Republic v Nairobi City County Council Assembly & another; Musumba & 4 others (Exparte Applicants) (Judicial Review Application E082 of 2023) [2025] KEHC 5656 (KLR) (Judicial Review) (5 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5656 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E082 OF 2023

RE ABURILI, J

MAY 5, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

NAIROBI CITY COUNTY COUNCIL ASSEMBLY ..... 1ST RESPONDENT

AUDITOR GENERAL ..... 2ND RESPONDENT

AND

JAIRUS MUSUMBA ..... EXPARTE APPLICANT

ALLAN IGAMBI ..... EXPARTE APPLICANT

MOHAMED SAHAL ..... EXPARTE APPLICANT

HESBON MOLE AGWENA ..... EXPARTE APPLICANT

JULIUS MATEKWA ASHAMI ..... EXPARTE APPLICANT

RULING

1. On 1st October 2024, Justice Jairus Ngaah delivered judgment in this case where he held that an audit report submitted outside the timelines stipulated under Article 229 (8) of the *Constitution* and section 48(1) of the *Public Audit Act* is a nullity to the extent that it was done outside the limitation period.

2. The court further held that an audit report discussed by Parliament outside the period prescribed by Article 229(8) of the *Constitution* and section 50(2) of the *Public Audit Act* which requires parliament or the county assembly to debate and consider the report and take appropriate action within three months of receiving the audit report is a nullity.

3. Vide Notice of motion dated 6th February, 2025, after Justice Ngaah the author of the impugned judgment had been transferred and I took over this Division of the High Court at Milimani, the Senate, which had not been a primary party to these proceedings filed an application under Article 159 of the *Constitution*, section 80 of the *Civil Procedure Act* and Order 45 of the Civil procedure Rules, seeking to review, vary or set aside of the above stated judgment; order that the proceedings be heard afresh and that the Senate be admitted to these proceedings as a Respondent and be allowed to file the requisite pleadings.

4. According to the applicant, the decision in question gravely affects the Senate's oversight role as espoused in Article 96(3) of the *Constitution* and that the effect of the judgment is such that the Senate cannot deliberate on or act on the Audit report for the Nairobi City County Alcoholics Drinks Control and Licensing Board for the Financial Year 2019/2020.

5. It is practically impossible for the Senate to be complying with the Constitutional and statutory timelines for the submission of the audit reports and debate held on the same considering that the senate is normally in recess in January and would have less than 8 weeks to conduct the oversight as stipulated in Article 96(3) of the *Constitution*. Further, that there are numerous county entities and funds in which oversight is to be conducted while governors and other state officers who facilitate oversight are sometimes not available for meetings.

6. That the judge in his determination as stated above did not sufficiently consider Article 259(1) of the *Constitution* on the manner of interpreting the *Constitution* as provided therein.

7. The applicant laments that the judgment of the court if left as it is would have the effect of nullifying most audit reports thereby prohibiting oversight by the Senate, the national Assembly and County Assemblies which in essence affects financial accountability by entities and public officers entrusted with public funds.

8. that Article 229 (4) and (9) of the *Constitution* ought not to be interpreted to prohibit financial accountability by public officers and thereby facilitate malfeasance but rather, to be interpreted to ensure accountability in the use of public funds; and that the strict interpretation of the said Article interferes with or restricts the implementation of Articles 95(4)©, 96(3) and 185(3) of the *Constitution* on oversight role of the Senate, the National Assembly and the County Assemblies over public funds hence the prayer for review of that judgment under Order 45 Rule 1 of the Civil Procedure Rules .

9. it is asserted that the applicant has met conditions for review and that this is a matter that is of great public interest hence the need for this court to exercise its inherent jurisdiction to review the judgment to enable the Senate perform its constitutional mandate of oversight over the use of national revenue allocated to public entities.

10. The application is supported by the affidavit sworn by Jeremiah Nyegenye the Clerk of the Senate on 7th February 2025 deposing the above stated facts.

11. Opposing the application for review, the 3rd, 4th, 5th, 6th and 7th exparte applicants who are the respondents in the application for review filed ground of opposition seeing to have the application for review and joinder dismissed contending that the applicant has not demonstrated that the application meets the threshold for review as stipulate din Order 45 Rule 1 of the Civil Procedure Rules.

12. That the applicant seeks to introduce new constitutional provisions different from those which the Court was asked to consider before delivering the impugned judgment and that the question which the court was asked to determine was whether the audits done outside the constitutional timelines

violates Article 229(4) and (9) of the *Constitution* which are issues of law that cannot be determined by way of review.

13. That issues of constitutional timelines have been settled by courts all the way to the Supreme Court hence this court cannot hold otherwise and that the application is an abuse of court process. Hence it should be dismissed or struck out with costs.

14. I observe that the National Assembly equally file a replying affidavit sworn by Samuel Njoroge, its Clerk on 7th March 2025, supporting the position taken by the Senate in its application dated 6th February 2025. The National Assembly also filed a similar application for review of the judgment by Ngaah J rendered on 1st October 2024 on the same grounds as those of the Senate. I stayed the said application as the only difference with that filed by the Senate are the parties, but playing the same oversight role, as the Senate and County Assemblies.

15. The application was argued orally on 10th March, 2025. According to the applicant/Senate,

16. Ms. Mwaura counsel for the applicant Senate reiterated the prayers in the Notice of motion and submitted that the judgment sought to be reviewed was not within the knowledge of the Senate until the Nairobi County Assembly refused to appear before Senate and as a result, the Senate cannot oversight the County Assembly.

17. It was submitted that there will be no financial accountability by public entities if the timelines stipulated in Article 229 of the *Constitution* are adhered to. She relied on Article 259 of the *Constitution* on the interpretation of the *Constitution* and argued that Article 229 should not be interpreted in a manner that prohibits Financial Accountability and making it impossible for the Senate to oversight the County Assemblies as mandated by Article 96(3) of the *Constitution*.

18. Counsel submitted that the challenge with timelines of Article 229 is that the National Assembly or Senate must debate and determine reports by 31st March of every financial year, which timelines are a challenge to Senate because in January, the Senate is occasionally on recess hence it has less than 8 weeks to debate the reports. That there are several entities – 47 County Assemblies and 47 County Executive Committee members CECs to be oversighted hence it would be a challenge to oversight taking into account public interest and financial accountability. Thirdly, that Governors and other State Officers who facilitate oversights are sometimes unavailable to appear before Senate to shed light on the issues raised in the Audit Reports hence if Senate was to go by the constitutional timelines, the Governors and State Officers would not have the opportunity to be heard.

19. Counsel prayed that the application be allowed, this being a matter of public interest, noting that the Senate was not a party to the proceedings. She submitted that there are exceptional circumstances. That the Senate only became aware of the case after the Nairobi City County Assembly declined to appear before the Senate. That there are other pending reports for consideration.

20. Further submission was that the declaration by Ngaah J on Article 229 that the Auditor General must submit the Audit reports within 6 months and Senate to debate the reports within 3 months is outside the jurisdiction of Judicial Review court because Judicial Review is limited to mandamus or certiorari and prohibition and therefore any declaration on constitutional timelines is in the purview of the Constitutional and Human Rights Division.

21. Opposing the application, Mr. McDonald counsel for the exparte applicants/ respondents submitted relying on the grounds of opposition dated 9/3/2025 that section 80 of *Civil Procedure Act* and Order 45 of the Civil Procedure Rules have settled rules for review. That sufficient reasons must be analogous to the other grounds. It was submitted that there is no new or important matter.

22. That the applicant does not want to follow the constitutional timelines. That the judgment already considered the matters complained of and that there is no apparent error on the face of the record. That what the Senate applicant is complaining about is that judgment will affect oversight role of Senate as Articles 96 & 259 of the *Constitution*, but that with sneaking in the issue of jurisdiction of the court, are matters of law which are beyond the jurisdiction of this court to warrant review of the judgment by Ngaah J.

23. It was submitted that even the Supreme Court has settled the issues/criteria for review.

24. Finally, it was submitted that Article 229(8) of the *Constitution* uses the terms 'shall' and that recess by the Senate cannot be used to avoid constitutional timelines, giving an analogy of the given constitutional timelines on Presidential elections and impeachment processes which cannot be enlarged. Counsel maintained that this court cannot review those timelines. That the Supreme Court delivers judgment in presidential Election Petitions within 14 days despite the shortness of the period as stipulated in the *Constitution* and that therefore this court cannot reopen the timelines set by the *Constitution*.

25. In a brief rejoinder, Ms. Mwaura submitted that on the grounds for review of the judgment of this court, they had indicated the inherent apparent errors of law that Article 229 should not be interpreted to affect the oversight role of the Senate and of the County Assemblies.

Analysis and determination

26. I have considered the application for review of the judgment rendered on 1st October 2024 by Ngaah J and the prayer for joinder of the applicant, the Senate. I have also considered the grounds of opposition and the oral arguments for and against the application. The main issue for consideration is whether the application is merited. There are ancillary questions that I will answer in the process of resolving the main issue as framed.

27. First, is that the applicant seeks that it be enjoined to the proceedings herein and the court reviews or varies/ sets aside the judgment so that the case can be reopened for a fresh hearing.

28. The question is whether a party can be enjoined to judicial review proceedings as a respondent, which proceedings have been determined on merit, so as to review and resuscitate the case for a fresh hearing on points of law.

29. Without going into an academic exercise, it is obvious that a party cannot seek to be enjoined to judicial review proceedings after the matter has been determined on merit, for the purpose of reviewing and reopening the case for a fresh hearing on points of law, as is the case herein and the reasons for this position that I take are as follows:

1. Finality of Proceedings

30. Once judicial review proceedings have been concluded by judgment, the matter is res judicata, that is, it has been finally decided by a court of competent jurisdiction. A party cannot be joined after the fact in an attempt to reopen the case. The correct remedy is an appeal or an application for review, but only by parties who were originally part of the case. I shall revert to this aspect of review later in this ruling.

2. Joinder of a party, to proceedings, if it must be accepted by the Court, Must Be Timely

31. Under the Civil Procedure Rules (Order 53 for judicial review) and Article 159 of the *Constitution* (on expeditious disposal of cases), parties seeking to be enjoined must do so before determination, and must demonstrate the following- that they have a direct interest in the subject matter; and that their presence

is necessary for the court to effectively and completely adjudicate the matter. Therefore, if the case has already been concluded, there is no ongoing process to join and therefore the timely application for orders of joinder would still not be available.

3. Judicial Review is Not Meant to Re-litigate

32. Judicial review focuses on the process, illegality or impropriety and not the merits. Once the court has rendered a decision, it is not possible to reopen the matter just because a new party wants a different interpretation of the law. That would violate the principle of finality and legal certainty.

4. Legal Remedies for a non-party affected by the judgment

33. If a third party believes that they are affected by the judgment, they may file a fresh suit (if they can show a cause of action), or they may seek review or appeal,but only in limited circumstances and typically only if they were parties or successfully move the court to review for mistake or error on the face of the record not on the basis of an error of law or interpretation of the constitutional provision.

34. In John Wekesa Khaoya v Kenya Power & Lighting Co. Ltd [2013] eKLR, it was held that joinder of a party is not permissible once a matter has been finalized.

35. In Republic v National Transport and Safety Authority & 10 others Ex Parte James Maina Mugo [2015] eKLR, the Court reiterated that judicial review is not an avenue to re-litigate issues or to introduce new parties' post-judgment.

36. The overarching principle is that Judicial review is not a forum to re-litigate issues already decided or to bring in new parties after a final judgment. Its purpose is to assess the legality of a decision or action taken by an administrator or person, body or authority, and not to re-argue the merits of the case or introduce new evidence or participants.

37. Courts consistently emphasize that judicial review is about the process, not the substance of the decision. So, unless there's a jurisdictional error, procedural unfairness, or illegality in the decision-making process, the original ruling generally stands.

38. A well-known case that illustrates this principle is R v. Panel on Take-overs and Mergers, ex parte Datafin plc [1987] QB 815 in which the applicant sought judicial review of a decision by the Panel on Take-overs and Mergers. The court emphasized that judicial review is confined to the lawfulness of the decision-making process, not the correctness of the decision itself. Importantly, it was made clear that judicial review cannot be used as an appeal in disguise, re-arguing the same issues or introducing new facts post-decision is not permitted.

39. In Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, the Supreme Court of Canada held that judicial review is not a forum for re-litigating the underlying merits of a decision. That the focus is on reasonableness and procedural fairness, not whether the reviewing judge agrees with the outcome. The Court stated that judicial review is not an appeal, and the reviewing court must not substitute its own view unless the decision is unreasonable in a way that is justified, transparent, and intelligible.

40. Accordingly, and based on the above principles, I have no hesitation in concluding that a party cannot be enjoined to already determined judicial review proceedings in order to reopen or reargue the case on points of law. Their recourse lies in appeal or a fresh suit, but only under strict legal grounds.

41. The second question that I shall answer is whether the applicant Senate which was not a party to these judicial review proceedings has locus standi to apply for review of the judgment to allow it to be a party

and specifically, a respondent so that the case can be reheard for a fresh interpretation of section 229 of the *Constitution* on the timelines for submission and consideration of audit reports.

42. The exparte applicants did submit that as there was already judgment, the applicant who was not a party to the judicial review matter cannot apply for review of the said judgment.

43. As to whether an applicant who was not a party to proceedings can seek a review of a judgment, the starting point is the statutory provisions allowing review being section 80 of the Civil procedure Rules and Order 45 Rule 1 of the Civil Procedure Rules reproduced below.

44. Under section 80 of the *Civil Procedure Act*:

> " 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."

45. On the other hand, the procedural aspect of section 80 above is Order 45 Rule 1 of the Civil Procedure Rules which provides that:

> Order 45 - Review
>
> 1. Application for review of decree or order
>
> (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.
>
> (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 on which he applies for the review.

2. To whom applications for review may be made

(1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

(3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.

3. When court may grant or reject application

(1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.

(2) Where the court is of opinion that the application for review should be granted, it shall grant the same:

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.

4. Application where more than one judge hears

(1) Where the application for a review is heard by more than one judge and the court is equally divided the application shall be dismissed.

(2) Where there is a majority, the decision shall be according to the opinion of the majority.

5. Re-hearing upon application granted

When an application for review is granted, a note thereof shall be made in the register, and the court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.

6. Bar of subsequent applications

> No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained.

46. From the above provisions, the applicant for review must be: A party to the suit, or A person claiming under a party (e.g., legal representative, assignee, etc. Therefore, a person who was not a party and does not claim under a party has no automatic right to apply for review. There are however, exceptions to the rule, such that Interested Parties or Affected Non-Parties can be allowed to seek review or setting aside of a judgment if they were directly affected by the judgment and or were denied a chance to be heard.

47. Additionally, where there was fraud, mistake, or misrepresentation that affected their rights, a non-party to proceedings may be allowed to apply for review of a judgment. For example, in Republic v. Advocates Disciplinary Tribunal & Another Ex-Parte Apollo Mboya [2019] eKLR, it was held that a non-party who is adversely affected by a judgment may apply to set aside or intervene, but this is not a review under Order 45; rather, it's an application invoking the court's inherent jurisdiction.

48. In National Bank of Kenya Ltd v. Ndungu Njau [1997] eKLR, the Court of Appeal emphasized that review is a creature of statute, and courts cannot enlarge its scope beyond what is prescribed.

49. In Republic v. Public Procurement Administrative Review Board & 2 Others Ex Parte Sanitam Services [2013] eKLR, the High Court found that a non-party cannot seek review unless they qualify as someone claiming under a party, or unless a fundamental right was affected, in which case, the correct course is to file a fresh suit or constitutional petition, not a review.

50. On the part of the Supreme Court, it has held that outrightly, a non-party to proceedings cannot apply for a review of a judgment. In Kaluma v NGO Co-ordination Board & 5 others (Application E011 of 2023) [2023] KESC 72 (KLR) (Civ) (12 September 2023) (Ruling) the Supreme Court held that it had neither jurisdiction to sit on appeal nor to review its decisions other than in the manner provided for by section 21A of the *Supreme Court Act*. These principles were also set out in the matter of Fredrick Otieno Outa vs Jared Odoyo Okello & 3 others, SC Petition No 6 of 2014; [2017] eKLR (Outa).

51. This principle was affirmed in the case of Law Society of Kenya v. Supreme Court of Kenya & another; Abdulahi SC & 19 others (Interested Parties), Petition E026 of 2024. In the latter case, the Court ruled that the applicants, who were not parties to the original proceedings, lacked locus standi to seek a review of the Court's decision. The Court emphasized that only parties to a case have the standing to apply for a review, as allowing non-parties to do so would undermine the finality of judgments and the sanctity of the judicial process.

52. The position of the Supreme Court aligns with the established legal position that review applications are generally restricted to parties to the original proceedings, unless exceptional circumstances exist. The Court's ruling underscores the importance of maintaining the integrity and finality of judicial decisions.

53. However, the *Civil Procedure Act* and Rules use the terms "any person" hence the wider interpretation that any person who is not a party to the proceedings may apply for review.

54. Therefore, unless a non-party can demonstrate a direct and substantial interest in the matter, or show that their rights were adversely affected by the judgment, they would not typically be deprived of the standing to seek a review of the court's decision. See the case of Ngororo v Ndutha & another [1994] eKLR where the Court of Appeal stated as follows:

> " ...Simpson, CJ, scrupulously avoided any mention about them in his ruling. We are bound by that ruling and we, therefore, reject all the grounds of appeal relating to these two issues.

> However, we would observe that under section 80 of the Civil Procedure Code, as we shall point out herein later, any person, though not a party to the suit, whose direct interest is being affected by the judgment therein is entitled to apply for a review. The 2nd respondent therefore has a locus standi." [emphasis added].
>
> ....The words "any person" and "for any sufficient reason" used in section 80 of the *Civil Procedure Act* clearly are meant to include a person who has a direct interest in a litigation or its result but has been deprived of a hearing as a party in relation to his interest. The question of why the 2nd respondent did not appeal, therefore, does not arise and we reject this submission."

55. In Pop-In (Kenya) Ltd & 3 others v Habib Bank AG Zurich [1990] eKLR

56. The Court emphasized that review is not an appeal in disguise and a person with no stake or who failed to participate in the original case cannot simply appear after judgment to challenge it.

57. On the whole, a non-party who is directly affected by a judicial review judgment may apply for review or setting aside, particularly if they were not aware of the case and had no opportunity to be heard.

58. The other question which this Court shall answer is whether the conditions for review have been met by the applicant Senate to warrant this court allowing the prayer for review and setting aside of the judgment and have the case heard a fresh.

59. According to the applicant, the judgment sought to be reviewed has gravely and directly affected its oversight role as stipulated in section 96 of the *Constitution*. That the judge should have interpreted the provisions of Article 229 of the *Constitution* in line with the principles set out in Article 259 of the *Constitution* and not interpreting it so strictly as to render audit reports submitted to Senate or County Assemblies or National Assembly outside the period stipulate din Article 229 of the *Constitution* to be null and void. Further, that unless the judgment is reviewed, there will be no financial accountability by public officers.

60. As earlier stated, aapplications for review of a judgment are governed by Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules. Courts Kenya have developed a set of well-settled principles that guide the exercise of this power of review. These are:

1. Discovery of New and Important Evidence

61. The applicant must show that new and important matter or evidence has been discovered. This evidence must: Be relevant and material to the case; Not have been within the applicant's knowledge; and not have been reasonably available at the time the judgment was made.

62. In Pancras T. Swai v Kenya Breweries Ltd [2014] eKLR, the Court held that the new matter must be one which the applicant, after due diligence, could not have produced earlier.

2. Mistake or Error Apparent on the Face of the Record

63. The error must be self-evident and obvious, not one that requires elaborate argument or interpretation. Minor or academic errors do not qualify. In Nyamogo & Nyamogo Advocates v Kogo [2001] EA 174, it was held that an error is apparent if it is so manifest and clear that no court would permit such an error to remain on the record.

3. Any Other Sufficient Reason

64. This is a residual ground, often invoked when strict grounds under (1) and (2) are not met. Courts interpret it narrowly and it covers exceptional circumstances, such as fraud or misrepresentation, or where a judgment was entered without jurisdiction or in violation of natural justice.

65. In Benjoh Amalgamated Ltd & Another v Kenya Commercial Bank Ltd [2014] eKLR, the Court emphasized that "sufficient reason" must be analogous to the other grounds.

4. The Application Must Be Made Without Unreasonable Delay

66. The applicant must move the court promptly upon discovering the basis for review. Delay must be explained and justified. In Francis Origo & Another v Jacob Kumali Mungala [2005] eKLR, it was held that delay defeats equity and may result in dismissal of the application.

5. The Review Must Be by the Same Court that Issued the Judgment

67. Only the same court (and preferably the same judge, if available) that passed the judgment can review it. A court of concurrent jurisdiction cannot review or reverse another judge's decision. In Uhuru Highway Development Ltd v Central Bank of Kenya [1996] eKLR, it was held that a judge of concurrent jurisdiction cannot sit on appeal over the decision of another judge of equal jurisdiction. Further, in Koigi Wamwere v Attorney General [2004] eKLR, it was stated that if a party disagrees with a judgment, the proper route is appeal, not seeking a second opinion from another court of the same rank. In Re Estate of Solomon Mwangi Waweru (Deceased) [2018] eKLR, it was emphasized that a different interpretation of law by another judge cannot be a basis for review or setting aside a previous judgment.

68. This leads me to discuss the most important of all principles applicable in applications for review, which legal principle reflects a fundamental distinction in Kenyan law and generally in common law jurisdictions, between an appeal and a review. The principle is that:

6. A ground for appeal cannot be used as a ground for review

69. The rationale behind this principle is that an appeal challenges the merits or correctness of a judgment (such as errors in interpretation of the law, the *Constitution* or facts), whereas review challenges the process or limited errors like a mistake apparent on the face of the record, or discovery of new evidence, not the correctness of the decision.

70. In National Bank of Kenya v Ndungu Njau [1997] eKLR, the Court of Appeal made this distinction clear that:

> " A review is not an appeal in disguise. It must be confined to the scope and ambit of Order 44 Rule 1 [now Order 45]. The mere fact that a court reached a wrong conclusion on law or facts is not a ground for review. The remedy is to appeal."

71. In Stephen Githua Kimani v Nancy Wanjira Waruingi T/A Providence Auctioneers [2016] eKLR, the court held:

> " A party cannot be allowed to invoke the review jurisdiction simply because they are aggrieved by the decision and failed to appeal."

72. Why does this matter? This principle of not allowing appeals to be disguised as review applications matters because, allowing parties to raise appealable issues as review grounds would undermine finality in litigation, allow abuse of court process by filing review instead of timely appeals and blur the separation between appellate and review jurisdictions. It follows that a party dissatisfied with the correctness of a judgment on facts or law must appeal, not seek review. Review is only available for limited procedural or factual anomalies, not for re-evaluating the judgment's merits.

73. In Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] KEHC 6379 (KLR, the High Court citing many other decisions of the Court of Appeal and Supreme Court held that:

> " Misconstruing a statute or other provision of law cannot be a ground for review. ... or law is not a ground for review though it may be a good ground for appeal."

74. Thus, 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 of the *Civil procedure ACT*. Similarly, an erroneous order/decision cannot be corrected in the guise of exercise of power of review.

75. Again, a mere disagreement with the interpretation of the law does not necessarily constitute grounds for review.

76. In the instant case, from my appreciation of the grounds for review given by the applicant, I have no doubt in my mind that the applicant wants this court to rehear the application for judicial review so that this court can interpret Article 229(4) of the *Constitution* differently, to the effect that the constitutional timelines provided therein cannot be mandatory and that this court can interpret the *Constitution* to enlarge the timelines set in the *Constitution* for submission of audit reports to the County and National Assembly or the Senate as the case may be, and that the legislature is not bound by those constitutional timelines for considering those audit reports.

77. That argument in my view, cannot be bought by this Court. I call it a temptation of the highest order that the applicant hallowed legislature wants this court to amend the *Constitution* by craft! I must say it here because the *Constitution* is the Supreme Law of the land and only the people of Kenya can amend it in the manner provided for in the *Constitution*. There can be no unconstitutionality in constitutional provisions. Accordingly, Courts should never tamper with its clear and 3xpress unambiguous provisions in the name of interpretation. Courts should not be tempted to amend the *Constitution*.

78. In cases where timelines are set specifically by the *Constitution*, without any discretion being left for interpretation, and therefore leaving no room for interpretation, this court is not about to be tempted to make those timelines elastic as if there is a state of emergency and therefore the provisions of the *Constitution* are being suspended and even if that were to be the case, it is not this court that would be empowered to suspend those provisions.

79. It is also important to remind the applicant of this hallowed principle of law that a judge cannot review or overturn the judgment of another judge of equal jurisdiction simply because they interpret the law or the *Constitution* differently. The proper remedy for an aggrieved party is to appeal to a higher court, not seek a second opinion from a peer court for a different interpretation.

80. In the Estate of Oliokampai Sarapae Sanguti (deceased) 2019 eKLR, the Court of Appeal described an error apparent on the face of the record and distinguished from an error of law as follows:

> "...In Nyamogo & Nyamogo v Kogo (2001) EA 174, this Court said that an error apparent 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 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 conceivably be two opinions, can hardly be said to be an error apparent on the face of the record."

81. Moreover, even if I were to hear this case afresh, with the same facts as presented, adding the applicant herein and the National Assembly and all the 47 County Assemblies as parties, I would arrive at the same decision without changing a word. The reasons are as follows without delving deep into the merits thereof:

82. Article 229 of the *Constitution* of Kenya, 2010 deals with the Auditor-General and outlines the process and timelines for the auditing of public accounts. Specifically, Article 229(4) requires that:

> "The Auditor-General shall audit and report, within six months after the end of each financial year, on the accounts of the national and county governments..."

83. On the other hand, the above constitutional provisions are given effect by section 48 of the *Public Audit Act*, 2015 (Cap. 412B) which outlines the Auditor-General's responsibility to audit and report on public accounts within specified timelines.

84. The Auditor-General is required to audit and report on the accounts specified in Article 229 of the *Constitution* within six months after the end of each financial year.

85. Why did Parliament not give a different timeline in the Act instead of giving the same timeline as that given by the *Constitution*? It is because Parliament was alive to the sanctity and constitutionality of the Constitutional provisions and therefore it could not amend the *Constitution* by changing or enlarging or reducing the reporting timelines.

86. That being the case, should court be asked by the same Parliament that enacted the implementing law to interpret the *Constitution* differently? If that is not temptation, then I have no other name for the request.

87. I am persuaded beyond doubt that where the *Constitution* fixes clear timelines for doing anything, courts have no jurisdiction to change those clear timelines or extend constitutionally fixed timelines, unless the *Constitution* itself provides flexibility.

88. First, is that Constitutional Timelines Are Mandatory and are strictly binding on all without exception unless there is an express provision in the *Constitution* for enlargement of that time stipulatedFor example, in several rulings related to election petitions and appointments, the courts have insisted that they cannot extend constitutionally fixed periods.

89. Secondly, is the Doctrine of Constitutional Supremacy- the *Constitution* is the supreme law of the land (Article 2). Courts are bound by it, and no other law or judicial discretion can override its express provisions unless there's ambiguity or a gap.

90. In Raila Odinga & Others v. Independent Electoral and Boundaries Commission & Others (2013), the Supreme Court held that constitutional timelines (like for filing and determining petitions) cannot be extended by courts. The apex Court stated:

> "Where the *Constitution* provides a specific timeline for doing something, courts cannot extend it. To do so would be to amend the *Constitution* through judicial craft."

91. In International Centre for Policy and Conflict & Others v. AG & Others (2013) – The High Court held that constitutional timelines are mandatory and not directory unless the *Constitution* says otherwise.

92. In Trusted Society of Human Rights Alliance v AG & Others [2012] eKLR, the High Court held that constitutional deadlines must be complied with, and failure to do so is not curable by judicial intervention.

93. In Commission for the Implementation of the *Constitution* (CIC) v AG & Another [2011] eKLR, the court declined to extend a constitutional timeline for passing legislation, reiterating that only Parliament, through proper procedures (and sometimes with public participation), can amend constitutional deadlines.

94. In Okiya Omtatah Okoiti v National Assembly & 3 others [2018] eKLR, the court refused to issue orders that would extend constitutional deadlines for implementation of recommendations from public audits.

95. The applicant also tended to submit that the declaration issued by this court was without jurisdiction because such order can only be issued in a constitutional petition. Again, assuming the declaration that the timelines set ourt in the specific Articles of the *Constitution* are mandatory is a matter outside the jurisdiction of this court, only an appeal can determine the propriety of that order and not this court which cannot sit on the judgment of a judge of concurrent jurisdiction.

96. In the end, as to what orders I should make, I find the prayer for joinder as a party to be devoid of merit. It is dismissed for the reasons advanced. The prayer for review of the judgment of Ngaah J delivered on 1st October 2024 is found to be devoid of merit as it seeks this court to sit on appeal of the judgment of the same court and interpret the *Constitution* differently. That is an impossibility that this Court cannot embark on. Consequently, the entire application and all the prayers sought are declined and dismissed.

97. I make no orders as to costs of the application.

98. Each party bear their own costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 5TH DAY OF MAY, 2025

R.E. ABURILI

JUDGE