Republic v Governor Kitui County & 2 others; Kilonzi (Exparte Applicant); Mbai (Intended Interested Party) (Judicial Review E010 of 2024) [2025] KEHC 4647 (KLR) (12 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4647 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

JUDICIAL REVIEW E010 OF 2024

LW GITARI, J

MARCH 12, 2025

IN THE MATTER OF ARTICLES 10,27,50,157 AND CHAPTER FOUR OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 13 AND 14 OF THE URBAN AREAS AND CITIES (AMENDMENT ACT) 2019

AND

IN THE MATTER OF SECTION 9 OF THE PUBLIC APPOINTMENTS (COUNTY ASSEMBLIES APPROVAL) ACT, 2015

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE GOVERNOR KITUI COUNTY ..... 1ST RESPONDENT

THE COUNTY GOVERNMENT OF KITUI ..... 2ND RESPONDENT

THE COUNTY ASSEMBLY ..... 3RD RESPONDENT

AND

NELSON MUE KILONZI ..... EXPARTE APPLICANT

AND

JOHN MUSYOKA MBAI ..... INTENDED INTERESTED PARTY

RULING

1. The applicant filed the application dated 10/11/2023 where the substantive prayer was for leave to apply for an order of mandamus compelling the 1st respondent to appoint him and his co-nominees to Mwingi Municipal Board. This court granted the same leave as prayed vide an order dated 7/3/2024. The court directed the applicant to file the substantive application within 21 days. The applicant failed to comply with the order and failed to file the substantive motion within 21 days. He filed the application which is dated 3/4/2024 seeking the extension of time to file the said intended substantive motion. Unfortunately, the application did not see the light of the day as it was dismissed on 16/5/2024 for none attendance by the applicant to prosecute it.

2. Upon dismissal of the said application the applicant filed the present application dated 7/6/2024 seeking orders that the court be pleased to review the orders issued on 16/5/2024 and orders granted on 5/6/2024. The application is based on the grounds that the applicant's counsel was not in court on 16/5/2024 when the application was dismissed. That the matter was coming for mention and the court could not issue substantive orders during the mention of a matter.

3. The applicant relies on Order 45 Rule 1(b) of the Civil Procedure Rules and submits that courts have ruled that it is a cardinal rule of National Justice that no substantive orders can be granted during the mention of the matter. He relies on:

    a. In Republic -vs- Anti-Counterfeit Agency & 2 Others Ex-Parte Surgippharm Limited [2014] eKLR the High Court observed that first and foremost, it is clear that the matter was coming up for mention for directions rather than for hearing. It is trite that on a day when a matter is fixed for mention the same ought not to be heard unless the parties consent to the hearing.

    b. In Central Bank of Kenya -vs- Uhuru High way Development Ltd & 3 Others Civil Appeal NO. 75 of 1998 the Court of Appeal held that where a matter is fixed for mention the Judge has no business determining on that date, the substantive issues in the matter unless the parties so agree, and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties.

    c. In Mr. Rahab Wanjiru Evans -vs Esso (K) Ltd Civil Appeal No. 13 of 1995 [1995-1998] 1 EA 332, it was held that when the matter is fixed for mention it cannot be heard unless by consent of the parties and that orders cannot be made before hearing submissions of the parties.

    d. Dealing with the same issue the Court of Appeal in AG -vs- Simon Ogila Civil Appeal No. 242 of 2000 (Supra) held that substantive matters cannot be determined on a date when the matter is coming up for mention only.

    e. Similarly, in Peter Nzioka & Another -vs- Aron Kuvuva Kitusa Civil Appeal NO. 54 of 1982; [1984] KLR 487, it was held that when the matter is fixed for mention and not hearing it cannot be lawfully dismissed. A similar view was taken by the Court of Appeal in Kenya Commercial Bank -vs- N J B Hawala Civil Application No. 240 of 1997.

4. Based on these authorities the applicant contends that there is an error apparent on the face of the record which the applicant calls this court to review. That the applicant had filed the application dated 16/5/2024 which was dismissed with costs on 5/6/2024 which ought to be reviewed in view of the errors apparent on the face of the record. That this court should not only do justice but should be seen to do justice. He pays that the application be allowed.

5. The 1st & 2nd respondent opposed the application and filed grounds of opposition dated 26/6/2024 and contends that the application is vexatious, frivolous and constitutes an abuse of the court process. The 1st and 2nd respondent contended that the applicants' application demonstrates an abuse of Section 3A of the *Civil Procedure Act* and has failed to adduce any material upon which this court can exercise discretion under Order 45 of the Civil Procedure Rules. The respondents contend that whereas the court has discretion to review its order, the same should be exercised judiciously with overriding objective to do justice to all the parties. That the review orders being sought herein will unreasonably enlarge the leave being sought in the application dated 3/4/2024. It is also the contention by the respondent that the application dated 3/4/2024 lacks basis in law and therefore offends the provisions of Order 53 of the Civil Procedure Rules. It is also argued that an order of dismissal cannot be said to be an error when Section 3A of the *Civil Procedure Act* is taken into consideration as courts of law are bound to make decisions based on law and evidence presented. It is contended that in the absence of plausible reasonable evidence in support of the application the court is unable to exercise its discretion judiciously. That the 1st and 2nd respondents are likely to suffer prejudice if he application is allowed as the applicant is merely and apparently using the court process to drag the respondent in court. That the application lacks merits and should be dismissed.

6. The 3rd respondent opposed the application and filed a Notice of Preliminary Objection. His contention is that the applicant has failed to annex the decree sought to be reviewed pursuant to Order 45 Rule 1. That the application is fatally defective. The application proceeded by way of written submissions.

7. I have considered all the submissions. I will address the issues raised in the submissions in the analysis and determination of the application.

Analysis And Determination

8. I have considered the application, the preliminary objection and the grounds of opposition as well as the submissions. The issues which arise for determination are:

    1. Whether the preliminary objection has merits.

    2. Whether the application meets the threshold for review under Order 45 Rule 1 Civil Procedure Rules.

Whether Preliminary Objection has merits.

9. The Preliminary Objection is based on the ground that the applicant has not annexed the order or ruling sought to the reviewed. I have considered the case of Peter Kirika Githaiga & Another -vs- Betty Rashid (2016) KLR where the Court of Appeal stated that:

> "Our understating is then that, where a formal order or decree has not been extracted or attached to the application for review but a party is able to direct the courts attention to that part of the ruling or judgment which he complains of since such decision would be in the court file anyway, the application for review cannot be rendered fatally defective."

10. I have also considered the authority of *Kenya Union of Clinical Officers & the Others -vs- County Government of Vihiga & Another (Employment and Labour Relations Claim 32 of 2021*) 2024

KEELRC 445 (KLR) (29/2/2024) ruling where the court while relying on the court of Appeal decision in Peter Kirika Githaiga & Another -vs- Betty Rashid (Supra) held that:

> " My reading of the Law is that it is not mandatory to annex the decree in the proceedings before this court."

11. See also the case of Karanja (suing as the Legal Representative of the estate of David Karanja Ng'ang'a -vs- Koibonet Sweet land Consultant Limited and 2 Others (Environment & Land Case 45 B of 2021) KEELC 3654 (KLR) (30 April 2024) Ruling. The court ruled the failure to annex the order that was to be reviewed was because the ruling can easily be accessed. I am well guided by the decision of the Court of Appel on this issue. I am also minded that failure to annex the ruling sought to be reviewed is not fatal and there is no requirement under Order 45 rule 1 (Supra) of the Civil Procedure Rules that the Order or Ruling sought to be reviewed be annexed to the application.

12. Be that as it may the applicant has attached evidence under paragraph 2 of the supporting affidavit which includes the cause list of the day and proceedings from the judiciary's online filing CTS as evidence of issuance of the order. This court is also able to access the ruling from the court file. The court would be failing in its duty by dismissing the application when it is the same court that issued the orders and can refer to them from the court file. Failure to annex the Order and the Ruling in such a situation is a technicality which should not deny the party a hearing in the right of Section 1A & 1B of the Civil Act which provides for the overriding objectives of the Act which to facilitate the just, expeditious and proportionate and affordable resolution of civil disputes governed by the Act.

13. On the other hand, Article 159(2)(d) of *the Constitution* on Judicial Authority, it is provided that, "Justice shall be administered without undue regard to procedural technicalities." It is my view that although it good practice to attach the decree or order a party seeks to review in order to enable the court have clarity as to the orders complained about, in the present application, failure to annex the order is not fatal as the court can have liberty to peruse the order and the ruling in the court file. It is trite law that a preliminary objection should be on a pure point of law which is clear from the pleadings and is argued on he assumption that all facts pleaded by the other side are correct. It cannot be argued if any fact had to be ascertained or what was sought was the exercise of Judicial discretion. See the case of Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors Limited (1969) E.A 696. I find that the preliminary objection raised was not on a pure point of law. This as the court had to ascertain the facts. The preliminary objection lacks merits.

Whether the application has merits

14. The legal basis for review is Section 80 of the *Civil Procedure Act* which 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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

15. The application is premised under Order 45 rule1 of the Civil Procedure Rules which 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay."

16. A party seeking review must demonstrate that the following exists on the order sought to be reviewed:

a. An error apparent on the face of the record.

b. Discovery of new and important matter.

c. Any other sufficient reason

17. The applicant contends that there is an error apparent on the face of the record as the court issued a substantive order when the matter was coming up for mention. The question is whether the impugned decision of this court amounts to an error apparent on the face of the record. The record shows that on 16/5/2024 when the matter came up for mention the applicant's application dated 3/4/2024 was dismissed for none attendance by the applicant. The applicant filed an application dated 16/5/2024 seeking to set aside the order of dismissal of the application dated 3/4/2024. The court dismissed the application as the applicant failed to attend court to prosecute it. Where an applicant relies on the ground that there is an error apparent on the face of the record, the error must be self-evident and not one that requires a long process of reasoning. The error must be distinguished from an 'error which is apparent on the face of the record as opposed to where the judge erred.'

18. An error apparent on the face of record will, where the circumstances allow, call for the filing an application for review. On the other hand, where the Judge has erred in his decision, the proper procedure is to file an appeal in the superior court to correct the decision where the Judge has erred. As submitted by the counsel for the 1st and 2nd respondents, a line must be drawn between a mere erroneous decision and an error apparent on the face of the record. A court should not review any Judgement once delivered by it save to correct any clerical mistake or an error arising from an accidental slip, or omission. The court will not vary its order thro' an application for review if the order represents what the court decided. The error which the court can correct thro' an application for review are minor errors which are apparent. The applicant has submitted that the order issued by this curt was made in error and therefore constitutes an error which this court can review. An analysis of the case relied on by the applicant is necessary. Barclays Bank of Kenya Limited & Another -vs- Gladys Muthoni & 20 Others (2018) eKLR it was held:

" With respect, we think the order was made in error on a mention date."

19. In Central Bank of Kenya -vs- Uhuru Highway Development Ltd & 3 Others (2014) Civil Appeal NO. 75 of 1998 the Court of appeal held that where a matter is fixed for mention the Judge has no business determining on that date, the substantive issues in the matter unless the parties so agree and

of course after complying with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties.

> " With respect, we think the order was made in error on a mention date. In the case of Republic -vs- Anti-Counterfeit Agency & 2 Others ex-parte Surgippharm Limited (2014) eKLR, Odunga J. examined several decisions of this court laying to rest the mater of "mention" dates:
>
> "In Central Bank of Kenya -vs- Uhuru Highway Development Ltd & 3 Others civil Appeal No. 75 of 1998 the Court of appeal held that where a matter is fixed for mention the Judge has not business determining on that date, the substantive issues in the matter unless he parties so agree, and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties. In Mrs. Rahab Wanjiru Evans -vs- Esso (K) Ltd, Civil Appeal No. 13 of 1995 [1995-1998] 1 EA 332, it was held that when the matter is fixed for mention it cannot be heard unless by consent of the parties and that orders cannot be made before hearing submissions of the parties. Dealing with the same issue the Court of Appeal in AG -vs- Simon Ogila Civil Appeal No. 242 of 2000 (Supra) held that substantive matters cannot be determined on a date when the matter is coming up for mention only. Similarly, in Peter Nzioki & Another -vs- Aron Kuvuva Kitusa Civil Appeal No. 54 of 1982; [1984] KLR 487, it was held that when the matter is fixed for mention and not hearing it cannot be lawfully dismissed. A similar view was taken by the Court of Appeal in Kenya Commercial Bank -vs- N J B Hawala Civil Application No. 240 of 1997...As was held in Onyango Oloo -vs- Attorney General [1986-1989] EA 456 a decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at."

20. It is intrinsic to note that the orders were issued on appeal. In this application, it is correct as submitted by the applicant that where the judge has erred the option open to the party is to file an appeal where the erroneous decision is considered and corrected. This court lacks jurisdiction to venture in such an adventure of correcting errors made by a Judge.

21. In the case of National Bank of Kenya vs Ndungu Njau (1997) eKLR, Court of Appeal, it was held that:

> " A review may be granted whenever the court considers that it is necessary to correct an error or omission on the part of the court. The error on 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 of review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. Misconstucting a statute or other provision of the law cannot be a ground of review."

22. In this matter the applicant had filed an application seeking leave to file Judicial Review proceedings to compel the 1st respondent to appoint the ex-parte applicant and the nominees to the Mwingi Municipal Board. The applicant was granted leave to file the substantive motion within 21 days from 7th March 2024. The ex-parte applicant failed to file the substantive motion within 21 days. He filed the notice of motion dated 3/4/2024 seeking an order to enlarge time to file substantive motion. This application came for mention before the Judge on 16/05/2024 but was dismissed for non-attendance by the applicant. The ex-parte applicant was invoking the discretion of court to set aside the dismissal

order. The Judge in his ruling held that the applicant had not given a plausible reason for not filing the substantive motion in time. The Judge then held that the applicant was guilty of latches and was undeserving of the exercise of court's discretion in his favour. The Judge was applying the overriding objective of the *Civil Procedure Act* and Rules.

23. It is clear from this background that the applicant was indolent and guilty of latches. There was no error apparent on the face of the record as envisaged under Order 45 of the Civil Procedure Rules.

Conclusion

24. I find that the application lacks merit and is dismissed.

DATED, SIGNED AND DELIVERED AT KITUI THIS 12TH DAY OF MARCH 2025

HON. LADY JUSTICE L. GITARI

JUDGE