Rono v Kiptoo & 4 others; National Police Service Commission & another (Interested Parties) (Petition E017 of 2023) [2025] KEHC 177 (KLR) (20 January 2025) (Ruling)

Neutral citation: [2025] KEHC 177 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PETITION E017 OF 2023

RN NYAKUNDI, J

JANUARY 20, 2025

BETWEEN

ROBERT RONO ..... PETITIONER

AND

HON DR CHRIS KIPTOO ..... 1ST RESPONDENT

THE HON ATTORNEY GENERAL ..... 2ND RESPONDENT

IP FRANCIS OMUSE ..... 3RD RESPONDENT

IP DAVID MUNGA DCIO – ITEN POLICE STATION ..... 4TH RESPONDENT

IP HARON ODHIAMBO, OCS-ITEN POLICE STATION ..... 5TH RESPONDENT

AND

NATIONAL POLICE SERVICE COMMISSION ..... INTERESTED PARTY

DIRECTOR OF PUBLIC PROSECUTIONS ..... INTERESTED PARTY

RULING

1. Robert Rono, the Petitioner/Applicant herein has brought in a notice of motion dated May 28, 2024 expressed under the provisions of Order 51 Rule of the Civil Procedure Rules. He prays that this court be pleased to review and/or revise its orders on the ruling delivered on 24th January, 2024 in Constitutional Petition No. 17 of 2023, Robert Rono v. Hon Dr. Chris Kiptoo & 4 others which orders allowed an application by the 1st Respondent to be struck out and removed henceforth from the proceedings. The application is based on grounds:

    a. The premature removal of the 1st Respondent from these proceedings is an error apparent on the face of the record because neither joinder nor misjoinder can defeat a constitutional petition under the Mutunga Rules.

b. The Petitioner has recently discovered new information (in form of an Occurrence Book (OB) record) which was not in his possession when the ruling was made.

c. The Petitioner's former counsel apparently delayed the process by failing to act on the Petitioner's instructions to file the application for review despite the petitioner's follow-ups

2. In response to the application, Dr. Chris Kiptoo swore an affidavit dismissing the application as one that is brought in bad faith. He deposed that there is no error whatsoever on the court's ruling and allegations of the issues raised is not new at all. That this court delivered a very well-informed ruling on 24/1/2024 allowing his application dated 2nd November, 2023 and addressed in detail the substance of the parties to a suit including the issues purported to be raised by the applicant herein.

3. He further deposed that the issues of his capacity in respect of the arrest of the petitioner/respondent as well as the alleged entries in the occurrence book were addressed in his said application and the arguments that the Petitioner did not disclose any course of action against him were clearly addressed both in his application and in the petitioner's response thereto and same was well determined in the court's ruling.

4. That indeed the issue of whether or not a misjoinder or non-joinder of parties can defeat this petition was equally appreciated and determined by this court. That the instant application therefore is an attempt to circumvent the said findings and court ruling, yet he did, not lodge any appeal against it. Further that the indolence and failure by the applicant to attach proper and/or necessary documents to his earlier pleadings cannot be treated as discovery of new information for the purposes of an application for review. That the application herein is an afterthought and is frivolous and vexatious. The applicant has taken over 4 months to bring this application without any valid reasons whatsoever.

5. Both parties filed written submissions in support and opposition of the application for review, which submissions are summarized as hereunder:

Petitioner/Applicant's submissions

6. Learned counsel Mr. Ochiel JD, appearing for the Petitioner, submitted that the application for review was premised on three main grounds under Order 45 Rule 1 of the Civil Procedure Rules 2010.

7. On the first ground, counsel argued that there was discovery of new and important evidence which was not within the Petitioner's knowledge at the time the ruling was made. In support of this argument, counsel relied on the case of Rose Kaiza vs Angelo Mpanjuiza (2009) eKLR, where it was held that before a review is allowed on ground of new evidence, it must be established that the applicant acted with due diligence. Counsel maintained that the new evidence was an Occurrence Book (OB) which was not in the Petitioner's possession or knowledge when the ruling was delivered.

8. On the second ground, learned counsel submitted that there was an error apparent on the face of the record. To buttress this argument, counsel cited the case of National Bank of Kenya Ltd vs Ndungu Njau where the Court of Appeal held that a review may be granted to correct an apparent error that is self-evident without requiring elaborate argument.

9. On the third ground regarding sufficient reason, counsel relied on the case of Shanzu Investments Limited vs Commissioner for Lands (Civil Appeal No. 100 of 1993), which cited *Wangechi Kimita & Another vs Mutahi Wakabiru CA No. 80 of 1985*. Counsel argued that the apparent delay by the Petitioner's former counsel in filing the review application, despite follow-ups by the Petitioner, constituted sufficient reason for review.

10. Throughout his submissions, learned counsel emphasized that under the Mutunga Rules Section 5(b), a petition shall not be defeated by reason of misjoinder or non-joinder of parties, and maintained that the 1st Respondent was a necessary party based on the Occurrence Book entries.

1st Respondent's submissions

11. Learned counsel Ms. Kittony, appearing for the 1st Respondent, commenced her submissions by setting out the statutory framework governing review applications. Counsel referred to Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, 2010.

12. In developing her argument, counsel cited the case of Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] KEHC 6379 (KLR), where Justice John M. Mativo held that a review may be granted whenever the court considers it necessary to correct an apparent error or omission on the part of the court, provided such error is self-evident without requiring elaborate argument.

13. On the first ground regarding discovery of new evidence, learned counsel argued that the applicant failed to meet the threshold for several reasons. To buttress this position, counsel relied on the case of Rose Kaiza -vs- Angelo Mpanjuiza (2009) eKLR, which was also cited by the applicant. Counsel maintained that the applicant failed to explain how he obtained the new evidence, when he acquired it, and failed to demonstrate due diligence.

14. Regarding the second ground on error apparent on the face of record, counsel cited the case of National Bank of Kenya Ltd Vs Ndungu Njau, arguing that the alleged error concerning interpretation of Section 5(b) of the Mutunga Rules had already been addressed by the court in its ruling at paragraph *4*, page 7.

15. On the third ground concerning sufficient reason and unreasonable delay, counsel submitted that no sufficient reason was advanced by the applicant. Counsel argued that the applicant merely blamed his advocate for the delay from January without properly substantiating the allegation through evidence.

16. In conclusion, learned counsel urged the court to dismiss the application with costs, citing Halsbury's Laws of England, 4th Edition regarding the court's discretion on costs.

Analysis and Determination

17. The central question before this Court is whether the circumstances presented warrant the exercise of this Court's review jurisdiction. The power of review, while discretionary, is circumscribed by well-established principles that have been crystallized through judicial precedent.

18. Under section 80 of the *Civil Procedure Act* and order 45 rule 1 of the Civil Procedure Rules, the court may review its decision, inter alia: - on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

19. Section 80 of the *Civil Procedure Act* Cap 21 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 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 of the Civil Procedure Rules, 2010 provides as follows: -

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."

20. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018* John M. Mativo Judge culled out the following principles from a number of authorities: -

i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/ tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into

consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1."

21. Starting with the ground of new evidence, the legal position as established in Ajiit Kumar Rath v State of Orisa & Others is that mere production of new evidence is not sufficient - the applicant must demonstrate that even with due diligence, such evidence could not have been discovered earlier. The court stated as follows:

> " The power is not absolute and is hedged in by the restrictions indicated in Order 47. 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 establishing it."

22. The Occurrence Book entry now produced presents a material new dimension. It establishes a direct connection between the investigation and the 1st Respondent, describing him as "PS Treasury Dr. Chris Kiptoo" in relation to the matter under investigation. This creates a nexus that was not apparent on the initial record.

23. While the threshold for admission of new evidence in review applications is high, the constitutional context of this matter requires a more nuanced approach. The fundamental question is not merely whether the evidence could have been discovered earlier, but whether its exclusion would result in a substantive injustice in the determination of constitutional rights.

24. The OB entry provides contemporaneous documentary evidence of the 1st Respondent's connection to the matters in dispute. This goes beyond mere hearsay and establishes a factual foundation for the 1st Respondent's role in the narrative that forms the basis of the constitutional petition.

25. The confluence of the constitutional dimension of these proceedings, the material new evidence establishing a direct nexus with the 1st Respondent, and the overarching principle that constitutional petitions should not be defeated by procedural technicalities, leads me to conclude that this is an appropriate case for review. The striking out of the 1st Respondent, in light of the new evidence and proper consideration of the Mutunga Rules, requires reconsideration. The constitutional importance of having all necessary parties before the court outweighs the procedural concerns raised.

26. Accordingly, the following orders do issue:

a. The application for review dated 28th May, 2024 is hereby allowed.

b. The orders striking out the 1st Respondent from these proceedings are hereby set aside.

c. The 1st Respondent shall remain a party to these proceedings.

d. Given the constitutional nature of these proceedings, each party shall bear their own costs.

27. Orders accordingly.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 20TH DAY OF JANUARY 2025

In the Presence of:

Mr. Ochala Advocate for the Petitioner

M/s Ledisha Advocate for the 1st Respondent

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R. NYAKUNDI

JUDGE