



Baboon Project Kenya v County Government of Nakuru & 2 others (Environment & Land Petition E004 of 2024) [2025] KEELC 4113 (KLR) (23 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4113 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND PETITION E004 OF 2024**

**A OMBWAYO, J
MAY 23, 2025**

**BABOONPROJECTKENYA VS COUNTY GOVERNMENT OF NAKURU AND NAKURU
WATER AND SANITATION SERVICES COMPANY LIMITED AND 1 OTHERS**

BETWEEN

BABOON PROJECT KENYA APPLICANT

AND

COUNTY GOVERNMENT OF NAKURU 1ST RESPONDENT

**NAKURU WATER AND SANITATION SERVICES COMPANY LIMITED &
ANOTHER & ANOTHER & ANOTHER 2ND RESPONDENT**

RULING

BRIEF FACTS

1. The Applicant filed the instant application dated 28th February, 2025 seeking the following orders:
 1. Spent.
 2. That the Honourable court be pleased to join the Applicant in the suit herein and defend the suit in person.
 3. Spent.
 4. That the Honourable court be pleased to review and set aside its ruling and orders dated 17th February, 2025.
 5. That the Honourable Court be pleased to issue any further and/or better orders as may meet the ends of justice herein.
 6. That the costs of this application be borne by the Respondents.



2. The Application was based on grounds set out and supported by the Affidavit of Hon. Susan Wakarura Kihika the Applicant herein sworn on 28th February, 2025. She stated that the 2nd Respondent filed the present petition that sought for a declaration that the 1st Respondent was responsible for removal of dumps and solid waste disposal of plastics. That the 1st Respondent permitted the continued dumping of both solid, liquid and toxic waste into the lake causing great harm to wildlife. She stated that before being cited for contempt, the 2nd Respondent ought to have effected personal service upon her and demonstrate the same before court. She stated that by the time the orders were issued, she was away on maternity leave, service had not been effected upon herself as required by law to warrant committal to contempt. She stated that the court cited her for contempt and fined her a sum of Kshs. 2,000,000/= without having been personally served the orders. She stated that it was in the interest of justice that the ruling delivered on 17th February, 2023 be reviewed.

Response

3. The 2nd Respondent through its Chief Executive Officer Simon Gichohi filed its Replying Affidavit sworn on 2nd April, 2025. He averred that on 26th September, 2024 this court delivered its judgment permanently restraining the Respondents from allowing disposal of refuse into Lake Nakuru Basin. He further averred that the 1st and 2nd Respondent permitted the continued dumping of both solid and liquid waste into the lake. He also averred that all parties were present during delivery of the judgment. He averred that on 7th November, 2024 the 2nd Respondent filed a Notice of Application that sought to commit the Applicant to prison for a term not exceeding 6 months having failed to comply with the orders. He averred that the Applicant's advocates filed its response to the application and on 17th February, 2025, the court delivered its ruling citing the Applicant for contempt. He averred that the Applicant was made aware of the orders but failed to comply. He averred that the public interest in safeguarding the Lake outweighs the Applicant's personal grievances and further delay in compliance will exacerbate environmental degradation. He averred that the Applicant failed to meet the threshold for review. He urged the court to dismiss the application with costs.
4. The 3rd Respondent through its Managing Director James Nganga Gathathi filed his Replying Affidavit sworn on 16th April, 2025 where he averred that the court in its ruling stated that the photographs adduced depicted a sorry state of the lake and thus the Applicant and 3rd Respondent were in contempt of the orders issued on 26th September, 2024. He averred that the Applicant has demonstrated sufficient reason for review since she was away on maternity leave and service was not effected upon herself to warrant committal to contempt. He further averred that the application was brought in good faith and should be allowed as prayed.

Submissions

5. Counsel for the Applicant filed his submissions dated 15th April, 2025 where he identified two issues for determination. The first issue was whether the court should stay the execution of the ruling of the ruling dated 17th February, 2025. He relied on the case of Kariuki Njuri V Francis Kimaru Rwara (suing as Administrator of the Estate of Rwara Kimaru alias Benson Rwara Kimaru (Deceased) [2020] and submits that the Applicant will suffer substantial loss if the ruling is not stayed since she faces eminent threat of execution where the Respondent was awarded Kshs. 2,000,000/= as fine against the Applicant. He submits that the Applicant intends to review the ruling and she is apprehensive that in the event of execution, the Respondent would not be in a position to reimburse the Applicant. He relied on the case of Kariuki Njuri V Francis Kimaru Rwara (supra) and submits that there was no delay in bringing the application. He submits that the court had the jurisdiction to levy security of costs. He further submits that the Respondents would not suffer any prejudice in the event security for costs is not awarded as they can easily claim from the Applicant.



6. The second issue was whether the court should review and set aside its ruling and orders dated 17th February, 2025. He relied on Order 45 Rule 3 of the Civil Procedure Rules and the case of Waithaka V Bashaeki & 2 Others (Civil Appeal 91 of 2018) [2024] KEHC 12791 (KLR). It was counsel's submission that he sought to review the ruling on account of any other sufficient reason justifiable before court. He cited the case of Omotoe & Another V Ogutu (Civil Appeal E005 of 2021) [2022] KEHC 16441 (KLR). He submits that the ruling on contempt delivered on 17th February, 2025 was delivered without having been effected personal service upon the Applicant. He further submits that the Applicant had not been accorded hearing pursuant to Article 50 of *the Constitution*. It was his submission that it was imperative that in contempt proceedings, service of court orders ought to be effected personally on the doer of the act and if in breach, the doer is required to show cause why she should not be cited for contempt. He relied on the case of Tom Ojienda & Associates V County Secretary, Nairobi City County & Another (Application 312 of 2019) [2022] KEHC 10705 (KLR) and submits that the 2nd Respondent ought to have effected personal service upon the Applicant. He also relied on the case of Nyamodi Ochieng Nyamogo & Another V Kenya Posts & Telecommunications Corporation (1994) eKLR and submits that the time the orders were issued, the
7. Applicant was away on maternity leave and thus service could not be effected upon her to warrant contempt. In conclusion, he submits that it would be in the interest of justice that the ruling be reviewed.
8. Counsel for the 3rd Respondent on the other hand filed his submissions dated 16th April, 2025 where he identified four issues for determination. The first issue was whether the court should grant stay of execution of the ruling dated 17th February, 2025 pending hearing and determination of the instant application. It was his submission that if no orders of stay was issued, the Applicant stood to suffer irreparable loss and damage since in the ruling the Applicant and 3rd Respondent were jointly fined Kshs. 2,000,000/=. He relied on Section 3A of the *Civil Procedure Act* and urged the court to issue stay orders.
9. The second issue was whether the court should review and set aside the ruling of 17th February, 2025 pending hearing of the application. He relied on the case of Republic V Public Procurement Administrative Review Board & 2 Others [2018] eKLR and Shanzu Investments Limited V Commissioner for Lands (Civil Appeal No 100 of 1993). It was his submission that the Applicant has demonstrated sufficient reason for review of the ruling since she was away on maternity leave and service was not effected upon herself to warrant committal to contempt. The third issue was whether the Applicant should be joined in the suit. While submitting in the affirmative, he relied on Order 1 Rule 10 of the Civil Procedure Rules and the case of Gerita Nasipondi Bukunya & 2 Others V Attorney General [2019] eKLR. He submits that the Applicant ought to be joined as a party to enable her defend the suit.
10. On the final issue of costs, he submits that the costs of the application ought to be borne by the 2nd Respondent.

Analysis and Determination

11. This court has carefully considered the application and the main issue for determination is whether the Applicant is deserving of the review orders sought for.
12. The jurisdiction of this court for review of orders is provided for under Order 45 Rule 1 (1) of the Civil Procedure Rules which provides as follows:
 1. Application for review of decree or order



- (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.”

13. It is this court’s view that the basis of an application for review of an order is on the discovery of new and important matters or evidence which after due diligence, was not within the Applicant’s knowledge or could not be produced by them at the time when the order was made. Further an application for review may also be made on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.
14. The Applicant has based this application of review on “any other sufficient reason’. She claimed that she was not personally served with the court’s ruling delivered on 17th February, 2025 as she was away on maternity leave. It was her contention that it would be in the interest of justice that she be allowed to join as a party to the suit so that she could accorded a chance to defend herself. The Respondent on the other hand contends that the Applicant was represented when the ruling was delivered and was therefore already aware of the matter.
15. It is not in dispute that this court delivered its ruling on 26th September, 2024 in favour of the 2nd Respondent. That it is also not in dispute that vide an application for contempt by the 2nd Respondent, the court delivered its ruling on 17th February, 2025 where it found the 1st and 3rd Respondents in contempt of the court orders issued on 26th September, 2024. It is this court’s view that in as much as the Applicant is the governor of the 1st Respondent and was never joined as a party to the suit, the county government was a party and that the fine was made against the County Government of Nakuru and not against Susan Kihika as a person. In addition, though the County Government of Nakuru was cited for contempt, there was evidence that office of the County Attorney was served with the notice. There was no need to serve the Governor personally.
16. In the case of *North Tetu Farmers Co. Ltd V Joseph Nderitu Wanjohi* (2016) eKLR Justice Mativo stated as follows: ' writing on proving the elements of civil contempt, learned authors of the book *Contempt in Modern New Zealand* have authoritatively stated as follows:-

there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases - (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant; (b) the defendant had knowledge of or



proper notice of the terms of the order; (c) the defendant has acted in breach of the terms of the order; and (d) the defendant's conduct was deliberate.” [Emphasis mine]

17. In light of the above, it is this court’s view that there was evidence that the Applicant was aware of the ruling and that she was notified of the same by the County Attorney who was aware of the orders. Furthermore, the Applicant has sought for orders that she be joined as a party to the suit. There is no need to enjoin the governor personally as the County Government is a party. In the circumstance, this court shall proceed to exercise its discretion and disallow the application. The upshot of the foregoing is that the application dated 28th February, 2025 is disallowed. Each party to bear its own costs. It is so ordered.

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO

**THE JUDICIARY OF KENYA. NAKURU ENVIRONMENT AND LAND COURT
ENVIRONMENT AND LAND COURT**

DATE: 2025-05-23 04:58:35

