**Cheruiyot & another (Suing as the Personal Representatives of Kiplangat Arap Chepkwony alias Chemwa - Deceased) v County Government of Bomet & 6 others (Constitutional Petition 8 of 2015) [2024] KEELC 581 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 581 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**CONSTITUTIONAL PETITION 8 OF 2015**

**MC OUNDO, J**

**FEBRUARY 8, 2024**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLE 23 (1), (3) (A) (B) (C), 28, 29 (D), (40) (3) AND 165 (3) (B) (4) OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

**PHILIP KIPNGETICH CHERUIYOT ..... 1ST PETITIONER**

**PETER RONO CHERUIYOT ..... 2ND PETITIONER**

**SUING AS THE PERSONAL REPRESENTATIVES OF KIPLANGAT ARAP CHEPKWONY ALIAS CHEMWA - DECEASED**

**AND**

**COUNTY GOVERNMENT OF BOMET ..... 1ST RESPONDENT**

**HON. ATTORNEY GENERAL ..... 2ND RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 3RD RESPONDENT**

**COMMISSIONER OF PRISONS SERVICE ..... 4TH RESPONDENT**

**O.C.P.D BOMET DIVISIONAL HEADQUARTERS ..... 5TH RESPONDENT**

**OFFICER IN CHARGE G.K PRISONS, BOMET ..... 6TH RESPONDENT**

**THE NATIONAL LAND COMMISSION ..... 7TH RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated the 6th April 2023 brought pursuant to the provisions of Part 1 Rule 5 (a), 7(a) and (c), 8, of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) practice and Procedure Rules 2013, Articles 159 (2) (d) of *the Constitution*

of Kenya, Section 80 of the *Civil Procedure Act*, and Order 45 Rule 1(i) (sic), 2 of the Civil Procedure Rules 2010, where the Petitioners/Applicants seek for orders that the Judgement and Decree of the Court made on the 27th July, 2018 be reviewed and set aside. The Applicants further seek to be granted leave to amend their Petition to incorporate the newly discovered evidence and/or document and also that the court do grant such other and consequential orders as it deems fit and just to grant.

2. The said application was supported by the grounds therein as well as the supporting Affidavit of Peter Cheruiyot Rono on his behalf and on behalf of his Co-Petitioner/Applicants, sworn on the 6th April 2023.

3. In summary, the main basis of seeking for the Review of the impugned judgment, that had dismissed their Amended Petition, together with all consequential orders therein, was that there had been discovered important material evidence that was not within their reach when the matter had proceeded for hearing to wit; that the suit land which was their deceased grandfather's (herein after referred to as the deceased) land was acquired by the Colonial Government vide Gazette Notice No. 1685 of 13th May, 1958 for purposes of establishing Bomet Trading Centre. That from the Archive records, the deceased was supposed to be compensated for 27 acres of land by payment of Kshs. 6750/= but whereas the deceased Co-Claimants and/or neighbors were compensated, the said deceased was never compensated.

4. That from the National Achieves file No. SR. LAND 16/3/4/98, they retrieved a Confidential Report dated 4th July, 1968 that reiterated the need to compensate the deceased for his land that was acquired by the Government. That there were numerous correspondences and debate in regards to the quest for the compensation of the deceased to wit; a letter dated 4th July 1969 that sought to know if the 68.7 acres forming part of Bomet sub-station was ever gazetted and whether compensation was awarded to other four claimants apart from the deceased herein, a letter dated 15th July 1969 that confirmed that the suit land herein was not part of the crown land hence the deceased ought to have been compensated for its acquisition by the government, a letter dated 18th July, 1969 where the Provision Commissioner expressed his dissatisfaction with the manner in which the District Commissioner was responding to his request to information in respect to the long-standing claim for compensation.

5. The Petitioners/Applicants further stated that they retrieved a letter dated 18th July 1969 from the Achieves where the Provincial Commissioner had expressed his intention to dispatch his Personal Assistant on a fact-finding mission in respect to the land in dispute. That they also retrieved a confidential report in File No. SR. LND/16/3/4/103 dated 30th July, 1969 where the said Personal Assistant made his findings and recommendations upon hearing the deceased and other claimants whose land had been acquired by Government.

6. That from the aforesaid records it was clear that when the Government acquired the land for purposes of establishing Bomet Substation, it identified land belonging to Kipsoi Arap Ngok, Kipkoech Arap Maina, Ngatuny Arap Bisei, Kimaiwa Arap Murgor and Kiplangat Arap Chepkwony (the deceased herein) and the said 5 persons were supposed to be compensated for their land but only the three of them had been compensated. That the deceased was never compensated for his land hence the government acted in gross violation of his constitutional right and had continued to violate the said rights to date.

7. He deponed that upon visiting the Principal Archivist in March 2011 in the company of his father (now deceased), they were furnished with only seven (7) documents hence it was not possible to get the relevant documents despite exercising all due diligence except such documents that the said Archivist released to them. That subsequently, the discovery of the new and important document released to them on 2nd October 2019 by the Principal Archivist, Nakuru Region, had necessitated the application

for Review. He maintained that at all material times, they exercised due diligence in seeking justice but the new evidence was not in their possession at the time of the hearing of the Petition.

8. That unless the order of Review were granted, the estate of the deceased would suffer irreparable loss as any Appeal from the judgment herein would fail for the same reason of insufficient evidence. Further that they had brought the instant application promptly within three (3) weeks of being furnished with new documentary evidence. They explained that the instant application had been filed without inordinate delay since they had initially lodged an Appeal whereby their then Advocate on record lodged a Notice of Appeal and filed a Record of Appeal. However, their present Advocate on record advised them that the appropriate relief would have been a Review and setting aside of the impugned judgement to pave way for introduction of further evidence in support of their Petition.

9. That subsequently, they lodged an application for Review on 6th December, 2019, which application was struck out vide a ruling delivered on 22nd September, 2022 for want of compliance with the rules on appointment of new Advocate after Judgment was entered. That upon their Advocates on record being supplied with the said ruling on 12th October, 2022, they promptly filed an application to come on record on 21st October 2022 which application was allowed vide a ruling of 9th March, 2023 whereupon the instant application was filed on 14th April, 2023 hence the delay in filing the instant application was not inordinate.

10. That they had sought for documents from County Government of Bomet and the Principal Archivist which documents he fully furnished to the court as attachment to the Petition but being a layman, he was not aware that there were other documents in possession of the National Archivist that would assist his case nor did their previous Advocate on record advise them on such documents. That it was upon consulting their current Advocate on record that they were advised to seek further documentation to prove their case whereupon they wrote a letter to the Principal Archivist who retrieved the important evidence that they did not have at the time of the hearing of their Amended Petition and which would have assisted the court to make an informed decision. That after discovering the said important document, on the advice of their Advocate, they opted for a Review instead of an Appeal hence the instant application.

11. In response and in opposition of the application, the 1st Respondent filed its Notice of Preliminary Objection dated 21st September, 2023 as well as the Replying Affidavit dated 5th October 2023 and filed on 13th October, 2023.

12. The Notice of Preliminary Objection, was premised on the following grounds;

    i. That the Court lacks jurisdiction as the said application is fatally defective having been filed in contravention of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules which do not permit a party to file an application for Review where an Appeal had been filed in the first instance.

    ii. That the orders sought cannot issue since the said application is a nullity as the Petitioners/ Applicants first lodged a Notice of Appeal and thereafter, filled a substantive Appeal at Nyeri Court of Appeal No. 77 of 2018 together with a record of Appeal.

    iii. That the court lacks the requisite jurisdiction to entertain the said application as it offends section 7 of the *Civil Procedure Act*, as the Petitioners filed the Notice of Motion dated 5th December, 2019 seeking the same orders of Review of the judgment dated 27th July, 2018, which application had already been heard and determined.

iv. That the application is incompetent, misconceived and otherwise an abuse of the due process of the court as the filing of both Appeal and Application for Review of judgment delivered on 27th July, 2018 by the Petitioners/Applicants is not a mere procedural technicality that is curable under the provisions of Article 159 (2) (d) of *the constitution*.

13. In its Replying Affidavit sworn by Langat Kipkosgei, a County Surveyor, County Government of Bomet, the 1st Respondent through the said Langat deponed that the instant application was an abuse of the Court's process since the Applicants could not exercise both the right of Appeal and Review of the same judgment at the same time. That the instant application was an afterthought, frivolous and an abuse of the court's process since the Petitioners/Applicants exhausted the process of Appeal and now wished to go back to the same judgment they sought Appeal against vide Nyeri Civil Appeal No. 77 of 2018. Further that there must be an end to litigation hence filing a similar application seeking similar orders of Review of the same judgement would greatly prejudice that 1st Respondent since a Review of the said judgement had already been adjudicated on by the court vide a Notice of Motion Application dated 6th December 2019 which notice of motion was dismissed vide a ruling dated 22nd September, 2022.

14. He further deponed that the instant application should be disallowed for the reason that the same had not been made without unreasonable delay the impugned judgement having been delivered on 27th July, 2018 while the instant application for Review was filed on 6th April, 2023, after a period of about 5 years. Further that allowing the Applicants to re-open the case in the face of the apparent delay and lack of reasonable explanation why the additional documents were not tendered in evidence in the first place would amount to an abuse of the court's process.

15. That the Applicants had deponed in ground (3) and paragraph (13) of their Supporting Affidavit that they discovered new and important matter or evidence after due diligence, however, at paragraph (31) of the said affidavit, the Applicants were well notified and fully aware that they were to collect documents from the Principal Archivist but they sought for the annexed documents after the delivery of the judgement.

16. That the Applicants had failed to meet the threshold that an Applicants must satisfy in an application for Review on grounds of discovery of new evidence because mere discovery of new or important matter or evidence was not sufficient ground for Review since no evidence had arisen that would necessitate the court to Review its judgment as the annexures sought to be relied upon were annexed to the amended Petition. That the Applicants had not shown that such evidence was not within their knowledge even after the exercise of due diligence, such that it could not be produced before the court earlier. That in any case, the documents or important matter did not prove that the suit property was part of L.R No. Kericho/Silibwet/16 as per the annexed certified copy of the extract of title marked LK-1. That the suit land had always been reserved for public use and public purposes as per the Registry Map Sheet (RM) and part development plan (PDP) marked LK-2 and LK-3.

17. That consequently, the Applicants' prayers in the instant application should not be granted for reasons that the evidence the Applicants sought to introduce was not new evidence as it had been within their reach all along and the issues raised therein had been pleaded in the main Petition as annexure marked PCR-5 and PCR-6 had been annexed to the amended Petition and considered by the court before delivery of the judgement. The 1st Respondent thus prayed that the instant Application be struck out with costs to the Respondents.

18. The 2nd, 3rd, 4th, 5th and 6th Respondents on the other hand in response and opposition to the application herein, filed their undated Grounds of Opposition on 22nd September 2023 to the effect that, there

had been unexplained inordinate delay on the part of the Petitioner/Applicants in making the instant application since it had taken close to five years for them to move the court. They placed reliance in the decided case of Pancras T. Swai v Kenya Breweries Limited [2014] eKLR.

19. That the instant application was an afterthought as the Applicants in their Application had admitted that they had preferred an Appeal vide an annexed Notice of Appeal and a Memorandum of Appeal in Civil Appeal No. 77 of 2018 annexed as PCR-2 and PCR-3 respectively in their Supporting Affidavit. That the said Appeal was withdrawn on 5th July, 2021, more than 3 years after its filing thus the Petitioners were barred from filling the instant application for Review as they had pursued an Appeal.

20. That the Petitioners had not demonstrated that they had exercised due diligence before filing the Petition and the amended Petition dated 12th October, 2015 since the letter annexed in the instant application as PCR-5 had been written by the Petitioner himself requesting for certified copies of the documents marked as PCR-17 (a-g) and there had been no evidence to demonstrate that the new evidence was not within his reach or knowledge at the time of filing the Petition. That the instant application was a demonstration of the Applicants' attempt to circumvent the law and adduce new evidence to fill the gaps in the Amended Petition. Further that the Applicants had a qualified Advocate on record who should have ensured that evidence is gathered, analyzed and filed on time to support their Amended Petition.

21. That among the documents relied upon by the Petitioners in the Amended Petition, were issued by the principal archivist Nakuru hence it was incorrect for the Applicants to swear that they did not know of the existence of the documents they now wish to introduce. Further that the Applicantss had not demonstrated that upon exercise of reasonable amount of due diligence, they were unable to procure the documents they now wished to rely on hence it was clear that the said Petitioners were on a fishing expedition aimed at trying out their luck after they were constrained to withdraw their Appeal before hearing for the reason that the said Appeal did not have any chances of success. That the Applicants had not explained satisfactorily why they could not access the new evidence during the hearing of the main Petition.

22. Reliance was placed in the decided case of D.J Lowe & Company Ltd v Banguo Indosuez, Nairobi Civil Application No. 217 of 1998 to state that caution should be exercised when it comes to admission of new evidence in Review. That the Petitioners had failed to prove ownership of the suit property by the late Kiplangat Arap Chepkwony alias Chemwa before or after the same was compulsorily acquired for public purposes. The documents now alleged to have been discovered and which the Petitioners intend to rely on did not prove that the deceased had absolute and indefensible title under any known provision of the law that is capable of being protected under Article 40 of *the Constitution*.

23. That the instant application for Review was res judicata as a similar application affecting the same parties had been filed and determined vide a ruling dated 22nd March, 2023. That it is in the interest of justice that the court dismisses the instant application in line with established practice and norm that litigation must come to an end since there was no tangible evidence to warrant the court the power to Review its judgment dated 27th July, 2018. Further that the Petitioners' assertion of violation of their right to own property in the parent Petition did not override the public interest rights which are represented by the institution of the 2nd to 6th Respondents herein.

The 7th Respondent did not file any response.

**Determination.**

24. Despite directions having been on the taken on the 26th September 2023 to dispose of the Application by way of written submissions which were to be filed within a time line of 21 days, on the 6th November

2023 parties had not complied wherein the court had granted them a further 14 days to file their written submissions. None of the parties had complied within the stipulated period of time as at the time I am writing this ruling.

25. It is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that parties who fail to file their submissions on an application as ordered by the court are deemed as a parties who have failed to prosecute their application and therefor that application is liable for dismissal. The filing of submissions within a stipulated period having been ordered by consent, the failure by the parties to exercise the leave granted to file written submissions clearly demonstrated inertia and inordinate delay, lack of interest and/or seriousness on their part in the prosecution of the matter which is destined for dismissal. In case I am wrong however, I shall determine the application on its merit.

26. I have considered the application herein and the response by the Respondents as well as the Preliminary Objection raised by the 1st Respondent. The Applicants seeks to have the court Review a judgment that had been delivered on the 27th July 2018 together with all consequential orders therein for reason that they had discovered new and important evidence that was not available to them/court during the trial to wit that the suit land which was their deceased grandfather's (herein after referred to as the deceased) had been acquired by the Colonial Government vide Gazette Notice No. 1685 of 13th May, 1958 for purposes of establishing Bomet Trading Centre. That from the Archive records, the deceased was supposed to be compensated for 27 acres of land by payment of Kshs. 6750/= but whereas the deceased co-claimants and/or neighbors had been compensated, the said deceased was never compensated.

27. That they are now in possession of a confidential Report dated 4th July, 1968 from the National Achieves file No. SR. LAND 16/3/4/98, that reiterated the need to compensate the deceased for his land that was acquired by the Government, a letter dated 4th July 1969 that seeks to know whether the 68.7 acres forming part of Bomet sub-station was ever gazetted and whether compensation was awarded, a letter dated 15th July 1969 that confirmed that the suit land herein was not part of the crown land, a letter dated 18th July, 1969 where the Provisional Commissioner expressed his dissatisfaction with the manner in which the District Commissioner was responding to his request to information in respect to the long-standing claim for compensation, a letter dated 18th July 1969 where the Provincial Commissioner had sought to dispatch his personal assistant on a fact-finding mission in respect to the land in dispute, a confidential report in File No. SR. LND/16/3/4/103 dated 30th July 1969 where the said personal assistant had made his findings and his recommendations thereto.

28. That from the aforesaid records it was clear that when the Government acquired the land for purposes of establishing Bomet Substation, it identified land belonging to Kipsoi Arap Ngok, Kipkoech Arap Maina, Ngatuny Arap Bisei, Kimaiwa Arap Murgor and Kiplangat Arap Chepkwony (the deceased herein) and the said 5 persons were supposed to be compensated for their land but only the three of them had been compensated. That the deceased was never compensated for his land hence the government acted in gross violation of his constitutional right and had continued to violate the said rights to date.

29. The Application had been opposed by that Respondents for reasons that it was fatally defective having been filed in contravention of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules which do not permit a party to file an application for Review where an Appeal had been filed in the first instance. That secondly, the court lacked the requisite jurisdiction to entertain the said application by virtue of the provisions of Section 7 of the *Civil Procedure Act*, to wit that it had already been heard and determined via a court's ruling dated 22nd March, 2023. The documents now alleged to

have been discovered and which the Petitioners intended to rely on did not prove that the deceased had absolute and indefensible title under any known provision of the law and lastly that Applicants had not shown that such evidence was not within their knowledge even after the exercise of due diligence, such that it could not be produced before the court earlier and in any case, the said documents did not prove ownership of the suit land which they had failed to prove in their Petition.

30. I find the issues arising therein for determination as being;

    i. Whether there should be a review of the Judgment and Decree of the Court made on the 27th July, 2018.

    ii. Whether the application is res judicata

    iii. Whether the Application is merited

31. On the first issue for determination, Order 45 Rule 1 of the Civil Procedure Rules provides as follows: -

    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 Review of judgment to the court which passed the decree or made the order without unreasonable delay."

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

33. From the above provisions, it is clear that whereas Section 80 of the *Civil Procedure Act* gives the court the power to Review its orders, Order 45 Rule 1 of the Civil Procedure Rules sets out the rules which restrict the grounds upon which an application for Review may be made. These grounds include;

    i. discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicants or could not be produced by him at the time when the decree was passed or the order made or;

    ii. on account of some mistake or error apparent on the face of the record, or

    iii. for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

34. The main grounds for Review are therefore; discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.

35. In this case, the reason given by the Applicants in their Application seeking to have the Judgment and Decree of the Court made on the 27th July, 2018 reviewed and set aside was based on the discovery of new evidence to wit that there were letters retrieved from the archives that their deceased grandfather's land was acquired by the Colonial Government vide Gazette Notice No. 1685 of 13th May, 1958 for purposes of establishing Bomet Trading Centre. That he was thus not compensated thereafter for the 27 acres of land.

36. I find that the Applicants' line of argument did not constitute ''new and important evidence that was not within their reach during the hearing and determination of their Amended Petition as this argument had been raised and litigated upon during the hearing of their Amended Petition wherein the impugned judgment had contained excerpts of the said arguments (see para 27, 30, 33, 36, 39 and 41of the Judgment) while referring to the documents presented before it. In fact at paragraph 39 of the Judgment, the Hon Judge had even referred to minutes of the Meeting of the District Commissioner held on 28th July, 1961. Under Minute 16/61 of the said minutes entitled Setting Apart Of Land where the deceased herein had been listed as one of those entitled for compensation. I find that the issues raised herein had been considered by the court before delivery of the judgment where the court had held that the whereas the claim therein had been in regard to land measuring 27 acres, the annexed copy of the green card was in respect of land measuring 0.08 hectares. The court in the impugned judgment had held as follows;

> ''I have taken note of the annexed copy of the green card, but the same is with respect to a parcel of land measuring 0.08 HA yet the claim herein is with respect to land measuring 27 acres.
>
> It is trite law that a certificate of title is conclusive evidence of ownership of property. A person registered as a proprietor enjoys all rights and privileges appurtenant thereto. It is my considered opinion that the Petitioners have not led sufficient evidence to enable tis Court conclude that the property alleged belonged to their deceased father ''

37. The said new and important evidence which consists mainly of follow up letters by the Provincial Commissioner and his Personal Assistant on the need to compensate the deceased herein, is in my view argumentative and did not constitute an error apparent on the face of the record. Indeed, the grounds relied upon in this application in my humble view are not grounds of Review as is stipulated by the provision of Order 45 Rule 1 of the Civil Procedure Rules but may qualify to be grounds of Appeal. In the case of National Bank of Kenya Ltd vs Ndungu Njau [1996] KLR 469 the court held:-

> " In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to Appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose."(Emphasis added).

38. Further Bennett J in Abasi Belinda vs. Frederick Kangwamu & Another [1963] E.A. 557 held that:

> " a point which may be a good ground of Appeal may not 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"

39. From the above decisions, it is clear that an erroneous conclusion of law or evidence is not a ground for a Review but may be a good ground for Appeal. A Review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier but should only be exercised for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it as was in the present case.

40. On the second issue as to whether the application is res judicata the court's ruling of 22nd September 2023, looking at the provisions of Section 7 of the *Civil Procedure Act*, the answer is in the negative for reason that the Applicants' Application seeking for orders that the Judgment and decree of the court made on the 27th July 2018 be reviewed and set aside had been struck out for non-compliance with the provisions of Order 9 Rule 9 of the Civil Procedure Rules and therefore the same had not been heard and finally decided by the court.

41. On the third issue as whether the Applicants Application was merited, in the decided case of Ajit Kumar Rath vs State of Orisa & Others on 2 November, 1999 Court at Page 608 the Supreme Court of India had this to say:-

'The power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule"

42. In the case of National Bank of Kenya Limited vs Ndungu Njau [1997] eKLR , the Court of Appeal had held as follows:-

> ''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.''

43. I also find that whereas the impugned Judgment was delivered on the 27th July 2018, the current application was filed on the 14th April 2023 which is a period of almost 5 years which I find was unreasonable delay in the circumstance.

44. Coupled with the delay in filing this application, the Applicants had also filed a substantive Appeal at Nyeri Court of Appeal being No. 77 of wherein upon realization that the said Appeal did not have any chances of success, they had withdrawn it 3 years later and opted for a Review. The fact that the

Court of Appeal had deemed their Appeal as duly filed was indicative enough that this Court has no jurisdiction to entertain the instant application. The Applicants cannot invoke an Appeal and Review jurisdiction at the same time. The instant application to that effect is fatally defective as was held by the Court of Appeal in the case of Martha Wambui vs. Irene Wanjiru Mwangi & Another (2015) eKLR, where it had been held that;

> "From the above provisions of section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure rules, it is clear that one cannot exercise the right of Appeal and at the same time apply for Review of the same Judgment/decree or order. One must elect either to file an Appeal or to apply for a Review. It therefore follows that the appellant herein had an unimpeded right to either Appeal against the ruling of 13/6/2014 or apply to have it reviewed. And having exercised the right to a Review , she lost the right of Appeal against the same order ..."

45. In conclusion, I find that the Applicants application does not meet the threshold set out under Order 45 Rule 1 of the Civil Procedure Rules. This is not a proper case for the court to exercise its discretion in favour of the Applicants and I accordingly proceed to dismiss the application dated 6th April 2023 with costs to the Respondents.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 8TH DAY OF FEBRUARY 2024**

**M.C. OUNDO**