



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Ayuma & 11 others v Trustees of the Kenya Railways Staff Retirement Benefits Corporation & 2 others; Kothari (Interested Party); Rift Valley Railways Workers Union (K) (Intended Petitioner) (Petition 65 of 2010) [2025] KEHC 5 (KLR) (Constitutional and Human Rights) (9 January 2025) (Ruling)

Neutral citation: [2025] KEHC 5 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 65 OF 2010

LN MUGAMBI, J

JANUARY 9, 2025

BETWEEN

SANTROS AYUMA 1ST PETITIONER
JOSEPH SHIKANGA 2ND PETITIONER
JOSEPH GITONGA 3RD PETITIONER
BETH WAITHIRA 4TH PETITIONER
LYDIA MUTHONI 5TH PETITIONER
LAMECK MWAMBE 6TH PETITIONER
JOSEPH OTIENO 7TH PETITIONER
WILSON GITHINJI 8TH PETITIONER
JOHN OCHIENG 9TH PETITIONER
EUNICE OPIYO 10TH PETITIONER
YASH PAL GHAI 11TH PETITIONER
PRISCILAH NYOKABI 12TH PETITIONER

AND

TRUSTEES OF THE KENYA RAILWAYS STAFF RETIREMENT BENEFITS CORPORATION 1ST RESPONDENT
THE KENYA RAILWAYS CORPORATION 2ND RESPONDENT
THE ATTORNEY GENERAL 3RD RESPONDENT



AND

MILON KOTHARI INTERESTED PARTY

AND

RIFT VALLEY RAILWAYS WORKERS UNION (K) ... INTENDED PETITIONER

RULING

Introduction

1. By a Notice of Motion Application dated 14th February, 2024 filed under Certificate of Urgency, by the Intended 13th Petitioner/Applicant and supported by the affidavit of Munayi Opondo Isaac sworn on even date, the Applicant attached a written Notice addressed to the Deputy Registrar which reads as follows:

“Review Of The Ruling”

‘I Munayi Opondo Isaac (MOI), being the Secretary General of the Applicant Trade Union herein with representative authority, as bestowed upon me by the Supreme Law, *the Constitution* of Kenya 2010, and the Relevant operationalizing statutes and, having been aggrieved by the ruling issued by the Trial Court in this matter on 15th day of September, 2023 do wish to have part of the said ruling reviewed, on the basis that there was an error on the face of the said ruling and, which error, apart from directly infringing on the procedures and rules of the Court and Civil Procedure Code and Rules, if not corrected is likely to further the prejudice already visited upon some if not all of the Petitioners and may as well be misconstrued to imply a settlement of the applicants interests and concerns in the matter, contrary to the position as obtains so that that the import of which shall be to further perpetrate and or sustain the prejudice and or the violation of the applicant members rights and interests.

In the said respect the applicant herein submits that the Ruling requires urgent review, the effect of which applicant herein do enclose a Notice of Motion and an affidavit in Support of the said application for review. The applicant wishes to be heard in the said Review and intends not to call any witness in support of the said application for Review.’

2. In the ensuing Notice of Motion, the applicant sought orders as stipulated hereunder:
 - i. That the application be certified urgent (spent)
 - ii. That the application upon the parties and be placed for directions on 15th day of February, 2024 for directions.
 - iii. That the applicant’s application dated 24th day of November, 2021 be and is hereby reinstated to be heard de-novo.
 - iv. That any other orders as the Court may deem fit to so direct.
 - v. That costs be in the Petition.
3. The Application is based on the grounds in the face of the application that are further reiterated in the Applicant’s affidavit in support.



4. In a nutshell, Mr. Munayi Opondo Isaac swore that he is the Secretary General of the Applicant Trade Union (the Intended 13th Petitioner). He stated that he represents the Applicant herein which is a member of the 1st Respondent Trust and where he thus represents over 8000 members of the Trust through the Trade Union hence it forms part of the owners of the suit property and it is thus imperative that the applicant's claim to ownership of the said property be deemed to be proximate interest in the suit property and be allowed ventilate these concerns from the of the 13th Petitioner's perspective. The deponent acknowledged he is aware of the judgment of this Court issued on 20th August, 2013 but these orders have remained unimplemented and as such the owners have not benefited from the land as those that were expected to execute the orders do not have the requisite locus.
5. He disclosed that there is another suit, Environment and land Court case Number E244 of 2020 whose proceedings have been halted to allow the High Court Civil Division in Civil Suit No. 629 of 2023 determine the question of locus in regard to whether or not there existed/exists valid Trust Deed of Appointment that could have enabled the execution of trust instruments authorizing lawyers to dispose the Trust property among other fiduciary duties and responsibilities.
6. That in the light of highlighted reservations concerning locus in relation to the 1st Respondent which are yet to be resolved, and considering the applicant is not just an authorized representative of the applicant but the applicant is also a member of the 1st Respondent; this Court ought to review its ruling and admit the applicant as the 13th Petitioner to assist the Court arrive at a just determination in this matter. He as well swore that contrary to the finding of the ruling for which he seeks review where it was found that applicant is seeking to join the matter as the 13th Petitioner at a point when the matter had conclusively progressed; the fact is that the applicant had been active participant as an interested party and that hence was only seeking to join as a 13th Petitioner having been an Interested Party owing to the fact that the orders expected to be issued would substantially affect the applicant and its members if it continues participating as an interested party.
7. He stated that the matter is not only proximate but transcends beyond and goes into ownership. That it is fair to bring on board the applicant as one of the co-owners of the suit property because none of the individuals or parties in the matter has credible locus to execute the Trust Instrument or implement the orders of the Court which explains why the orders have remained unimplemented since 2013 when the judgment was passed.

1s to 10th Petitioners case

8. Wokabi & Company Advocates for the 1st to 10th Petitioners filed grounds of opposition dated 15th March, 2024 in which they opposed the application by the 13th Intended Petitioner on the following grounds:
 - i. That the application is incurably defective, legally misconceived and procedurally incompetent
 - ii. The Application seeks orders that are incapable of being granted as there is no reason to necessitate a review of the ruling delivered on 15/9/2023.
 - iii. The application even if it were proper for review has been filed belatedly and actuated by undue and unexplained delay by a party whose interest or claim in the matter is incomprehensible.
 - iv. The Application and orders sought are incapable of being granted in the manner they are structured. The only recourse the applicant had, if so, aggrieved by the ruling was to prefer an appeal.



- vi. The application is frivolous, vexatious and abuse of the Court process not disclosing any reasonable cause of action capable of adjudication by the Court.

11th Petitioner

9. Ms. Imbosa for the 11th Petitioner told Court on 30th May, 2024 that the 11th Petitioner had elected not to participate in the interlocutory application.

1st Respondent's Case

10. The Isaac Sila, the Chief Executive of the 1st Respondent filed a replying affidavit sworn on 13th June, 2024 in which he stated that the application dated 24th November, 2021 was dealt with substantively and merits by Justice Thande who dismissed the same on 15th September, 2023 and this Court became functus officio.
11. That the applicant seeks a review without demonstrating that it has met threshold for review such as discovery of material evidence that could not have been placed before the Court when the matter was determined. That in fact, the applicant has not sought any order for review of the ruling of 15/9/2023 in his Notice of Motion hence the instant application must fail.
12. Further, the applicant has been told by different Courts numerously that the Trade Union (13th Intended Petitioner) cannot represent retirees. That the retirees are members of the 1st Respondent. The cases in point being ELC 783 of 2017 and ELRC No. 197 of 2015.
13. In his brief submissions, the 1st Respondent Counsel reiterated in brief the factual account as narrated in the affidavit of the 1st Respondent.
14. When the parties convened before this Court for directions on 15th May, 2024; there was consensus that this Court deals with the application dated 14/2/2024 as the application would equally address the subsequent ones that the Petitioner had filed. The Court directed filing of submissions in respect of that application with a return date of 23rd July, 2024. However, come this day, only Ms. Nyambura for 1-10th Petitioners appeared before me and on her part, she indicated that she won't file any submissions since according to her view, there were no issues of law that were raised by the application of 14/2/2024.
15. The Court having noted the absence of the parties and the failure to file submissions as ordered, directed that it would proceed and decide the matter based on pleadings on record and fixed a ruling date.

Analysis and Determination

16. It is my humble view is that the only issue that arises for determination in this application is:
Whether or not this Application is merited
17. As noted from the beginning, the substantive order that the applicant seeks in the Notice of Motion dated 14/2/2024 is that 'the applicant's application dated 24th day of November, 2021 be and is hereby reinstated to be heard de-novo'
18. It is necessary to examine the reason why the applicant wants this order. The applicant gives various reasons. He stated that he represents the Applicant herein which is a Trade Union with a membership of over 8000 and is in fact a member of the 1st Respondent Trust hence forms part of the owners of the suit property and it is imperative that the applicant's claim to ownership of the said property be deemed



to have proximate interest in the suit property and should thus be allowed ventilate these concerns from the of the Intended 13th Petitioner's perspective.

19. The guiding legal principles upon which Kenyan Courts make findings on grant of an order for review is explicitly provided for under Section 80 of the *Civil Procedure Act*, Cap 21 Laws of Kenya and Order 45 of the Civil Procedure Rules. These provisions provide as follows:

Section 80 - Review

- i. Any person who considers himself aggrieved—
- ii. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- iii. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 Rule 1

- i. Any person considering himself aggrieved—
- ii. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- iii. by a decree or order from which no appeal is hereby allowed,
- iv. 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.

20. I carefully read the ruling by Justice Thande to find out whether the learned Judge addressed this issue in the ruling of 15th September, 2023. Judge Thande after weighing the arguments made before dismissed the applicant's assertion by holding as follows in paragraph 15 of the ruling:

15. As stated by the Court of Appeal a joinder of a party in proceedings is not automatic right, but one which is granted upon exercise of discretion of the Court concerned. It is noted the Petition herein was filed in 2010 and judgment delivered in 2013. The Applicant has not explained where he has been for over 10 years. Further, the applicant claims ownership of the subject property on the ground that its members are members of the 1st Respondent. This being the case, its input ought to have made through the 1st Respondent in whom the subject property is vested. The circumstances herein are that orders were in 2014 given in favour of 1st Respondent for vacation of suit property by the petitioners and timelines given. It is therefore difficult to understand what input the applicant will have in the matter at this late stage.... There is no demonstration by the applicant that it has identifiable and proximate stake in the matter in issue or that its presence will assist the Court all matters in dispute, which in any event have already been resolved..."

21. It is apparent that what the applicant seeks through this application is an attempt to relitigate the same issues that were before Justice Thande and which, the Judge fully applied her mind and decided on



merits. The Judge cited inordinate delay of over 10 years in bringing up application long after the Judgment was delivered as one of the reasons she threw out the application.

22. In the instant application, the applicant claims that the Judge made an apparent error on the face of record but does not demonstrate how the finding of the Judge on inordinate delay is an error apparent on the face of the record. In fact, there is not even an attempt is made to explain the inordinate delay that was one of the basis for declining the application.
23. Moreover, as noted by Lady Justice Thande, allowing or not allowing joinder application is an exercise of judicial discretionary power of the Court which is arrived at after the Court appraises itself of the facts of the given case. The Judge was not persuaded by the strength of the arguments advanced by the Petitioner and found that ‘the applicant had not demonstrated an identifiable and proximate stake in the matter in issue or that its presence will assist the Court all matters in dispute, which in any event have already been resolved...’
24. It would be imprudent to interfere with this finding as doing so is tantamount to sitting on appeal of a finding by a Judge of concurrent jurisdiction.
25. In the case of *Jimi Wanjigi & another v Inspector General of Police & 3 others* [2021] eKLR the Court observed as follows concerning review:
 37. Courts have severally dealt with the issue of review. The Supreme Court in *Application No. 8 of 2017, Parliamentary Service Commission -vs- Martin Nyaga Wambora & others* [2018] eKLR, quoted with approval the findings of the East Africa Court of Appeal in *Mbogo and Another -vs- Shah* [1968] EA, upon establishing the following principles: -
 31. Consequently, drawing from the case law above, particularly *Mbogo and Another v Shah*, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:

A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.

Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;

An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.

In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.

During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.

The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:

1. as a result, a wrong decision was arrived at; or
2. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.



38. The Court of Appeal in Civil Appeal No. 2111 of 1996, *National Bank of Kenya vs. Ndungu Njau* observed as follows in respect of reviews applications: -

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 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 proceeds on an incorrect expansion of the law.”

26. The Court of Appeal in *Nyamogo & Nyamogo v Kogo* 2001 EA 173 as cited with approval in *George Gikubu Mbuthia v Kenya Power & Lighting Company Ltd* [2004] eKLR also affirmed as follows:

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

27. What the petitioner complains of is not a self-evident error but an argumentative issue.
28. If the Petitioner believes that the Judge made an error by not giving adequate weight to any point he had that argued that is a matter for the appeal and not a review application.
29. In the overall analysis, I find no merit in the instant application. I dismiss the same with costs to the Respondents.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 9TH DAY OF JANUARY, 2025.

.....

L N MUGAMBI

JUDGE

