



REPUBLIC OF KENYA



**Sadia & another v Rarieda Sub County Fisheries Officer & 3 others (Constitutional
Petition E005 of 2022) [2025] KEHC 2909 (KLR) (14 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2909 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CONSTITUTIONAL PETITION E005 OF 2022**

**DK KEMEL, J
MARCH 14, 2025**

BETWEEN

JOSEPH OMONDI SADIA 1ST PETITIONER

DAVID OCHIENG MILANDO 2ND PETITIONER

AND

RARIEDA SUB COUNTY FISHERIES OFFICER 1ST RESPONDENT

**CHIEF OFFICER, DEPARTMENT OF AGRICULTURE, IRRIGATION, FOOD
LIVESTOCK AND FISHERIES, SIAYA COUNTY 2ND RESPONDENT**

DIRECTOR OF FISHERIES, SIAYA COUNTY 3RD RESPONDENT

BMO NETWORK CHAIRMAN, RARIEDA SUBCOUNTY ... 4TH RESPONDENT

RULING

1. The Petitioner herein has moved this court vide a Notice of Motion dated 18th September, 2024 seeking the following reliefs.
 - i. Spent
 - ii. This court be pleased to review and vacate its judgment dated 2/5/2023 and all consequential orders therefrom.
 - iii. Costs of this application be provided.
2. The application is supported by the grounds set out on the face thereof and by the supporting affidavit of the 1st Petitioner/Applicant sworn on even date. The Applicant gravamen is inter alia; the issues raised in the application are weighty and challenge the judgment of this court issued on the 2/5/2023 that are manifestly unjust and ought to be reviewed varied and or set aside; that if these orders are allowed to continue being in force, a grave injustice will have been committed upon the Petitioners as



their rights under Article 50 of the Constitution of Kenya 2010 is under threat; that it is undisputed that the Petitioners were procedurally removed from office, and were never provided with the relevant information with regards to their removal from office; that as a consequence, of the illegal removal from office, the petitioners instituted this suit via a petition dated 26th September 2022; that the Respondent thereafter filed a replying affidavit dated 30/1/2023, where they purported that there existed an employer employee relationship between the Respondents and petitioners and that the High Court did not have the requisite jurisdiction to handle the suit; that in agreeing with the Respondent, the court delivered its judgment on 2/5/2023 where it stated that it did not have jurisdiction to handle the suit and further directed that the suit ought to have been filed in the Employment and Labour Relation Court; that the Petitioners therefore approached the Employment and Labour Relations Court in Kisumu, which court directed that there did not exist an employer employee relationship thus, it did not have jurisdiction to hear and determine the suit; that the Petitioner's right to fair hearing is therefore under threat as both courts have determined that they do not have jurisdiction; that it has been established there existed no employer – employee relationship, the High Court is therefore the only forum approachable to the Petitioners; that it is in interest of justice that this application be heard expeditiously to protect the Petitioners right under Article 50 of the Constitution of Kenya 2010; that the application has been brought within reasonable time possible and in the interest of fairness, justice and the strict abidance with the rule of law and the delay if any was as a consequence of the parties herein having filed a suit in the Employment and Labour Relations Court; that it is in the interest of justice and fairness that the judgment dated 2/5/2023 be reviewed, varied and /or set aside in its entirety.

3. The 1st, 2nd and 3rd Respondents filed ground of opposition dated 39/11/2024 wherein they raised two grounds namely: that the application is incompetent, bad in law and an abuse of the court process; that the application does not meet the threshold for review of judgment as provided for under Order 45 Rule 1 of the Civil Procedure Rules.
4. The 4th Respondent did not file any response.
5. The application was canvassed by way of written submissions.
6. The Petitioner's submissions are dated 20/1/2025. The Petitioners raised two issues for determination namely; whether the court has jurisdiction to hear and determine this application; whether the Applicant has met the threshold for granting an order for review. As regards to the first issue, it was submitted that this court has jurisdiction to determine the application.

As regards the second issue, it was submitted that the Petitioners have shown sufficient reasons for review pursuant to Order 45 of the Civil Procedure Rules. Learned counsel for the Petitioners' submitted that after the dismissal of the petition by this court on 3rd May 2023, the Petitioners moved to ELRC Court in Kisumu where upon the said court directed that Employer-Employee relationship did not exist and that it did not have jurisdiction. That being the position, the Petitioners believe that this court has the jurisdiction to determine this matter. The Petitioners submit that this court has inherent jurisdiction to ensure that there is no miscarriage of justice or failure of justice or abuse of the judicial process. It is the Petitioners case that their Constitutional Petition was never determine on merit for reasons that the court believed that it did not have the requisite jurisdiction to hear and determine the same and that the same ought to have been determined by the Employment and Labour Relation's Court. The Petitioners were then turned away by the ELRC Court and therefore they believe that their right to fair hearing as guaranteed under Article 50 (2) of the Constitution will be infringed unless the



court intervenes by reviewing its judgment on the issue of jurisdiction. Learned counsel relied on the case of *Wangechi Kimata & Another vs Charan Singh (C.A. No. 80 of 1985)* which held as follows:

“any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by Section 80 of the *Civil Procedure Act*; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”

Finally, it was submitted that the decision of this court had been decided without the principle of natural justice being taken into account and hence the Petitioners’ plea for review so that they can get justice in the matter.

7. The 1st, 2nd and 3rd Respondents submissions are dated 18/2/2025. Learned counsel raised one issue for determination namely whether the application meets the threshold for review of judgment. It was submitted that review is provided for by Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. It was submitted that the Petitioners view that Justice Ogembo was in error and which related to an interpretation of the law. It was the submission of the counsel that the error in the interpretation and application of the law by a Judge is not sufficient ground for review of a judgment arising from the said alleged error. That being the position, it was the view of the counsel that such an error cannot be ground for review of a judgment. Further, the Petitioners’ request to this court to handle the matter is like inviting this court to sit on appeal on a decision of a Judge of an equal status which is not allowed. Further, it is submitted that the application has been made more than twenty (20) months after the judgment was delivered and thus there was unreasonable delay. It was finally submitted that the application dated 18/9/2024 does not meet the threshold for review of judgment. The same should be dismissed.
8. I have given due consideration to the application and rival submissions. It is not in dispute that the late Justice Ogembo delivered the judgment in this matter on 2/5/2023 wherein he found that this court lacked jurisdiction to hear and determine the Petitioners’ petition. It is also not in dispute that the Petitioners did not prefer an appeal against the said order. It is also not in dispute that the Petitioners moved the Employment and Labour Relations Court at Kisumu for further redress but were unfortunately turned away on the ground that there existed no Employee – Employer relationship. It is not in dispute that the Petitioners have decided to approach this court to interfere with the judgment delivered on 2/5/2023. I find the only issue for determination is whether the Petitioners’ application meets the threshold for review of the said judgement.
9. Review of decrees or orders is provided for by Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. The same provides for review in three circumstances namely: discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant 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 and whatever the ground there is a requirement that the application has to be made without unreasonable delay.
10. It is not disputed that the orders made by the late Justice Ogembo had been made by the court of coordinate jurisdiction and therefore this court is not entitled to reverse, vary or alter the order or decision of the said Judge. The circumstances of the Petitioners are understandable in that upon the dismissal of the petition by Ogembo J, on grounds of lack of jurisdiction by the court as it established the existence of an Employee – Employer relationship, they moved to the Employment and Labour Relations Court at Kisumu. The Petitioners were however turned away as the said court held that



it did not have the jurisdiction since there existed no employer – employee relationship between the Petitioners and the Respondents. This then forced the Petitioners to come back to this court. As it is, the Petitioners have found themselves in a culdesac situation so to speak. They now beseech this court to entertain the matter in the interest of natural justice as they have nowhere to turn to. It is not disputed that the Petitioners contention is that the learned Judge, (Ogembo J,) made an error in the interpretation and application of the law. The issue which arises under those circumstances is whether an error in the interpretation and application of the law by a Judge can be sufficient ground for review of a judgment arising from the said error. It is my considered view that the request by Petitioners amounts this court sitting on appeal on a decision of a Judge in a court of concurrent jurisdiction. This is untenable. The Petitioners having formed the view that the leaned Judge who dismissed the suit on the grounds of lack of jurisdiction, implied that the said Judge had made an error in the interpretation of the law and that is why they went to the Employment and Labour Relations Court. It is therefore improper for the Petitioners to come back to the same court to seek for a review of judgment that had been arrived at in error by the Judge. The proper course of action for the Petitioners was to lodge an appeal against the said decision of the Judge but not to seek for review of the impugned judgment. The Petitioners are deemed to have exercised their choices contentiously. In the case of Republic versus Cabinet Secretary for Interior and Coordination of National Government Exparte Abulahi Said Salad [2019] eKLR, the court held:

“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 proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. Misconstruing a statue or other provision of law cannot be a ground for review.”

11. Learned counsel for the Petitioners has submitted that the impugned judgment should be reviewed so that the court is seen to promote public interest and enhance public confidence in the rule of law and system of justice in the country. However, as noted above, the Petitioners contend that the impugned judgment dated 2/5/2023 had been arrived at by the learned Judge in error since the Employment and Labour Relations Court later established that it was the High Court that had jurisdiction in the matter. That being the position, the error so made could only be cured by an appeal and not review. Consequently, I am not persuaded by the submissions by counsel for the Petitioners to entertain the application as it would amount to sitting on a decision for a Judge of a Court of concurrent jurisdiction. The only option for the Petitioners is to lodge an appeal against the impugned judgment.
12. In view of the foregoing observations, it is my finding that the Petitioners’ application dated 18/9/2024 lacks merit. The same is dismissed. Each party to bear their own costs.

DATED AND DELIVERED AT SIAYA THIS 14TH DAY OF MARCH, 2025.

D. KEMEI

JUDGE

In the presence of:

M/s Mugoye.....for Petitioners

N/A Okanda.....for 1st, 2nd and 3rd Respondents

N/A.....4th Respondent



Ogendo.....Court Assistant

