



REPUBLIC OF KENYA



KENYA LAW

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**Nthesi & 8 others v Nyakundi & 7 others; Obuhatsa & 10 others
(Interested Parties) (Petition E464 of 2021) [2023] KEHC 17216 (KLR)
(Constitutional and Human Rights) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17216 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E464 OF 2021

HI ONG'UDI, J

MAY 12, 2023

BETWEEN

**MOSES NTHESI 1ST PETITIONER
EPHRAIM WAIGI 2ND PETITIONER
ROBERT GICHANA 3RD PETITIONER
NATIONAL ELECTIONS BOARD 4TH PETITIONER
ESKIMOS KOBIA KIRUBI 5TH PETITIONER
SAMMY MUSAU WILSON 6TH PETITIONER
AMOS MUNYIRA 7TH PETITIONER
GENARD NJIRU 8TH PETITIONER
MWANAHAMA SALIM 9TH PETITIONER**

AND

**JEREMIAH NYAKUNDI 1ST RESPONDENT
NICHOLAS KIBITOK MAIYO 2ND RESPONDENT
SARAH KAGENDO MITAMBO 3RD RESPONDENT
ONESMUS JOHNES KAUWI 4TH RESPONDENT
PATRICK LUMUMBA OLALI 5TH RESPONDENT
ROSE OTIAK 6TH RESPONDENT
MOHAMMED AWADH OMAR 7TH RESPONDENT**



NATIONAL PARENTS ASSOCIATION 8TH RESPONDENT

AND

DAVID SILAS OBUHATSA INTERESTED PARTY

JOSEPH LANGAT INTERESTED PARTY

ESKIMOS KOBIA KIRUMBI INTERESTED PARTY

CAROLINE MADINA INTERESTED PARTY

NANCY CHEGE INTERESTED PARTY

CECILIA NJUKI INTERESTED PARTY

GABRIEL OBUYA INTERESTED PARTY

JOHN NJIRAINI INTERESTED PARTY

RODGERS MWAWASI INTERESTED PARTY

ABSOLOM MUKUUSI INTERESTED PARTY

SAMMY NDUNDA MBAE INTERESTED PARTY

RULING

1. The respondents/applicants herein filed a Notice of Motion application dated 10th January 2023 under Order 10 Rule 11, Order 36 Rule 2, 4, 7, 8, 10 and Order 45 Rule 1(1) (a) (b) Civil Procedure Rules, 2010 and Section 1A, 1B and 3A, 29(a) (b) and 80(a) (b) Civil Procedure Act. The applicants seek orders that:
 - i. Spent.
 - ii. The Court be pleased to review and set aside and or vary its informed judgment of 31st May 2022 at Nairobi in the instant petition, Petition No.E464 of 2021 which was entered against the respondents with costs in default of entering appearance and filing a defence together with the Decree of 15th July 2022 and Orders issued on 19th September 2022 and any consequential decree and orders of the Court as it may deem fit and just.
 - iii. Pending the inter partes hearing and determination of this application, this honourable court be pleased to issue a conservatory order in the nature of an injunction restraining the petitioners together with the interested parties in the suit from intermeddling with the affairs of the 8th respondent.
 - iv. The honourable Court be pleased to stay and set aside the orders of 19th September 2022 and from any further execution of either by their agents, officers or any persons acting on their behalf from implementing the orders as they are still in the positive.
 - v. An order do issue to maintain the status quo antecedent with respect to the administration, operation and management of the 8th respondent pending the hearing and determination of this application.
 - vi. An order do issue quashing the Kenya Gazette Notice Vol. CXXIV No.183 dated 9th September 2022 which declares the persons named therein as the 6th petitioner together with



the interested parties; David Silas Obuhatsa, Joseph Langat, Eskimos Kobia Irumbi, Caroline Madina, Nancy Chege, Cecilia Njuki, Gabriel Obuya, John Njiraini, Rodgers Mwawasi, Absolom Mukuusi and Sammy Ndunda Mbae as the purported officials of the 8th respondent.

- vii. An order do issue directing the 6th petitioner, the 1st and 3rd interested parties to submit to this honourable Court the Kenya Commercial Bank cheque book together with a narration of any bank accounts opened in the name of the 8th respondent including the seal and stamp in their possession.
- viii. This honourable Court be pleased to grant the respondents herein and indeed all the respondents to the suit leave to file their defence and defend the suit albeit out of time.
- ix. An order do issue restraining the petitioners and interested parties herein from holding any public pronouncements on the behalf of the 8th respondent pending the determination of this application.
- x. Costs of the application be provided for.

The Respondents/ Applicants' case

2. The application was supported by Nicholas Kibitok Maiyo's affidavit sworn on 10th January 2023 in which he swore that he is the 8th respondent's Chairman. Referring to the petitioner's petition dated 1st November 2021 which is the subject of the instant application, he averred that the petitioners had not approached the court with clean hands. He deposed that the petitioners had withheld material facts in that the issues therein were res judicata by virtue of the successive decisions in the High Court and the 6th petitioner's appeal preferred to the Court of Appeal in Kenya National Parents Association vs. Cabinet Secretary, Ministry of Education v. Prof. Jacob Kaimenyi & 2 others (2019) eKLR and the High Court case of Kenya National Parents Association v Cabinet Secretary, Ministry of Education Jacob Kaimenyi & 2 others (2016) eKLR.
3. He deposed that there was never any authorized person or agent at their office, 13th Floor Room 1305 to receive service on behalf of the respondents or notify him. The reason being that this is not the 8th respondent's permanent office owing to the nature of their operations. He averred that the 8th respondent largely borrows the conferencing office and the board room when the need arises. He went on to note that the 8th respondent could even take a year without convening at the office as their other meetings are held through teleconferencing. In view of this he averred that the petitioners had not been keen on effecting proper service on the respondents.
4. He challenged the petitioners' affidavits of service in total which he averred never reached the respondents, were defective, full of fabrications and authored in bad faith. He deposed that the respondents were never notified of the substantive suit, the mention notices and orders as issued by the court and so they were never represented in court.
5. He similarly deposed that the 8th respondent's email 'ceo@npa.ke' as captured in the affidavit of service dated 14th September 2022 was wrong since the right domain name is 'co.ke'. Further that the petitioner's counsel misspelled their advocate's email by failing to add an extra letter 'a' to ckianda@mk.co.ke to be ckiandaa@mk.co.ke which in effect meant service was not properly effected as the message was not delivered.
6. He averred that these anomalies were also seen in the affidavit of service dated 13th December 2022. In view of this, he stated that the respondents were yet to be served with such applications, mention and hearing notices including the substantive suit, and the notice of entry of the judgment dated 31st



- May 2022. He deposed that the petitioners' action of failing to serve them in the end denied them an opportunity to defend the suit and in the end, appeal the said judgment. Ultimately he stated that they were condemned unheard.
7. He deposed that once the court decree and orders were issued on 15th July 2022 and extracted by the petitioners, they were served upon himself, the 1st and 3rd respondents vide their personal Whatsapp accounts on 22nd September 2022. He pointed out that this was contrary to the date, 20th September 2022 which was given in the affidavit of service dated 26th September 2022.
 8. He in like manner challenged the petitioners' and interested parties' credibility and integrity for the following reasons: they moved to court with unclean hands by failing to reveal material facts; misled the court to solely rely on their constitution which is in grave variance with the dictates of the [Basic Education Act](#); the 4th petitioner is a busy body and stranger to the affairs and elections of the 8th respondent; the petitioners' and interested parties are strangers to the affairs of the 8th respondent and keen to usurp the mandate of the 1st to 7th respondents as bestowed by the Ministry of Education; there is a risk of public funds being misappropriated by the petitioners owing to their fraudulent conduct; the petitioners reputation as such will taint the 8th respondent's reputation if the court allows the petitioner to fully execute the judgement and orders; the 6th petitioner and 11th interested party are one and the same person and the 6th respondent has instigated multiple ambush suits against the respondents in their pursuit to have favourable court orders and also for the interested parties to be recognized as officials. He accordingly urged the Court to take note of the petitioners integrity issues which made them unfit to hold public office.

The Petitioners and Interested Parties case

9. In response, the petitioners filed the following grounds of opposition dated 23rd January 2023.
 - i. The respondents/applicants have enjoined the interested parties in this suit without first seeking and obtaining leave of this honourable court as required under Rule 7(1) Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
 - ii. The orders sought in the Notice of Motion application dated 10th January 2023 are in form of an appeal and that this Court lacks jurisdiction to allow the application, as it is functus officio as held in the Supreme Court case of Raila Odinga & others v IEBC and others (2013)eKLR and the Court of Appeal case of Telkom Kenya Limited v John Ochanda and 996 others(2014)eKLR. As such ought to dismiss the application with costs.
 - iii. The application seeks to introduce a completely new cause of action from the one originally pleaded in the petition dated 1st November 2021.
 - iv. The orders sought have been overtaken by events and respondents failed to meet the test for grant of conservatory orders.
 - v. The application is frivolous, vexatious, incompetent and improperly before this Court and hence ought to be dismissed with costs.
10. In their supporting affidavit dated 23rd January 2023 sworn by the 6th petitioner who is also the 11th interested party, they reiterated the contents of their grounds of opposition. Additionally it was deposed that the respondents were trying to revive a matter that had been conclusively finalized and were guilty of laches in filing the application 8 months later.



11. He deposed that the respondents were not being truthful since they knew about the existence of the substantive suit. He noted that the 2nd respondent even commented the issue to a standard news reporter on 1st August 2022 where he stated “...as you can see, we (the respondents) are different entities and we are cautioning them, to stop dragging our names in court because we are not them and they are not us.”
12. He deposed that the 2nd respondent had failed to disclose that a notice of election and a decree was delivered and received at his office on 22nd July 2022, a month before the 8th respondent’s national elections were held on 27th August 2022. He averred that the respondents’ allegations were false and misleading since the petitioners’ actions were based on the court orders issued by this court. He deposed that the respondents’ application was frivolous, vexatious, incompetent and improperly before this Court.

The Interested Parties case

13. The interested parties filed a replying affidavit dated 6th March 2023 sworn jointly by the 1st and 3rd interested parties. They deposed that Nicholas Kibitok Maiyo, the 2nd respondent was the former chairman of the 8th respondent until 27th August 2022 when elections were conducted and the interested parties elected as officials. This was in line with this court’s orders dated 31st May 2022.
14. They deposed that on the handover day, 6th October 2022, at the 8th respondent’s borrowed office at Re-Insurance Plaza, the 2nd respondent, Kauwi Onesmas (Treasurer) and Okiya John were present. He deposed that they willingly handed over the office to the interested parties being the newly elected officials to the 8th respondent’s National Executive Council. The handover as well included the bank account.
15. It was averred that the respondents had sufficient time to appeal against the judgment delivered on 31st May 2022, subsequent orders and elections therein but failed to do so. Considering this, they stated that the instant application is an afterthought and a malicious attempt to frustrate the interested parties’ running of the 8th respondent. Similarly, that the respondents were at liberty to file complaints of misconduct and integrity issues whilst initiating removal of the interested parties from office as prescribed under the 8th respondent’s Constitution.
16. They noted that the firm of Moraa and Kianda Advocates is the same firm that represented the respondents during the hearing of the substantive suit. They pointed out that the advocates had not filed an affidavit indicating that they had not received instructions or that the firm did not receive service of court pleadings as the suit continued.
17. They as such averred that the instant application had failed to present material facts for review. It was argued that instead the issue was ripe for an appeal as had also been admitted by the respondents in their affidavit. In conclusion, it was stated that the application ought to be dismissed since it is an abuse of the Court process.

The Respondents/Applicants submissions

18. The firm of Moraa and Kianda Advocates on behalf of the respondents filed written submissions dated 9th February 2023. On whether there is an error apparent on the face of the record counsel submitted that the affidavits of service dated 8th November 2021, 25th November 2021, 7th February 2022 and 14th September 2022 relied upon by the court are incurably defective in view of Order 5 Rule 15 of the Civil Procedure Rules, 2010. It was noted that the affidavits had no names or addresses of the persons authorized as agents of the respondents to receive and witness the service. To buttress this point reliance



was placed on the case of Agigreen Consulting Corp Limited v National Irrigation Board (2020) eKLR where it was held that an affidavit of service must prima facie disclose proper and actual service for it is on the basis of this service that judgment is entered. Similar reliance was placed on the case of National Bank of Kenya v Peter Oloo Aringo (2004) eKLR.

19. Counsel while relying on the case of National Bank of Kenya Ltd v Ndungu Njau (1997) eKLR noted that 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. Related reliance was placed on the case of Muyodi v Industrial and Commercial Development Corporation & another (2006)1 EA 243.
20. On the issue of jurisdiction as raised by the petitioners and interested parties, counsel cited the Court of Appeal case of Telkom Kenya Limited v John Ochanda & 996 others (2014) eKLR noting that the *functus officio* doctrine was not to be understood to bar engagement by a court with a case that it has already decided on. Counsel submitted that there were exceptional cases to this doctrine such as correcting clerical error or a judicial change of mind even where a decision has been communicated to the parties as held in the case of Raila Odinga v IEBC (2013) eKLR. Also see: Mombasa Bricks & Tiles LTD & 5 others v Arvind Shah & 7 others (2018) eKLR, Michael Kinyua Mutungi & 6 others v Vil Limited; Robin Mwenda Kaumbuthu t/a Mwenda Kaumbutu & Co. Advocates & 4 others (2022) eKLR, among others.
21. Counsel on admissibility of the newspaper cuttings as adduced by the petitioners and interested parties argued that the law relating to admissibility and probative value of newspaper cuttings is hearsay evidence as per Section 86(1)(b) of the *Evidence Act*. That this Section provides that newspapers are one of the documents whose genuineness is presumed by the Court as held in the case of IEBC V NASA Kenya & 6 others (2017) eKLR and Laxmi Raj Shetty v State of Tamil Nadu 1988 AIR 1274,1988 SCR (3) 706.
22. On whether they were guilty of laches and delay, Counsel relying on the case of Mwangi S. Kimenyi v the Attorney General & another (2014) eKLR submitted that there was no precise measure of what amounts to inordinate delay and the same differs from case to case. He contended that the general elections and reshuffling of the Cabinet Secretaries meant that they had to wait to confirm the status of any election that may have been conducted outside their knowledge. In conclusion, he urged the Court to allow the application and set aside the judgment dated 31st May 2022.

The Petitioners and Interested Parties / respondents submissions

23. The petitioners and interested parties filed two sets of written submissions and a list of authorities. The first set dated 23rd February 2023 was filed by the firm of Njeri Ngunjiri Advocates and the second set dated 10th March 2023 filed by the firm of Wesonga Wamalwa & Kariuki Associates Advocates.
24. Counsel on the issue of service submitted that the respondents at the time of filing the petition dated 1st November 2021 had indicated that service would be through the registered offices of the association which is at Re-Insurance Plaza on 13th Floor, Door No.1305. It was noted that this was not denied by the respondents either. The service throughout the existence of the suit, was done at this point.
25. Counsel further pointed out that the 8th respondent's Constitution under Article 5 states that the Chief Executive Officer (who then was the 1st respondent) is to supervise the day to day activities of the association and supervise all employees. As such it was argued that it was the CEO who was supposed to have challenged the service of the court pleadings by the process server not the 2nd respondent, who was not a full time officer of the 8th respondent.



26. Counsel submitted that the respondents advocate failed to seek the leave of this Court to cross examine the process server on the contents of his affidavit which were claimed to be dishonest as stipulated under Order 5 Rule 16 of the Civil Procedure Rules, 2010. In support reliance was placed on the case of *Azina Chepkemboi Said v Noah Maritim Too & 2 others* (2017) eKLR where it was held that the defendants did not apply to cross examine the process server hence it was proved on a balance of probabilities that they were served and as such the court could not exercise its discretion to set aside the judgment after hearing a party and following due process unless the person seeking the same gives the court good reasons.
27. On whether the matter is *res judicata* as deposed by the respondents/applicants, counsel submitted that the issues were not the same since they dealt with a challenge to the actions of the Cabinet Secretary for Education, Prof. Jacob Kaimenyi for denying the right of conducting elections of their members in schools. In the same way the petitioners in both suits are different and have litigated under a different title.
28. He further submitted that the respondents failed to disclose that as elected on 5th October 2016, their elections were nullified by Hon. Justice Mrima in the judgment delivered on 21st January 2021 in HC Petition No.470 of 2016 *Moses Chesang & 19 others v Cabinet Secretary Ministry of Education & 7 others* (2021) eKLR.
29. On the third issue, whether this court is *functus officio*, counsel asserted that the respondents/applicants have a tendency of not participating in court proceedings as also witnessed in *Moses Chesang & 19 others* (*supra*) despite being properly served with court documents. It was stated that the petitioners effectively served the respondents through their registered office at Re-insurance Plaza. In view of this, he stated that this court having rendered its decision in this matter became *functus officio*. In support counsel referred to the Court of Appeal case of *Telkom Kenya Limited* (*supra*) where it was held that this principle prevents the re-opening of a matter before a court that rendered the final decision. Also see: *Raila Odinga & others v IEBC & others* (2013) eKLR.
30. On whether there was inordinate delay in filing the instant petition, counsel stated that the judgment had been rendered on 31st May 2022 and a decree of the judgement issued on 15th July 2022. It was noted that the respondents/applicants who had averred that they never received service, filed their Memorandum of Appearance on 5th October 2022 and an affidavit of compliance on 14th October 2022. Counsel argued that despite being aware of the judgment and decree the respondents did not file the application at that time and did not give any reasons why the application was filed 8 months later.
31. Counsel submitted that a party must show to the satisfaction of the court that there was discovery of a new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. He argued that this was not proved by the respondents. On the prayer for conservatory orders, counsel argued that the same had been overtaken by events since the interested parties were already in office. Furthermore that the respondents/applicants handed over the office of the 8th respondent on 7th October 2022 and even filed an affidavit in compliance on 14th October 2022. Counsel further pointed out that the respondents had not given reasons why Gazette Notice Vol. CXXIV No.183 dated 9th September 2022 ought to be revoked.
32. The petitioner and interested parties / respondents in their second set of submissions basically reiterated what was in the first set. It was also argued that it is the firm of Moraa and Kiandaa Advocates who were and are still on record for all the respondents / applicants and as such there was no complaint by the 2nd respondent in the supporting affidavit that the firm erroneously or deliberately purported to



act for them. As such, counsel submitted that service through an advocate on record is proper service, as was held in the case of Abdalla Ali Taib & 3 others V Rabinder Kaur Ahluwalia (2015) eKLR.

33. It was additionally submitted that the advertisement published in the Daily Nation on 1st August 2022 announcing the elections scheduled for 27th August 2022 was in the public domain and ran for 26 days. Counsel accordingly urged the court to take note of these facts and not allow the 2nd respondent/applicant's feign ignorance. He thus urged the court not to allow the application.

Analysis and Determination

34. From the foregoing account, and my analysis of the same I find the issues arising for determination to fall in two categories:

Preliminary issues

- a. Jurisdiction of this court to entertain matter.
- b. Whether the interested parties were properly enjoined in the suit by the respondents.

Substantive issue

- c. Whether the instant application satisfies the threshold for grant of a review order.

Jurisdiction of this court

35. This court's jurisdiction to entertain this matter was challenged by the parties simultaneously. First, the respondents/applicants argued that the substantive suit had violated the doctrine of res judicata. On the other hand, the petitioners and the interested parties asserted that the instant application was an appeal disguised as an application for review. In view of that, they contended that this court was functus officio and as such did not have jurisdiction to hear the application.
36. I will commence by answering the question of jurisdiction as required by the law. In this regard the Supreme Court In the Matter of Interim Independent Electoral Commission [2011] eKLR on the essence of jurisdiction held as follows:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.”

a. Doctrine of Res Judicata

37. The respondents deposed that the petition dated 1st November 2021 violated the doctrine of res judicata in view of the successive suits being, the Court of Appeal case in Kenya National Parents



Association vs. Cabinet Secretary, Ministry of Education v. Prof. Jacob Kaimenyi & 2 others (2019) eKLR and the High Court case of Kenya National Parents Association v Cabinet Secretary, Ministry of Education Jacob Kaimenyi & 2 others (2016) eKLR. The petitioners and interested parties opposed this averment stating that the petitioners in both suits were different and litigated under different titles. In like manner, that the issues raised in the two petitions were not the same.

38. This doctrine is captured under Section 7 of the *Civil Procedure Act*, CAP 21. It provides as follows:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

39. The Supreme Court in the case of Kenya Commercial Bank Limited v. Muiri Coffee Estate Limited & another Motion [2016] eKLR discussing the doctrine held as follows:

“(52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights...”

40. An examination of the facts of these cases is imperative. The substantive suit herein was filed on 1st November 2021 by the petitioners. It revolved around the contention that their right to freedom of association under Article 36(1) of *the Constitution* had been violated by the 1st respondent. They claimed that the 1st respondent had usurped, the 1st petitioner’s mandate by issuing notices of national elections on behalf of the 8th respondent. The respondents went on to carry out stage managed elections and elected officials in violation of the law.

41. Alternatively, the cited civil case as captured in its synopsis was a dispute that had been precipitated by the decision of the 1st and 2nd respondents (The Cabinet Secretary, Ministry of Education, Prof. Jacob Kaimenyi and the Principal Secretary, Ministry of Education, Science & Technology, Dr. Belio Kipsang) to call for the election of members of schools parents’ associations in accordance with the provisions of the *Basic Education Act*, No. 14 of 2013. This decision was contested by Kenya National Parents Association which argued that it had the exclusive mandate to organize and conduct such elections.

42. At first glance, the parties in both suits are manifestly different. Furthermore, as highlighted above, the issues raised therein although before a competent court raised diverse questions and issues. In view of this, I find myself not agreeing with the respondents’ contention. The substantive suit herein did not violate the doctrine of res judicata and in that regard this court has jurisdiction to entertain the matter.

b) The principle of functus officio

43. To answer this question, it is important to interrogate the components of what constitutes functus officio and whether or not this principle is applicable in the circumstances of this petition. The



Supreme Court expounding on the doctrine of *functus officio* gave the following guidance in the case of *Raila Odinga & 2 others* (*supra*):

“(18) We, therefore, have to consider the concept of “*functus officio*,” as understood in law. Daniel Malan Pretorius, in “The Origins of the *functus officio* Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832, has thus explicated this concept:

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

44. Likewise the Court of Appeal in the case of *Telkom Kenya Limited v John Ochanda* (*supra*) explaining the scope of this principle opined as follows:

“...The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued...”

45. The *Civil Procedure Act* under Section 99 provides the scope of engagement once a matter becomes final to be as follows:

Amendment of judgments, decrees or orders

Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.

46. Comparing Section 99 against the principles of review will assist this court to arrive at a definitive conclusion and answer to this question. The respondents herein primarily approached this court for a review of its judgment and orders. While *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 are silent on the issue of review, Order 45 Rule (1) of the Civil Procedure Rules in filling the lacuna provides:

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.



47. A Court faced with such an application under Order 45 Rule 3 is required to proceed as follows:
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.
48. The Court in the case of Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR reiterated the provision of order 45 Rule 1 of the Civil Procedure Rules. The Court further stated:
- “ 13. It is also important to distinguish grounds of appeal and grounds for review. Guidance can be obtained from the case of National Bank of Kenya Ltd vs Ndungu Njau[9] where the court held:-
- “In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge’s alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose.”
49. Considering the cited law and authorities my view is that the jurisdiction of a court to revisit a matter that it has rendered its judgment on is constrained in law. Fundamentally where a matter is outside this scope a court automatically is stripped off its jurisdiction to entertain the matter. For a review to be plausible a party’s case is restricted to discovery of new and important matter or evidence which even with the exercise of due diligence was not within their knowledge; some mistake or error apparent on the face of the record or for any other sufficient reason which has been argued to mean reasons analogous to the ones stated.
50. The principle of *functus officio* in lieu, dictates that once the judgment and decree of the court is perfected the same cannot be reviewed by the same court. It is discernible that the two principles are anchored on the judicial legal principle of finality. In my view the common thread that cuts across the two principles is that a party cannot approach the court for review disguised as an application for a fresh hearing or arguments on the merits of a case that has been conclusively settled. This automatically invokes the principle of *functus officio*.
51. The sequence of events as detailed in these parties case and record is that on 31st May 2022 this court rendered its judgment in favour of the petitioners’ as follows:



- i. A declaration do issue that, the elections of Nicholas Kibitok Maiyo, Sarah Kagendo Mitambo, Onesimus Johnes Kauwi, Patrick Lumumba Olali, Rose Otiak and Mohammed Awadh Omar on 20th August, 2021 as officials of the 8th respondent were not free, fair and transparent and so violated the petitioners' fundamental rights and freedoms guaranteed under Article 10(2) (C), 36(1) and 47(1) of *the Constitution* of Kenya, and therefore null and void for all intents and purposes.
 - ii. A declaration do issue that, the 1st respondent's action of organizing and presiding over elections of the officials of the 8th respondent on 20th August, 2021 without involving the petitioners violated the national values and principles of governance which include good governance, integrity, transparency and accountability guaranteed under Article 10(2)(C) of *the Constitution* of Kenya.
 - iii. An order do issue quashing Kenya Gazette Notice Number 8777 of 27th August, 2021 which declared Nicholas Kibitok Maiyo, Sarah Kagendo Mitambo, Onesimus Johnes Kauwi, Patrick Lumumba Olali, Rose Otiak And Mohammed Awadh Omar as officials of the 8th respondent.
 - iv. An Order do issue authorizing the National Elections Board of the 8th respondent to organize and preside over fresh elections of the National Parents Association within 45 days from the date of judgment and the O.C.S – Kamkunji Police Station do provide security during elections.
 - v. Prayer v was declined.
 - vi. The respondents to pay costs.
52. The petitioners' were thereafter issued with the decree of the Judgment on 15th July 2022. The 8th respondent's elections following an extension of time by the court were advertised in the Nation newspaper on 1st August 2022. This election was consequently conducted on 27th August 2022. The interested parties herein were elected as the new officials under Gazette Notice No.10685 dated 9th September 2022.
53. The record reflects that despite this win, the 2nd respondent refused to hand over the 8th respondent's offices situated at 13th Floor Re-insurance Plaza, its bank accounts, website, receipt books, office files, sponsorship agreements, membership registers and other official documents.
54. As a result and following the petitioners' application, this court issued an order on 19th September 2022 restraining the respondents from presenting themselves as the legitimate officials of the 8th respondent. Further the court on 6th October 2022 issued the following orders:
- i. The respondents to undertake the handing over exercise in the presence of the petitioners' interested parties, their Counsel and a police officer representing the inspector general.
 - ii. The exercise to be conducted on 7th October 2022 at 9:00a.m. at Re-Insurance Plaza, 13th Floor, Room 1305.
 - iii. Counsel for both parties to ensure total compliance with the Court orders issued on 19th September 2022.
 - iv. The respondents to be re-served with the Notice of Motion dated 26th September 2022.
 - v. Affidavits confirming compliance with the exercise to be filed by both parties within 7 days of the exercise.



- vi. Mention on 21st October 2022 before the Deputy Registrar to confirm compliance.
55. The parties in compliance filed their affidavits of compliance dated 13th October 2022 by the 1st Interested Party and the 2nd respondent on 14th October 2022.
56. The respondents afterwards on 10th January 2023 filed the instant application seeking review of this Court's judgment and orders. In support of their case the respondents challenged the manner of service by the petitioners and claimed that the affidavits of service were defective and full of fabrications. Moreover the respondents challenged the credibility of the petitioners owing to the information presented in court. They argued that this had misled the court in its final determination of the matter. The respondents in addition raised other issues that they sought to address hence urging the court to allow their application.
57. It was incumbent on the respondents to demonstrate through evidence that they satisfied the elements for grant of a review. While the respondents chiefly challenged the place of service, they did not deny that the same was the recognized official office for the 8th respondent and even used the same for handover to the newly appointed officials. In view of this, it is apparent that this piece of information cannot be deemed to reveal the discovery of new and important evidence which after the exercise of due diligence, was not within the knowledge of the respondents. It is presumed that the respondents were effectively served as a result.
58. The Court in the case of *Nesco Services Limited v CM Construction (EA) Limited* [2021]eKLR speaking to this issue opined as follows:
- “29. ... I agree with the holding in *Mariambai Chand Gulam vs. Zerakhanu Remtulla Ebrahim* [1953-1957] 2 TLR 168 that the object of all service is only to give notice to the party on whom it is made, so that he may be aware of, and able to resist, that which was sought against him, and where that has been done, so that the Court might feel perfectly confident that service has reached him, everything has been done that could be required.
30. It was therefore held in *Parminder Singh Sagoo and Another vs. Neville Anthony Dourado* [1983] KLR 365 that if a notice arrives at the address of the person to be notified at such a time and by such a means of communication that it would in normal course of business come to the attention of that person on its arrival, that person cannot rely on some failure of himself or his servants to act in a normal business-like manner in respect of taking cognisance of the communication, so as to postpone the effective time of the notice until some later time when in fact it comes to his attention.”
59. The respondents in making out their case did not demonstrate that the Court's verdict had some mistake or error apparent on the face of the record. This in actual fact does not require an elaborate argument to be established as it is obvious.
60. Furthermore, the respondent's application if allowed seeks to demonstrate to the court that the petitioners had moved to court with unclean hands by failing to reveal material facts; as outlined at paragraph 9 of this Ruling.
61. All these reasons cited by the applicants in my view are not sufficient reasons to satisfy the dictates of Order 45 of the Civil Procedure Rules but an invitation to the court to conduct a fresh hearing based on the merits of the case with a view to have the court arrive at a different conclusion than the one



arrived at on 31st May 2022. Clearly these factors do not meet the threshold for a review or the scope outlined in Section 99 of the *Civil Procedure Act*. This court proceeded with the hearing upon being satisfied that the respondents/applicants had been well served and were aware of the petition and the directions issued.

62. On the flipside, it is discernible that this Court's judgment has since been perfected. I say so because Orders (i) (ii)(iii) and (iv) of the Judgment have since been fulfilled and the new officials are in office carrying out their mandate. This primarily bars this court from reviewing or altering its decision, as there is no clear reason shown to make the court do so. It is my considered view that the respondents' application is an invitation to interrogate the merits and re-litigate the issues in the substantive suit.
63. The upshot is that the respondents' application dated 10th January 2023 lacks merit and is hereby dismissed with costs to the petitioners and interested parties.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 12TH DAY OF MAY 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. Ong'udi

Judge of the High Court

