Kariuki (Suing as a Member and in the Interest of a Group of Persons going by the Name Eintreten Association) & 4 others v Kinya & another (Constitutional Petition E007 of 2024) [2025] KEHC 6945 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6945 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CONSTITUTIONAL PETITION E007 OF 2024

FN MUCHEMI, J

MAY 22, 2025

BETWEEN

JAMES GACHERU KARIUKI (SUING AS A MEMBER AND IN THE INTEREST OF A GROUP OF PERSONS GOING BY THE NAME EINTRETEN ASSOCIATION) .... 1ST PETITIONER

MOSES MEGA GITHINJI (SUING AS A MEMBER OF AND IN THE INTEREST OF A GROUP OF PERSONS GOING BY THE NAME MALEWA SIBS ASSOCIATION) .... 2ND PETITIONER

JAMES GACHIRA NGANGA (SUING AS A MEMBER OF AND IN THE INTEREST OF A GROUP OF PERSONS GOING BY THE NAME WISELIKE GROUP) .... 3RD PETITIONER

RACHAEL NJERI KARIUKI (SUING AS A MEMBER OF AND IN THE INTEREST OF A GROUP OF PERSONS GOING BY THE NAME NONGAI MWARA ASSOCIATION) .... 4TH PETITIONER

JOYCE NJOKI KIBUTHIU (SUING AS A MEMBER OF AND IN THE INTEREST OF A GROUP OF PERSONS GOING BY THE NAME LOBBYDALE ASSOCIATES) .... 5TH PETITIONER

AND

MOSES KINYA .... 1ST RESPONDENT

THIKA WATER AND SEWARAGE COMPANY LTD .... 2ND RESPONDENT

RULING

1. This application is dated 17th January 2025 seeks for orders of review and setting aside of the ruling delivered on 19th December 2024.

2. The respondents filed a replying affidavit dated 6th February 2025 in opposition to the application.

The Petitioners'/Applicants' Case

3. The applicants aver that in the ruling delivered on 19th December 2024, the court struck out their petition dated 10/05/2024 for the reason that it offended the sub judice rule. The applicants argue that the said ruling has mistakes or errors apparent on the face of the record namely when the court failed to analyse the issue of locus standi and the court departed from the precedent decision in Kenya National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission & 16 Others (Interested parties) [2020] eKLR, whereby the court noted that the existence of two similar petitions seeking similar orders is what was paramount as opposed to same parties when determining the issue of the doctrine of sub judice. The applicants further argue that the court failed to indicate what information the applicants sought to be granted, which amounted to an error apparent on the face of the record.

4. The applicants further state that there is a difference between the substratum of an application filed in a petition and a different substratum for the substantive application and the court mistook the substratum of the application dated 28th June 2022 filed alongside Milimani Constitutional Petition No. E327 of 2022 and the substratum of the substantive petition in the said suit.

5. The applicants argue that the court ought to have stayed the ruling of the application dated 25th June 2024 awaiting the hearing and determination of their application in Milimani Constitutional Petition No. E327 of 2022. The applicants further state that it is an error apparent on the face of the record that the court in paragraph 33 of the impugned ruling found that there were no orders of withdrawal by the court in relation to Constitutional Petition No. E327 of 2022 and therefore there were two petitions pending seeking similar orders in two different court.

The Respondents' Case.

6. The respondents state that this court struck out the petition dated 10/05/2024 for offending the doctrine of sub judice such that the orders sought in the instant application do not obtain as there exists nothing to stay as the court issued negative orders.

7. The respondents argue that the instant application does not meet the threshold for review orders as set out under Order 45 of the Civil Procedure Rules and Section 80 of the *Civil Procedure Act*. The grounds on the face of the application are largely at variance in light of the threshold for an application for review as envisioned under the law. The respondents further state that they oppose the allegations by the applicants that the court failed to analyse the issue of locus standi and departed from the precedent decision in Kenya National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission & 16 Others (Interested parties) [2020] eKLR as the same does not satisfy the ground of error apparent on the face of the record but largely forces the court to reconsider its reasoning, which in essence is a ground that can be raised at appeal.

8. The respondents further argue that the grounds set out in the application do not satisfy the fact that by its very connotation of mistake apparent on the face of record signifies an error which is evident

per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position.

9. The respondents further state that the applicants have failed to substantiate the error apparent on the face of the record in relation to the claims in paragraphs 7, which indicates that the court failed to state what sort of information the petitioners were entitled to. The respondents argue that the said averments will require the honourable court to conduct a detailed re-examination of the legal position to each of the issues raised, which should be best handled at appeal.

10. The respondents state that the applicant contends to the reasoning of the court in relation to paragraphs 8-12 on the meaning of 'substratum of an application filed in a petition' and 'a different substratum for the substantive petition' which contradicts the reasoning of mistake apparent on the face of the record.

11. The respondents aver that the applicants have not been able to point out any error apparent on the face of the record. As a matter of fact, the grounds relied upon by the applicant will require a methodical analysis of the court record and such grounds are not within the purview of the prescribed law in so far as review is concerned. The respondents argue that the only remedy available for the applicants is preferring an appeal against the impugned ruling.

12. Parties put in written submissions.

The Applicants' Submissions.

13. The applicants submit they seek the orders for review on the grounds that the impugned ruling consists of errors apparent on the face of the record which include paragraph 33 of the ruling whereby the court held that the petition in High Court Milimani Constitutional Petition No. E327 of 2022 was still pending in court despite the applicants contending that they had applied to withdraw the said petition therefore drawing the conclusion that there existed two petitions in the two different court relating to the same subject matter. the applicants argue that instead of striking out the petition in this case, the court ought to have stayed the said petition awaiting the hearing and determination of the petition filed in the Milimani High Court.

14. The applicants further submit that the court wrongly interpreted the cases of Republic v Paul Kihara Kariuki, Attorney General & 2 Others ex parte Law Society of Kenya [2010] and Kenya National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission & 16 Others (Interested parties) [2020] eKLR and struck out the petition dated 10/5/2024 instead of staying the proceedings in the current petition awaiting the hearing and determination of the petition in Constitutional Petition No. E327 of 2022.

The Respondents' Submissions.

15. The respondents rely on Section 80 of the *Civil Procedure Act*, Order 45 Rule 1 of the Civil Procedure Rules and the cases of Republic v Public Procurement Administrative Review Board & 2 Others [2018] eKLR and Ajit Kumar Rath v State of Orisa & Others 9 Supreme Court Cases 596 at page 608 and submit that the applicants have not met the threshold for review. The respondents submit that the applicants have sought review on the grounds of error apparent on the face of the record however the said grounds seek to correct what the applicants believe to be an erroneous decision guised in the exercise of the power of review.

16. The respondents further rely on the case of Paul Mwaniki v NHIF Board of Management [2020] eKLR and submit that an error apparent on the face of the record is one that is usually self evident

and does not require elaborate arguments. The respondents submit that it is the applicants' case that under paragraph 33 of the impugned ruling the court mistakenly struck out the Petition in Milimani Constitutional Petition No. 327 of 2025 as opposed to what is deemed to be the correct position as per the applicant's argument, where the proceedings ought to have been stayed until the full hearing and determination in light of the absence of an order from court showing that the petition had been withdrawn. The respondents submit that the applicants contend that another different position should have been taken by this Honourable Court on the aforementioned matter, which goes against the purview of review.

17. The respondents further refer to the case of Republic v Advocates Disciplinary Tribunal ex parte Apollo Mboya [2019] eKLR and submit that the applicants' arguments require extensive reasoning, re-examination and scrutiny of the facts and evidence before this court while marrying with the legal position with regard to the stated issue. The respondents submit that if indeed the court failed to take into account the issue raised by the applicants during the delivery of the ruling, then the same can suffice as a ground of appeal and not review as claimed by the applicants.

18. The respondents submit that the applicants contend that in paragraph 30 of the impugned ruling, the court in opting to be guided by the principles substantiated in Republic v Paul Kihara Kariuki, Attorney General & 2 Others ex parte Law society of Kenya, the court should have stayed the proceedings instead of striking them out which the applicants believe to be a mistake apparent on the face of the record. The respondents believe that the applicants argument urges the court to have arrived at another finding as opposed to what it arrived at as its decision, which saw the striking out of the proceedings herein. Further, the applicants warrant to interfere with the exercise of the court's discretion including questioning why the Honourable Court departed from the principles substantiated in the case of Republic v Paul Kihara Kariuki, Attorney General & 2 Others ex parte Law Society of Kenya, which does not form the basis of review. To support their contentions, the respondents rely on the case of Cherop v Bowen (Civil Case No. E009 of 2022)[2024] KEHC 10425 (KLR) (21 August 2024) (Ruling).

19. The respondents rely on the cases of Paul Mwaniki v NHIF Board of Management [2020] eKLR and National Bank of Kenya Ltd v Ndugu Njau [1997] eKLR and argue that if indeed the decision of this Honourable Court was erroneous and that a different decision ought to have been arrived at, then it would be correct and proper to seek the inherent jurisdiction of an appellate court to challenge the said decision as opposed to review.

The Law

Whether the orders sought for review and setting aside are warranted.

20. Order 45 of the Civil Procedure Code sets out the parameters for an application for review as follows:-

Rule 1 (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 order made or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case which he applies for the review.

21. It then follows that Order 45 provides for three circumstances under which an order for review can be made. The applicant must demonstrate to the court that there has been 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. Secondly, the applicant must demonstrate to the court that there has some mistake or error apparent on the face of the record. The third ground for review is worded broadly; an application for review can be made for any other sufficient reason.

22. The applicants grounded their application on error apparent on the face of the record. The Court of Appeal in the case of Muyodi v Industrial and Commercial Development Corporation & Another [2006] 1 EA 243, considered what constitutes a mistake or error apparent on the face of the record, and stated as follows:-

In Nyamogo & Nyamogo v Kogo [2001] EA 174 this Court said that an error 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 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 has to be established by long drawn process of reasoning or on points where there may be 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 or wrong view is certainly no ground for a review although it may be for an appeal.

23. Similarly in National Bank of Kenya Ltd v Ndungu Njau Civil Appeal No. 211 of 1996 (UR) the Court of Appeal 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. "

24. Additionally in Paul Mwaniki v National Hospital Insurance Fund Board of Management [2020] eKLR the court stated:-

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 a 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 law. Misconstruing a statute or other provisions of law cannot be a ground for review.

25. The court went on to say:-

The term 'mistake or error apparent' by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and

process of reasoning, it cannot be treated as an error apparent on the face of the record for purposes of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/ decision. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it.

26. Evidently, from the above, it is clear that the error ought to be so glaring that there can possibly be no debate about it. An error which has to be established by a long drawn out process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. According to the applicants, the errors apparent on the face of the record are the wrong interpretation by the court of the decisions in Republic v Paul Kihara Kariuki, Attorney General & 2 Others ex parte Law Society of Kenya [2010] and Kenya National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission & 16 Others (Interested parties) [2020] eKLR and striking out the petition dated 10/5/2024 instead of staying the proceedings in the current petition awaiting the hearing and determination of the petition in Constitutional Petition No. E327 of 2022. Further, the court differed from the holding in Kenya National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission & 16 Others (Interested parties) [2020] eKLR, whereby the court noted that the existence of two similar petitions seeking similar orders is what was paramount as opposed to same parties when determining the issue of the doctrine of sub judice. Additionally, the court failed to indicate what information the applicants sought to be granted.

27. All the grounds the applicants have termed as errors apparent on the face of the record do not suffice as such as they are not errors that are self evident but require an elaborate argument to be established. The grounds require a detailed examination, scrutiny and elucidation of facts. Furthermore, the applicants by claiming that the court ought to have stayed the proceedings instead of striking out the petition amount to a situation where the applicants are deciding the application by themselves. If they disagree with the court's ruling, the right action to be taken was to file an appeal against the court's ruing in a higher court.

28. The applicants have brought the present application about one (1) month after the impugned decision was made. Thus the application was filed timeously.

29. It is my considered view that the applicants have not met the threshold to warrant the orders sought for review under Order 45 Rule 1 (a) of the Civil Procedure Rules.

30. Accordingly, the application dated 17th January 2025 lacks merit and is hereby dismissed with costs to the respondent.

31. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 22ND DAY OF MAY 2025.

F. MUCHEMI

JUDGE