



Sandiko & 2 others v Attorney General & 6 others; Saoli & 67 others (Interested Party) (Petition 380 of 2017) [2022] KEELC 2482 (KLR) (7 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2482 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
PETITION 380 OF 2017**

CG MBOGO, J

JULY 7, 2022

**IN THE MATTER OF ARTICLE 22 (1) IN THE MATTER OF ALLEGED
CONTRAVENTION OF FUNDAMENTAL RIGHTS & FREEDOMS UNDER ARTICLES
27,40 & 50 OF THE CONSTITUTION AND IN THE
MATTER OF THE ENVIRONMENT & LAND COURT
ACT, 2011**

BETWEEN

**KOELEKEN SANDIKO 1ST PETITIONER
SALATON NANDUNGUENKOP 2ND PETITIONER
PARKIRE NANDUNGUENKOP 3RD PETITIONER**

AND

**ATTORNEY GENERAL 1ST RESPONDENT
LAND REGISTRAR NAROK 2ND RESPONDENT
LAND ADJUDICATION OFFICER NAROK 3RD RESPONDENT
CHIEF LAND REGISTRAR 4TH RESPONDENT
DIRECTOR ADJUDICATION & SETTLEMENT 5TH RESPONDENT
DIRECTOR GENERAL, KENYA WATER TOWERS 6TH RESPONDENT
COUNTY SECRETARY, NAROK COUNTY 7TH RESPONDENT**

AND

BIKATU OLE SAOLI & 67 OTHERS INTERESTED PARTY



RULING

1. Before this court for determination is the notice of motion application dated 3rd March, 2022 filed by the applicants/petitioners and expressed to be brought under Rules 19 and 25 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013) seeking the following orders: -
 1. That this honourable court be pleased to review the orders made herein on 6th May, 2019 on the petitioners notice of motion dated 5th April, 2019.
 2. That this court be pleased to allow prayer 3 of the said petitioner's notice of motion dated 5th April, 2019.
 3. That this honourable court be pleased to order the respondents to supply to the petitioners the documents listed at paragraph 38 (a) and (b) of the petition herein dated 24th April, 2017.
 4. That the costs of this application be provided for.
2. The application is premised on the grounds inter alia that the petitioners' filed a notice of motion application dated 5th April, 2019 and which the court delivered a ruling on 6th May, 2020 and directed the parties to exchange all documents that they wish to rely on within 21 days amongst other orders. The application is supported by the affidavit of Salaton Nandunguenkop sworn on 22nd April, 2022 on his behalf and on behalf of his co-petitioners. The applicant deposed that the application dated 5th April, 2019 was allowed by a ruling delivered on 6th May, 2020 which prayer 3 touched on production of documents contained in paragraph 38 (a) and (b) of the petition dated 24th April, 2017. The applicant further deposed that under Article 35 of *the Constitution* as interpreted in *Nairobi Law Monthly Company Limited versus Kenya Electricity Generating Company Limited & 2 Others* [2013] eKLR, this court has power to order that the state supplies documents required to enforce his/her rights.
3. The applicant deposed that the documents which the respondents are holding are necessary for this court to resolve the dispute between the parties herein.
4. The 1st – 4th respondents filed grounds of opposition challenging the application on the following grounds: -
 1. That the application has not met threshold for grant of review of the orders on either discovery of new evidence, error apparent on the face of the record and or any aggrieved issue.
 2. That the applicant has not demonstrated prejudice it will suffer if the documents are not produced and the matter is not being set down for hearing.
 3. That the application herein is an abuse of the court process.
 4. That the application be dismissed with costs.
5. The applicants/petitioners filed written submissions dated 30th May, 2022. The applicants submitted that every citizen has the right of access to information held by the state and failure by the respondents to issue the documents to the applicants is a breach of their constitutional right as enshrined under Article 35 (1) of *the Constitution*.



6. The applicants submitted further that Rule 25 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* 2013 and Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules* empower this court to grant the orders sought in the application. The applicants relied on the case of *Sardar Mohamed versus Charan Singh Nand Singh & Another* HCCA No. 51 of 1959 [1959] EA 793 and *Mapala versus British Broadcasting Corporation* [2002] 1 EA 132 (CAT).
7. On whether there is an error apparent on the face of the record, the applicant relied on the case of *Nyamogo and Nyamogo Advocates versus Moses Kipkolum Kogo*, Civil Appeal No. 322 of 2000 (2001) 1 E.A 173 and submitted that their contention falls squarely in the position that there is an error apparent on the face of the record and further that after the delivery of the ruling on 6th May, 2020 the Hon. Attorney General undertook to supply the said documents and has not done so to date hence filing of the instant application.
8. The 1st-4th respondents filed written submissions dated 14th June, 2022. The 1st-4th respondents submitted that the application is premised on various letters allegedly written to various respondents seeking that they be furnished with the documents yet they have produced the documents in their bundle of documents and as such there is no prejudice that will be suffered if the matter could be set down ready for hearing. The 1st-4th respondents raised 4 issues for determination which is as outlined below: -
 - i. That this honourable court be pleased to review the orders therein made on 6th May, 2020 on the petitioners notice of motion dated 5th April, 2019.
 - ii. Whether the court can compel the respondents to produce the documents listed in the petitioner's application dated 3rd March, 2022.
 - iii. Whether the petitioner has met the threshold for production of the documents listed in the application and if the documents were available without seeing the orders of the court.
 - iv. What purpose will production of the listed documents serve in the determination of the pending application.
 - v. Costs.
9. On the first issue, the 1st-4th respondents submitted that the petitioners have not met the 3 conditions to warrant the grant of the orders sought herein to the effect that no evidence apparent on the face of the record and or no new evidence has been discovered to warrant the court to vary the orders issued therein and that in the absence of the 3 ingredients, the application ought to be dismissed forthwith.
10. On the second issue, the 1st- 4th respondents submitted that the petitioners have listed various documents which they have produced in their bundle and on the bundle of the declaration of the adjudication record, the same was vide gazette notice which the petitioners should take judicial notice of and obtain the same from the government printer.
11. On the third issue, the 1st- 4th respondents submitted that the application is an abuse of the court process geared towards achieving no good probable cause and that since filing of the petition in the year 2017, the petitioners have been making one application after the other without setting the petition ready for hearing. Further, that the *Evidence Act* provides that a party wishing to rely on certain documents can issue a notice of production upon a party stating precisely the documents seeking to be produced that if the same is not produced, the applicant then shall rely on the said documents in the hearing with any objection from the opponent. The 1st-4th respondents further submitted that this



provision is to aid the party who will be likely to be prejudiced and is not in possession of certain original documents to proceed and rely on the documents in his possession as evidence in the suit. Further that the petition before the court is not premised on production of certain documents but certain rights of parties claiming to be entitled to land within Nkareta Adjudication Section and hence the affected parties are the interested parties whose rights will be prejudiced as they are not made the proper parties in the petition to defend themselves from the petitioners claim over the suit property.

12. On the fourth issue, the 1st-4th respondents submitted that the petitioners have not demonstrated what value and meaning the said documents will serve in the hearing of the petition since no prejudice has been demonstrated and stated in the petition which will affect the rights of the petitioners as to the nature of their claim.
13. Finally, on the issue of costs, the 1st-4th respondents submitted that the application being an abuse of the court process which seeks to serve no purpose, the same should be dismissed with costs.
14. I have carefully analysed the application, grounds of opposition and the written submissions filed by both parties and the issue for determination is whether the notice of motion application dated 3rd March, 2022 has merit.
15. The legal provisions for review, setting aside and/or varying court orders are found mainly under the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rules (1) & (2) of the *Civil Procedure Rules*. A clear reading of these provisions indicates that Section 80 is on the power to do so while Order 45 sets out the rules on doing it.
16. Section 80 provides: - 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 Court which passed the decree or made the Order and the Court may make such order thereto.Order 45 (1). States as follows: - Any person considering 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, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the 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 Judgement to the Court which passed the decree or made the order without unreasonable delay”(emphasis mine).
17. From the above stated provisions, it is quite clear that they are discretionary in nature. The unfettered discretion must be exercised judiciously, not capriciously and reasonably. To qualify for being granted the orders for review, varying and/or setting aside a court order under the above provisions to be fulfilled, the following ingredients, jurisdiction and scope are required.
 - a) There should be a person who considers himself aggrieved by a Decree or order;
 - b) The Decree or Order from which an appeal is allowed but from which no appeal has been preferred;



- c) A decree or order from which no appeal is allowed by this Act;
 - d) There is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made; or
 - e) 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.
 - f) The review is by the Court which passed the decree or made the order without unreasonable delay.
18. The power of review is available only when there is an error apparent on the face of the record. Indeed, this court emphasizes that a review is not an appeal. The review must in this case be confined to error apparent on the face of the record. In the case of *“Ajit Kumar Rath – Versus – State of Orisa, 9 Supreme Court Cases 596 at Page 608 the Supreme Court of India had this to say:-*
- “The power can be exercised on application of a person on the discovery of new and important matter or evidence which after the exercise of due diligence was not within the 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”.....means a reason sufficiently analogous to those specified in the rule...”
19. On the other hand, the right to access information is a right that the individual has to access information held by public authorities acting on behalf of the state. This is an important right for the proper and democratic conduct of government affairs, for this right enables citizens to participate in that governance. For instance, and for citizens to protect their other rights, the right to access information becomes critical for any meaningful and effective participation in the democratic governance of their country.
20. The importance of this right was fully appreciated by the drafters of our Constitution and they dutifully included Article 35 to make this right attainable as the foundation for an open, responsive, accountable and democratic government and its institutions. *The Constitution* therefore, grants citizens’ access to information as a constitutional right and only the same Constitution can limit that access.
21. In that regard, Article 35 of *the Constitution* provides that;
- 1) “Every citizen has the right of access to—
 - a) information held by the State; and
 - b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
 - 2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.



- 3) The State shall publish and publicise any important information affecting the nation.
22. The Constitution is therefore clear that information held by the state is accessible by citizens and that information is available on request. What this means is that once a citizen places a request to access information, the information should be availed to the citizen without delay. Article 35 of the Constitution does not in any way place conditions for accessing information. The most important thing is that information be in possession of the state, state officer or public body.
23. The right to access information as a basis for accountability, responsiveness and openness was emphasized in the case of *Brummerv Minister for Social Development & Others* where the Court stated;
- “(62) The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency “must be fostered by providing the public with timely, accessible and accurate information.”
- (63) Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas.”
24. Further, Section 4 of the Access to Information Act which is material, to this petition provides for the procedure to access information. The section provides;
- 1) “Subject to this Act and any other written law, every citizen has the right of access to information held by—
 - a) the State; and
 - b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.
 - 2) Subject to this Act, every citizen’s right to access information is not affected by—
 - a) any reason the person gives for seeking access; or
 - b) the public entity’s belief as to what are the person’s reasons for seeking access.
 - 3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.
 - 4) This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.
 - 5) Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information.
25. It is the petitioners’ submission that the instant application is premised on the ground that there is an error apparent on the face of the record. I have perused the ruling delivered on 6th May, 2020 by my brother Justice Kullow and I note from the said ruling, the application dated 5th April, 2019 was not opposed and the court allowed the application as prayed. My understanding is that over and



above allowing the orders as prayed in the application, the court went further and directed on how the petition would proceed.

26. I am not persuaded by the submissions of the 1st-4th respondents that the documents the petitioners seek to be supplied with are already in their bundle of documents. The 1st-4th respondents have not indicated the documents already supplied to the petitioners, instead, they have referred the petitioners to the government printers. It is only fair that being the custodians of the gazette notices, the contents of which have emanated from their office, that it be supplied to them.
27. Arising from the above, and in the interest of justice, I will allow the notice of motion application dated 3rd March, 2022 in terms of prayer 3 of the notice of motion application dated 5th April, 2019 and I order that the respondents do supply to the petitioners with the documents listed at paragraph 38 (a) and (b) of the petition dated 24th April, 2017. Each party to bear its own costs. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON 7TH JULY, 2022.

Mbogo C.G

Judge

7/7/2022

In the presence of: -

CA: Timothy Chuma

5| Page RULING PETITION 380. OF 2017 RULING DELIVERED VIA EMAIL ON 7TH JULY, 2022

