating that pursuant to Articles 10, 35, 47 and 50 of the Constitution and the enabling provisions of [Access to Information Act](#), the Applicant was entitled to the said documents as of right.
25. On the issue of costs awarded to the 3<sup>rd</sup> Respondent, the Applicant submitted that the court inadvertently awarded the costs of the petition to the 3<sup>rd</sup> Respondent on the basis of false/forged replying affidavit that was filed by the 3<sup>rd</sup> Respondent. The Applicant reiterated that in a constitutional matter, the issue of cost is itself a constitutional issue and as such parties must be afforded an opportunity to be heard on the same before a decision is rendered. The Applicant submitted that the parties were not heard on the issue of costs. The Applicant submitted further that the issue of costs was neither pleaded nor argued by the 3<sup>rd</sup> Respondent at any time. The Applicant submitted that the issue was raised by the court on its own motion and it proceeded to determine the same without giving notice or affording the Applicant an opportunity to be heard.
26. On the issue of whether a judgment obtained by fraud can be challenged in any court at any time under Section 47 of the [Evidence Act](#); the Applicant cited [AV Papayya Sastry & Others v Government of AP & Others](#) pg 7 & [Rajib Panda v Lakhan Senbh Mahapatra & Others](#) at para 37 and submitted that a judgment obtained by fraud can be challenged in any court.
27. On the issue of *res judicata*, the Applicant submitted that a judgment that is affected by fraud is tainted wholly and the same is not a judgment on which a plea of *res judicata* can be raised. The Applicant submitted that such judgment is a nullity in the eye of the law. In support of this submission, the Applicant cited [Mahboob Sahab v Syed Ismail & Others and Asharfi Lal v Smt Koili \(Dead\) By LRs](#) on April 20, 1995 at par 8 and [AV Papayya Sastry & Ors v Government of AP & Others](#) pg 11 and the case of *Schierhout v Union Government*.
28. The Applicant filed further submissions in response to the 3<sup>rd</sup> Respondent’s submissions where he reiterated the foregoing submissions. The Applicant submitted that its application was not brought under Order 45 of the [Civil Procedure Rules](#) but under Section 3A of the [Civil Procedure Act](#) and Section 47 of the [Evidence Act](#), Cap. 80 Laws of Kenya.

### **The 3<sup>rd</sup> Respondent’s submissions:**

29. The 3<sup>rd</sup> Respondent filed his submission on July 5, 2022. The 3<sup>rd</sup> Respondent submitted that the judgment of May 2, 2018 was appealable and once an Appeal was preferred against the same by the Appellant, the Appellant could not apply for a review of the same judgment unless or until the Appeal was withdrawn. In support of this submission, the 3<sup>rd</sup> Respondent cited a number of authorities. The 3<sup>rd</sup> Respondent submitted that following the filing and service of a Notice of Appeal, there was already a pending Appeal in the Court of Appeal against the said judgment.
30. The 3<sup>rd</sup> Respondent submitted further that this court lacks jurisdiction to entertain the present application since the application has no valid basis. The 3<sup>rd</sup> Respondent submitted that the grounds on which the Applicant seek to review or vary and set aside the judgment of May 2, 2018 are that, the court inadvertently awarded costs to the 3<sup>rd</sup> Respondent who had filed a replying affidavit with



documents whose authenticity was yet to be determined in the Civil Suit and that the judgment dated May 2, 2018 was obtained by fraud.

31. The 3<sup>rd</sup> Respondent submitted that fraud is a serious accusation and the standard of proof in respect thereof is above a balance of probabilities. The 3<sup>rd</sup> Respondent cited *Njuwangu Holdings Ltd v Langata Kpa Nairobi & 5 Others* [2014] eKLR in support of this submission. The 3<sup>rd</sup> Respondent reiterated that he did not influence the court to make the orders of May 2, 2018. The 3<sup>rd</sup> respondent submitted that in the judgment of May 2, 2018, the court exercised its discretion and it was within the law for the court to award costs to the 3<sup>rd</sup> Respondent. The 3<sup>rd</sup> Respondent relied on *Kbelef Khalifa & 2 Others v Independent & Electoral Boundaries Commission & Another* [2018] eKLR in support of this submission.
32. The 3<sup>rd</sup> Respondent also submitted that whether or not the judge had good or sufficient grounds on which to exercise his discretion was entirely a matter for the judge to decide and another court cannot interfere with the exercise of that discretion. The 3<sup>rd</sup> Respondent cited *Kenya Human Rights Commission & Another v Attorney General & 6 Others* [2019] eKLR, and *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* – Supreme Court Petition No 4 of 2012 – [(2014) eKLR in support of this submission. The 3<sup>rd</sup> Respondent submitted further that this court should consider whether in filing the petition herein the Applicant was pursuing a personal or public interest. The 3<sup>rd</sup> Respondent relied on *Feisal Hassan & 2 Others v Public Service Board of Marsabit County & Another* (2016) eKLR in support of this submission.
33. On the Applicant’s prayer that the taxation of costs in this petition should be deferred and be determined in the Civil Suit, the 3<sup>rd</sup> Respondent submitted that this prayer sounds much like an application for stay which is similar to the Applicant’s application dated June 6, 2018 for stay of execution that was dismissed. The 3<sup>rd</sup> Respondent submitted that the Applicant cannot bring another application seeking the same orders of stay of execution.
34. The 3<sup>rd</sup> Respondent submitted that the Applicant has not offered any security as required by the law. The 3<sup>rd</sup> Respondent submitted that there is no harm in having the costs taxed so that if the Applicant was to seek any stay of execution, the same can be deposited in an interest earning account to await any further orders of the court. The 3<sup>rd</sup> Respondent urged the court to find that the award of costs to the 3<sup>rd</sup> Respondent was not inadvertent and that the court had jurisdiction to award the said costs. The 3<sup>rd</sup> Respondent prayed for the Application to be dismissed with costs.

#### **Analysis and determination:**

35. As I mentioned earlier in the ruling, the Applicant’s application is brought under Articles 10, 35, 47, 50, 159 and 259 of the Constitution of Kenya, Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Rules*. This petition was brought by the Applicant pursuant to Article 22 of the *Constitution of Kenya*. The rules applied in constitutional petitions are *The Constitution Of Kenya (protection Of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013* (hereinafter referred to only as “the Rules”). The Civil Procedure Rules are not applicable to constitutional petitions. The provisions of the Civil Procedure rules invoked by the Applicant as a basis for the present application are in the circumstances not relevant.
36. The burden was on the Applicant to establish that the court has power under the Rules to grant the orders sought. The Applicant has sought the review and setting aside of the judgment entered herein on May 2, 2018 as concerns the costs that were awarded against the Applicant in favour of the 3<sup>rd</sup> Respondent. There is no provision in the Rules for review of judgments made in constitutional



petitions. Rule 3(8) of the Rules however gives the court inherent power to make orders necessary for the ends of justice to be met or to prevent abuse of the court process. It provides as follows:

“3(8) Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

37. In the absence of an express power of review in the Rules, I am of the view that this rule is wide enough to cover applications for review on the grounds put forward by the Applicant. To bring himself under this rule, the Applicant has to establish that the orders sought are either necessary for the ends of justice to be met or to prevent abuse of the court process. In his petition, the Applicant sought several reliefs that I have set out herein earlier together with the costs of the petition. The 3<sup>rd</sup> Respondent opposed the petition and urged the court to dismiss the same with costs. The court heard the petition and dismissed the same with costs to the 3<sup>rd</sup> Respondent. While awarding the costs of the petition to the 3<sup>rd</sup> Respondent, the court stated as follows:

“(i) That the filing of the petition was unnecessary as it raised issues that are on all fours for determination in Kisumu ELC 144 of 2012. That the court finds no merit in the petition. That as the 3<sup>rd</sup> Respondent filed his replying papers and participated in the hearing of the petition, he is entitled to his costs.

8. That the petition having been found to be without merit is hereby dismissed with costs to the 3<sup>rd</sup> Respondent.”

38. Rule 26 of the Rules provides as follows:

26. The award of costs is at the discretion of the Court.

(1)  
(2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.”

39. The issue of costs of the petition was at the discretion of the court. There is no doubt from the excerpt of the judgment of the court that I have reproduced above that the court applied its mind to the issue and exercised its discretion accordingly. Whether the court exercised its discretion correctly or wrongly is not for this court to determine. This court would be sitting on appeal if it was to attempt to answer that question. As correctly submitted by the 3<sup>rd</sup> Respondent, the Applicant had a right of appeal against the judgment of the court and lodged a Notice of Appeal to the Court of Appeal. All the arguments put forward herein such as that; the judge did not apply the established principles for awarding costs in constitutional petitions, the judge failed to hear parties before awarding costs, the order on costs was discriminative, the judge awarded costs that were not sought and that the judge awarded costs while deferring all the other reliefs claimed in the petition to the Civil Suit are issues which this court has no jurisdiction to consider in exercise of its inherent power of review of judgments or orders. These are issues that should be urged in the pending appeal in the Court of Appeal.

40. I am in agreement with the Applicant that this court has inherent power to vary or set aside its judgment or order if the same has been procured by fraud or misrepresentation. Once again, the burden was on the Applicant to establish the alleged fraud and misrepresentation on the part of the 3<sup>rd</sup> Respondent. At the outset, I wish to point out that fraud and misrepresentation are issues that cannot be determined on affidavit evidence. The 3<sup>rd</sup> Respondent was not a claimant in the petition. He was joined in the petition by the Applicant. He had a right to defend himself. In its judgment, the court did not find the



3<sup>rd</sup> Respondent's replying affidavit fraudulent or scandalous. Whether or not the documents that were relied on by 3<sup>rd</sup> Respondent in the petition were fraudulent or forgeries would be determined by the court in the Civil Suit. In the judgment, the court stated as follows:

(h) That the legality or otherwise of the documents filed and maintained at the Land Registry relating to land parcels Kisumu Municipality/Block 5/898 and 899 is among the matters or issues for determination in Kisumu ELC 144 of 2012 which is between more or less the same parties.”

41. It is not for the Applicant to determine the legality or otherwise of those documents. The Applicant has not placed before this court any judicial pronouncement from the Civil Suit or any court of competent jurisdiction on the legality or otherwise of the said documents. The Applicant has also not established that the court was misled into awarding costs to the 3<sup>rd</sup> Respondent. For the foregoing reasons, I am not satisfied that a case has been made for the review and variation of the judgment made herein on May 2, 2018.

42. I am also of the view that the Applicant's application is incompetent. As I have mentioned, the Applicant has appealed against the judgment of the court that was delivered on May 2, 2018 by filing a Notice of Appeal that has not been withdrawn. The right to apply for review is therefore not available to the Applicant. In *Karani & 47 Others 3v Kijana & 2 Others* [1987] KLR 557 the court stated as follows:

...once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal.”

43. In *Otieno Ragot & Co Advocates v National Bank of Kenya Ltd* [2020] eKLR the court stated that:

...It is not permissible to pursue an appeal and an application for review concurrently: if a party chooses to proceed by way of appeal, he automatically loses the right to ask for a review of the decision sought to be appealed.”

#### **Conclusion:**

44. In conclusion, I find no merit in the Notice of Motion Application dated May 24, 2021. The application is dismissed with costs to the 3<sup>rd</sup> Respondent.

**DELIVERED AND DATED AT KISUMU THIS 24<sup>TH</sup> DAY OF NOVEMBER 2022.**

**S. OKONG'O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Nabai for the Petitioner

N/A for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

N/A for the 3<sup>rd</sup> Respondent

Ms. J. Omondi-Court Assistant

