Kiplangat & 4 others v Director of Public Prosecutions & 3 others (Judicial Review Miscellaneous Civil Application E096 of 2023) [2025] KEHC 7207 (KLR) (Judicial Review) (23 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7207 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW MISCELLANEOUS CIVIL APPLICATION E096 OF 2023

JM CHIGITI, J

MAY 23, 2025

BETWEEN

JOEL KIPCHIRCHIR KIPLANGAT ..... 1ST APPLICANT

ZACHARIAH WAKHUNGU BARAZA ..... 2ND APPLICANT

NATHIEL KIPKEMBOI BARMASI ..... 3RD APPLICANT

SAMUEL KIPKORIR CHEPKWONY ..... 4TH APPLICANT

JOHN KIMAIYO ROTICH ..... 5TH APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS ..... 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE, NATIONAL POLICE SERVICE OF KENYA ..... 2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 3RD RESPONDENT

CHIEF MAGISTRATE'S COURT, NAIROBI ..... 4TH RESPONDENT

RULING

Brief Background

1. The Exparte Applicants/Respondents moved the Court vide a Notice of Motion dated 25th July 2023 seeking the followings orders:

    a) That the Honourable Court be pleased to issue an Order of Certiorari to bring into this Honourable Court and quash the decision of the 1st Respondent or officers subordinate to the

1st Respondent, and on the recommendation of the 2nd and 3rd Respondents, to charge the Applicants with criminal offences before Milimani Chief Magistrates Court Criminal Cases No.E1005 OF 2022, Republic versus Zachary Wakhungu Baraza & Nathaniel Kipkemboi Barmasai, No. E499of 2023: Republic vs Joel Kiplagat Kipchirchir and Criminal Case No. E1026 of 2022: Republic vs Joel Kipchirchir Kiplangat, Samuel Kipkorir Chepkwony& John Kimaiyo Rotich.

b) That an Order of Prohibition to issue directed at the1st Respondent or through officers' subordinate to him, prohibiting him from carrying on with the further prosecution of the Applicants in Milimani Chief Magistrate's Criminal Cases Numbers E1005 of 2022, E499 of 2023 and E1026 of 2022 or any other proceedings that may be instituted on the same basis and touching on the subject matter of the impugned investigations.

c) That an Order of Prohibition to issue directed at the2nd and 3rd Respondents or through officers' subordinate to them prohibiting them from carrying on with any further investigations touching on the Applicants.

d) That an Order of Prohibition to issue to prohibit the2nd and 3rd Respondents from taking evidence, conducting proceedings or carrying on with the trial of the Applicants in Milimani Chief Magistrate's Criminal Case No. E1005 Of 2022: Republic vs Zachariah Wakhungu Baraza & Nathaniel Kipkemboi Barmasai, Criminal Case Number E499 of2023: Republic vs Joel Kiplagat Kipchirchir and Criminal Case No. E1026 of 2023: Republic vs Joel Kipchirchir Kiplagat, Samuel Kipkorir Chepkwony and John Kimaiyo Rotich or any other criminal proceedings that may be instituted on the same basis and touching on the 1st Applicant relating to the subject matter of the impugned investigations and/or allowing the 1st and 3rd Respondents to prosecute any other criminal case relating to the property known as Land Reference Number E366 of 2022 situated within Westlands Area, Nairobi. (hereinafter "the property").

e) That the costs of this suit be awarded to the Applicants.

2. On 4th April 2024 the Honourable Court issued the following orders;

a) An Order of Certiorari is hereby issued to bring into this Honourable Court and quash the decision of the 1tRespondent or officers subordinate to the 1stRespondent, and on the recommendation of the 2ndand 3rd Respondents, to charge the Applicants with criminal offences before Milimani Chief Magistrates Court Criminal Cases No. E1005 OF 2022, Republic versus Zachary Wakhungu Baraza & Nathaniel Kipkemboi Barmasai, No. E499 of 2023: Republic vs Joel Kiplagat Kipchirchir and Criminal Case No.E1026 of 2022: Republic vs Joel Kipchirchir Kiplangat, Samuel Kipkorir Chepkwony & John Kimaiyo Rotich.

b) An Order of prohibition is hereby issued to directed at the 1st Respondent or through officers' subordinate to him, prohibiting him from carrying on with the further prosecution of the Applicants in Milimani Chief Magistrate's Criminal Cases Numbers E1005 of 2022, E499 of 2023 and E1026 of 2022 or any other proceedings that may be instituted on the same basis and touching on the subject matter of the impugned investigations.

c) An Order of prohibition is hereby issued to directed at the 2nd and 3rd Respondents or through officers' subordinate to them prohibiting them from carrying on with any further investigations touching on the Applicants.

d) An Order of prohibition is hereby issued to prohibit the 2nd and 3rd Respondents from taking evidence, conducting proceedings or carrying on with the trial of the Applicants in Milimani

Chief Magistrate's Criminal Case No. E1005 Of 2022: Republic vs Zachariah Wakhungu Baraza &Nathaniel Kipkemboi Barmasai, Criminal Case Number E499 of 2023:Republic vs Joel Kiplagat Kipchirchir and Criminal Case No. E1026 of 2023: Republic vs Joel Kipchirchir Kiplagat, Samuel Kipkorir Chepkwony and John Kimaiyo Rotich or any other criminal proceedings that may be instituted on the same basis and touching on the 1st Applicant relating to the subject matter of the impugned investigations and/or allowing the 1st and3rd Respondents to prosecute any other criminal case relating to the property known as Land Reference Number E366 of 2022 situated within Westlands Area, Nairobi. (hereinafter "the property") and Costs to the Applicants.

3. Being dissatisfied with the judgment, the applicant has moved the court Via the application dated 30th October, 2024 invoking Article, 50, 159 2(d) of the *Constitution*, Order 51 rule 1 of the Civil Procedure Rules 2010 and Sections 1A, 1B & 3A of the *Civil Procedure Act* Cap 21 of the laws of Kenya and all other enabling provisions of the law seeking the following orders;

    1. ...spent.
    2. That this Honourable Court be pleased to grant a temporary stay of execution of the judgment delivered the pending the hearing and determination of this application inter-parties.
    3. That this Honourable Court be pleased to vary, review, discharge or set aside its orders issued 4th April 2024.
    4. That this Honourable Court be pleased to set aside the ex-parte proceedings and Judgment and direct that the matter be heard de-novo.
    5. That this Honourable Court be pleased to re-open this suit.
    6. That costs of this application be in the cause.

The Applicants Case;

4. The applicant relies on the Supporting Affidavit Of Sgt. Eric Onyango. It is his case that The Exparte applicants/Respondents moved the Court vide a Notice of Motion dated 25th July 2023. The Application was heard ex parte and the Honourable Court on 4th April 2024 issued aforementioned orders;
5. It is his case that the Director of Criminal Investigations was not served with the pleadings in this suit and thus was not granted an opportunity to defend the matter.
6. The Applicant argues that the matter proceeded without the input of the Director of Criminal Investigations despite the fact that there is a plausible response which raises triable issues.
7. It is its case that only the 1st respondent (The Director of Public Prosecution) was served with the pleadings and that he became aware of the Judgment in this matter on 25th October 2024.
8. It is argued that the Director of Criminal Investigations has a good defence and should therefore be granted a chance to defend the matter considering that what the Orders issued herein stops the statutory mandate of the National Police Service and the DCI.
9. The applicant believes that the application has been made timeously without delay and the Court should exercise its discretion in order to avoid an injustice.

10. The Applicant submits that the main issue for determination is whether this Honourable Court ought to set aside the ex-parte judgment and reopen the suit to uphold the 2nd to 4th Respondents' right to be heard.

11. It invokes Article 50 of the *Constitution* which provides that;

    (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

    (2) Every accused person has the right to a fair trial...

12. The *Civil Procedure Act*, in Section 20 provides that;

    " Where a suit has been duly instituted the defendant shall be served in manner prescribed to enter an appearance and answer the claim." In Ridge v Baldin (1964) AC (1963) 2 ALL ER 66 the court observed as follows:

        " The principle of fairness has an important place in the administration of justice and is also a good ground upon which courts ordinarily exercise discretion to intervene and quash the decisions of a tribunal or subordinate court made in violations of right to a fair hearing and due process."

13. It is argued that for the full realization of the parties' constitutional right to a fair hearing and their right to be heard in accordance with the rules of natural justice, it is imperative that the parties are duly informed of any case instituted against them in a court of law.

14. This obligation can only be fulfilled through the proper service of the pleadings and all documents filed in court upon the adverse party.Such service ensures that the affected party is made aware of the case against them, thereby affording them the opportunity to prepare their defence and respond to the claims brought forth. The applicant is obligated to serve all parties involved, particularly the respondents, with the relevant documents and pleadings.

15. The directions of this Honourable court on the 21st July 2023 in direction 2 stated:

    1. The Applicant shall file and serve the substantive Motion within 14 days of today's date.

16. The Applicant chose not to serve the 2nd to 4thRespondent as directed. It is their case that in the interest of justice and fairness, the court should set aside the judgment, which is the fruit of the poisonous tree, and order that the matter be heard de novo.

17. This will ensure that the Respondents are afforded their constitutional right to be heard, and that the proceedings are conducted in accordance with the law, free from the taint of procedural irregularities.

18. Reliance is placed in the case of James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR where the Court of Appeal held that;

    " In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence

raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations."

19. The Applicant also submits that our Court of Appeal in James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR upheld the Principle that where an adverse order is made against a party who is affected by it without notice to him/her the order is liable to be set aside ex debito justitiae. The Court held as follows;

> The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo v. Attorney General [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in Sangram Singh v. Election Tribunal, Koteh, AIR 1955 SC 664, at 711:
>
> > [T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."

20. The approach of the courts where an irregular default judgment has been entered is demonstrated the following cases. In Frigonken Ltd v. Value Pak Food Ltd, HCCC NO. 424 of 2010, the High Court expressed itself thus:

> If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justitiae. Such a judgment is not set a side in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process."

Earlier in Kabutha v. Mucheru, HCCC No. 82 of 2002 (Nakuru) Musinga, J. (as he then was) had expressed the principle thus:

> [W]ith respect to the trial magistrate, she had no discretion to exercise in the circumstances of the case since there was no service at all and as earlier said, the default judgment had to be set aside as a matter of right. Discretion would have arisen if service was proper and there had been for example delay in entering appearance. Where there is no service of summons to enter appearance, an applicant does not have to show that he has an arguable defence so as to persuade the court to set aside an ex parte judgment. In such circumstances, the court is under a duty to remedy the situation and uphold the integrity of the judicial process." (See also, Bouchard International (Services) Ltd v. M'Mwereria [1987] KLR 193, Remco Ltd v. Mistry Jadva Parbat & Co. Ltd. & 2 Others [2002] 1 EA 233 and Baiywo v. Bach [1987] KLR 89.

21. The former Court of Appeal for Eastern Africa, in Ali Bin Khamis v. Salim Bin Khamis Kirobe & Others, [1956] 1 EA 195 expressed the view that where an order is made without service upon a person

who is affected by it, procedural cockups will not deter the court, ex debito justitiae, from setting aside such an order. Briggs, JA., with whom Worley P. and Sinclair, VP. concurred, stated thus:

> On the appeal before us Mr. Khanna relied on Craig v Kanseen [1943] 1 All ER 108 as showing that where an order is improperly made without serving a person known to be affected by it and having a statutory right to be served before it can be made, the order is a nullity in the sense that it must be set aside ex debito justitiae, and that in cases of nullity procedure is unimportant, since the Court has inherent jurisdiction to set aside its own order. I accept these principles, as laid down by Lord Greene, MR." (Emphasis added).

22. It submits that an order made without hearing the other side of a dispute is in the category of orders which Lord Diplock in Lord Diplock in Isaacs v. Robertson, [1984] 3 All E.R. 140 at 143 held to be liable to be set aside ex debito justitiaewithout need to applying in accordance with the Rules of court for setting aside:

> " there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts ex debito justitiae the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice."

The Ex Parte Applicant/Respondents case;

23. The application is opposed through the replying affidavit of zachariah wakhungu baraza, who argues that the Applicants were all along aware of the Court proceedings herein and indeed they affirmed the position in the Chief Magistrate's Court Nairobi Criminal Case Number E1005 of 2022 (Republic vs Zacharia Baraza Wakhungu & Others) as seen and evidenced by the Court proceedings.

24. It is his case that at no time when the said criminal case came up for mention at the Chief Magistrate's Court did the Deponent or the Director of Public Prosecutions allude to the Presiding Magistrate that the Respondents had not been served with the pleadings.

25. It is argued that The Office of the Director of Public Prosecutions is independent and cannot be controlled by the Attorney General and it prosecutes and defends suits by or against them.

26. Once a criminal case is in the hands of the Director of Public Prosecutions, the Attorney General nor the 2nd or 3rd Respondents have any power or authority to purport to speak on behalf of the 1st Respondent and that it is only the 1st Respondent who has exclusive mandate vested under the law to issue directions regarding these proceedings.

27. On the 25th July, 2023 the Applicants were represented in was Court wherein the pleadings and Court Order were served on the officer of the Applicant at his request and the 1st Respondent indeed confirmed receipt of the Court Order staying the criminal proceedings.The affidavit of service demonstrates service.

28. The 1st Respondent was routinely served with the Mention Notices and chose not to appear in Court.

29. The Applicants have not offered any explanation whatsoever as to why they waited till October 2024.

The Ex Parte Applicant/Respondents Submissions;

30. He submits that it is premature for the respondents to plead facts until the Court determines whether or not their application should be allowed.

31. At the time of filing the judicial review proceedings herein, the Director of Public Prosecutions who is the named 1st Respondent was already seized of the proceedings by virtue of having instituted Chief Magistrate's Criminal Case Numbers E1005 of 2023 and E1026 of 2022.

32. The 1st Respondent in exercise of its constitutional mandate was all along aware that this Honourable Court had stayed the criminal proceedings.

33. The Chief Magistrate's Court, who is the 4th Respondent, and all the Respondents were made aware of the termination of the criminal proceedings on 15th May, 2024 and they affirmed the position and did not contest these proceedings but waited till 30th October, 2024 (5 months 15 days) to present the application herein.

34. The Attorney General is purporting to prosecute the proceedings on behalf of the 1st Respondent yet the only persons mandated under the *Constitution* of Kenya 2010 to commence criminal proceedings and or prosecute any matter that appertains to those proceedings is the 1st Respondent to the exclusion of anyone else.

35. The Attorney General did not file any Notice of Appointment of Advocates to appear for the 2nd, 3rd and 4th Respondents yet it has purported to plead for them.

36. It is submitted that The Director of Public Prosecutions has not contested the Judgment.

37. The evidence on record and in the Replying Affidavit demonstrates beyond doubt that the Respondents were duly served with the pleadings and chose to ignore the same.

38. The substratum of the judicial proceedings herein were to quash set and prohibit the prosecution by the 1st Respondent of the Applicants in Chief Magistrate's Criminal Cases Numbers E1005 of 2023 and E1026 of 2022.

39. It is submitted that The mandate to institute and or discontinue criminal proceedings is solely vested to the Its Respondent under Article 157 (6) of the *Constitution* which states as follows:

> "(6) The Director of Public Prosecutions shall state powers of prosecution and may: a) Institute and undertake criminal proceedings against any person before any Court (other than a Court martial) in respect of any offence alleged to have been committed;
>
> b) Take over and continue any criminal proceedings commenced in any Court (other than a Court martial) that have been instituted or undertaken by another person or authority with the permission of the person or authority; and
>
> c) Subject to Clause (7) and (8), discontinue at any stage before Judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under Paragraph

40. The 1st Respondent is the key party mandated to or otherwise challenge the judicial review proceedings herein.By purporting to file the application herein, the Attorney General is usurping the sole mandate of the Director of Public Prosecutions donated in Article 157 aforesaid.

41. It also submitted that even if there was a proper application before the Court filed by a competent party, the respondent submits that the application fails to meet the test set out in the celebrated case of Shah vs Mbogo in which the Court held that the Court must be satisfied that:

a) Either that the Defendant was not properly served with Summons.

b) Or that the Defendant failed to appear at the hearing due to sufficient cause.

42. The said case was cited with approval in the case of Wachira Karani vs Bildad Wachira (2016) KEHC 6334 (KLR).

Analysis and determination;

43. The issue for determination is whether there are sufficient and justifiable reasons to set aside the Judgment and the proceedings to be heard afresh.

44. The Office of the Director of Public Prosecutions is an independent constitutional office that is created under Article 157 of the *Constitution*.

45. In the case of The Director of Public Prosecutions v Kiptoo & 6 others (Criminal Revision E1550 of 2024) [2024] KEHC 16692 (KLR) (Crim) (20 December 2024) (Ruling) The court held that;

> " The Director of Public Prosecutions is the officer in law mandated to initiate Criminal Prosecutions in Kenya under Article 157 of the *Constitution*. He enjoys that exclusive authority until parliament otherwise decides in line with Article 157 (12) of the *Constitution*."
>
> The creation of the Independent Director of Public Prosecutions was not by accident by the framers of our Constitution. Kenya was emerging from a one -party dictatorship under which the violation of human rights through politically engineered prosecutions was prevalent. Kenyans will recall with nostalgia the harrowing tales of the Nyayo torture chambers by those who survived to tell their story.
>
> The framers of our Constitution through a deliberate act after wide consultations created the independent office of the DPP who would not sit as a member of the cabinet or parliament in order to cushion the holder thereof from political interferences in the making of the decision to prosecute.
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> In exercising that power, the DPP under Article 157(10) of the *Constitution* is not subject to the direction or control of any -body or authority not even the courts. However, the courts in appropriate cases can intervene to check the excesses of the DPP once an aggrieved party presents a case demonstrating such abuse. See Ngome vs DPP and Another; Ethics and Anti-Corruption Commission (2024) eKLR.

46. The Attorney General is an independent office that is created under Article of the *Constitution*.

Article 156 (1) provides that;

There is established the office of Attorney-General.

(4) The Attorney-General--

(3) The qualifications for appointment as Attorney-General are the same as for appointment to the office of Chief Justice.

(2) The Attorney-General shall be nominated by the President and, with the approval of the National Assembly, appointed by the President.

(a) is the principal legal adviser to the Government;

(c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.

and

(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings;

(7) The powers of the Attorney-General may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

47. The Director of Public Prosecutions is not controlled by the AG and cannot be controlled by the Attorney General. Once a criminal case is in the hands of the Director of Public Prosecutions, no other organ has power or authority to purport to speak on behalf of the Director of Public Prosecutions.

48. It is only the Director of Public Prosecutions who has exclusive mandate vested under the law to issue directions regarding criminal proceedings.

Republic v Director of Public Prosecutions & another Ex parte Habiba Mohamed; Ibrahim Sheikh Hussein & another (Interested Parties)[2022] eKLR, the court held as follows:

> " In as much as the Director of Public Prosecutions has power without regard to any one control of any authority, the powers are fettered by the same Constitution, it obligates him to have consideration of public interest, interest of the administration of justice and he must prevent abuse of legal process. The power is not absolute!"

49. The 4th Respondent is created under Article 166 of the *Constitution*. This court was aware of the proceedings before this court given that the ex parte applicant informed it and served it with the court order as gleaned from the pleadings. It cannot be heard to say that it was not aware of the proceedings before this court.

50. The AG has no locus standi to argue that the 3rd Respondent has a strong case.The AG cannot act for The 3rd Respondent and advance an argument that the ODPP has a strong case. This amounts to the usurpation of the powers of the ODPP. No reason has been advanced by the ODPP. The court is left to wonder how the AG is acting for the ODPP. That is illegal.

51. In the case of Shah vs Mbogo the Court held that the Court must be satisfied that:

a) Either that the Defendant was not properly served with Summons.

b) Or that the Defendant failed to appear at the hearing due to sufficient cause.

52. Section 80 of the *Civil Procedure Act* which 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."

53. The legislative principle that guides the exercise of the above jurisdiction is contained in Order 45 rule 1 of the Civil Procedure Rules which 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."

54. Reliance is placed in the principles as enunciated in the case of Republic v Advocates Disciplinary Tribunal Ex-parte Apollo Mboya [2019] eKLR :

"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" in the light of other specified grounds appearing in Order 45 Rule 1 has to be interpreted

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 the 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 conne 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 sucient 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 detailed examination."

55. In Sanitam Services (E.A.) Limited v Rentokil (K) Limited & another [2019] eKLR the Court of Appeal outlined the following principle:

> "Jurisdiction to review a judgment or order of a court is donated by Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. By those provisions of law any person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or is aggrieved by a decree or order by which no appeal is 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 – a person who is within those categories may apply for a review of judgment or to the court which passed the decree or made the order and this should be done without unreasonable delay."

56. In Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR the Court of Appeal emphasized the principle in the following words:

> "Section 80 of the *Civil Procedure Act* and order 45 rule 1 of the Civil Procedure Rules gives the court unfettered discretion to make such order as it thinks on sufficient reason being given for review of its decision. However, as it has been constantly stated, this discretion should be exercised judiciously and not capriciously.....The main grounds for review are therefore; discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay."

57. In Appeal no. NAI 50 of 2010 9NYR4/2010), the court opined as follows;

> The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance. In Henry Mukora Mwangi -vs- Charles Gichina Mwangi- Civil Application No. Nai. 26 of 2004, this Court held:-
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> > "It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in Mwangi -vs- Kenya Airways Ltd. [2003] KLR 486 in which this Court stated: 'Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules.' For instance, in Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi Civil Application No. Nai. 255 of 1997 (unreported), the Court expressed itself thus: 'It is now well settled that the decision whether

> or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted presumption that anyone, even a Judge, knows all the rules and orders of the Supreme Court.' "

58. Article 50 of the *Constitution* guarantees everyone to the right to fair hearing. No one should be condemned unheard.

    In order to satisfy itself whether or not all the parties were duly served by this court I have referred to the affidavits of service.

59. The court has noted that the application was filed Over five months after the judgment. The applicant has not explained the delay. The court is of the view that the delay was inordinate.

60. The court has looked at the replying affidavit that the applicant indicates it would rely on. The court as earlier noted cannot allow an affidavit that is filed by The AG on behalf of the ODPP.The AG cannot act for the ODPP.

61. This court notes that the 4th Respondent was served with the court order and it cannot argue that it was not aware of the proceedings.

61. No case is made out by the applicant for the 4th Respondent as a result of which no orders can be issued in its favour.

Disposition:

62. The application lacks merit.

Order:

63. The application is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2025

.....

J. CHIGITI (SC)

JUDGE