



**Bandari & 2 others v Kenya Railways Corporation & 3 others (Constitutional
Petition 57 of 2016) [2023] KEHC 23834 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23834 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION 57 OF 2016**

OA SEWE, J

SEPTEMBER 22, 2023

**N THE MATTER OF: ARTICLES 19, 20, 21, 22, 23, 28,
47, 50 AND 53 OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF
RIGHTS OR FUNDAMENTAL
FREEDOMS UNDER ARTICLES 28,
43 AND 47 OF THE CONSTITUTION
OF KENYA, 2010**

BETWEEN

MUSA M. BANDARI 1ST PETITIONER

MOHAMEDNURU MWAMBA 2ND PETITIONER

OMARI BAKARI SUYA 3RD PETITIONER

AND

KENYA RAILWAYS CORPORATION 1ST RESPONDENT

COUNTY GOVERNMENT OF MOMBASA 2ND RESPONDENT

NATIONAL LANDS COMMISSION 3RD RESPONDENT

KENYA MARITIME AUTHORITY 4TH RESPONDENT



RULING

- (1) The Notice of Motion dated 19th September 2022 was filed herein on 26th September 2022 by the law firm of Aboubakar, Mwanakitina & Company Advocates on behalf of Hassan Ali Mohamed, Rashid Mohamed Nuru, Mboje Karani Kiroboto, Tele Hirimu Ali, Mbaruku Hamisi Yusuf, Mwinyi Ali Mwinyi, Nelson Thomas Thecher, Ali Hamadi Kea, Shufaa Ahmed Chii, Matano Swaleh Kimuswa, Mwacheti S. Sumuni, Hamisi Athman, Naman Mohamed Mwinyi, Abdalla Tando Said, Rashid Mwajuma Rashid, Bintisaid Mzee Alimasi, Harun Moyo Athman, Eunice Akinyi Ojala, Mrashi Hamisi Rajab, Mbaruku Hassan Bakari, Abdillahi Swaleh Rashid and Suleiman Mwinyi Kimuswa, who also claim to be Petitioners in this suit. They prayed for review of the judgment of the Court delivered on 15th October 2020 as well as an order that they be considered as petitioners in connection with the declaratory orders referred to as Orders (a), (b) and (c) of the said Judgment. They also prayed for costs of the application.
- (2) The applicants contend that they were fishermen in possession of valid licences from the 2nd respondent; and that their names appear in the list annexed to the Supporting Affidavit filed with the Petition. They further averred that they could not annex their licences as they had surrendered the same to their chairman for purposes of compensation, but were thereafter side-lined by the chairman during the identification exercise. They further averred that it was not until July 2022 that they were able to retrieve their licences with the assistance of the area village elders; and that this was long after this case had been determined. It was therefore their assertion that it is in the interest of justice that their application be allowed and the orders sought granted.
- (3) The application was filed pursuant to Sections 1A, 1B and 80 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, and Order 45 Rules 1, 2 and 4 of the *Civil Procedure Rules*. It was supported by the affidavit of the 1st petitioner herein, Musa Bandari, sworn on 20th September 2022, to which were attached copies of Fisherman's Licences and other documents marked Annexure "MB-1".
- (4) On behalf of the 1st respondent, a Replying Affidavit was filed by Mr. Simon Karina, Advocate, sworn on 6th December 2022. He averred that the Court does not have jurisdiction to order the inclusion of the applicants as being among the petitioners because the rights and obligations of the parties have been fully determined in the judgment dated 15th October 2020. In particular, Mr. Karina pointed out that:
 - (a) The Court determined at paragraph 41(c) of the judgment that the 1st and 2nd respondents only had an obligation to compensate the 1st, 2nd and 3rd petitioners for their loss of livelihood as a result of the Standard Gauge Railway (SGR) project.
 - (b) At paragraph 40 of the judgment the Court held that it was unable to make judgment in favour of the persons whose names and identity card numbers the petitioners had annexed as members of the Petition because there was no evidence of how they were affected by the SGR project.
- (5) Thus, it was the averment of the 1st respondent that the Court having fully determined the rights and obligations of the parties to this suit, including the claim by the 68 other persons, it is *functus officio*. In addition, Mr. Karina pointed out that, thus far, there is no order of the Court re-opening the hearing of the case after judgment; and therefore that the finding on liability cannot be retried in the same matter.
- (6) In addition to Mr. Karina's Replying Affidavit, the 1st respondent filed a Notice of Preliminary Objection dated 28th September 2022 contending that:
 - (a) The hearing of the underlying dispute is concluded and the Court is now *functus officio*;



- (b) There is no order of the Court re-opening the hearing of the case after judgment;
 - (c) The rights and obligations of the parties have been fully determined in the judgment delivered on 15th October 2020;
 - (d) The finding on liability cannot be retried in the High Court in the same matter.
- (7) Directions were thereafter given on 25th October 2022 that the application be canvassed by way of written submissions. It appears only the applicants and the 1st respondent complied. Thus, counsel for the applicants, Mr. Aboubakar, relied on the written submissions filed on 20th January 2023. He pointed out that it is not disputed that the applicants annexed to their Supporting Affidavit a list of all the 68 BMU members, containing their national identity card numbers, licence numbers and their signatures; or that the only reason the judge gave for not considering the 65 other members for compensation was that their licences for 2014 or 2015 had not been exhibited; which have now been annexed to the Supporting Affidavit.
- (8) Thus, counsel submitted that the applicants have satisfied the elements required for the Court to allow a review of its judgment; and in particular, they have shown that there is discovery of new and important evidence which after the exercise of due diligence could not have been produced by the applicants at the time when the judgment was passed. He further submitted that, in the event the Court finds otherwise, then the application ought to be considered under the third limb of Rule 1 of Order 45 of the *Civil Procedure Rules*, namely, any other sufficient reason. He accordingly urged the Court to find that the applicants have demonstrated that indeed they were fishermen in 2015; and that, had the relevant documents been presented to the Court, judgment would have been entered in their favour.
- (9) Counsel further submitted that substantive justice is the ultimate justice where rights of parties are protected and upheld and that Article 159(2)(d) of *the Constitution* is explicit in this regard. He submitted that substantive justice is what is meant to be achieved by the instant application. Counsel placed reliance on High Court Miscellaneous Application No. 317 of 2018: *Republic v Advocates Disciplinary Tribunal* as to what amounts to “any other sufficient reason”.
- [10] On behalf of the 1st respondent, Mr. Karina relied on his written submissions dated 14th February 2023. He proposed the following two issues for determination:
- (a) Whether the Court has jurisdiction to order the inclusion of the persons named in the Notice of Motion dated 19th September 2022 as successful petitioners.
 - (b) Whether the applicants have satisfied the grounds for review of the judgment dated 15th October 2020.
- (11) Mr. Karina reiterated the grounds set out in the Notice of Preliminary Objection dated 28th September 2022 and relied on *Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited)* [2014] eKLR on the principle of *functus officio*. He urged the Court to find that it is barred from re-engaging with its decision in the circumstances proposed by the applicant; having rendered a conclusive decision on the merits of the case.
- (12) In the alternative, Mr. Karina submitted that, in the event the Court finds that it has jurisdiction to entertain the application, a finding ought to be made that there is no justification for review. He relied on *Pancras T. Swai v Kenya Breweries Ltd* [2014] eKLR and *Rose Kaiza v Angelo Mpanjuiza* [2009] eKLR and contended that the applicants have neither established that they acted with due diligence in getting and producing the alleged new and important evidence before the Court delivered its judgment in this Petition nor have they established that the existence of the evidence was not within



their knowledge. He likewise relied on the Rose Kaiza case for the proposition that where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause.

- (13) In the light of the foregoing, it is imperative that the jurisdictional issues raised in the Notice of Preliminary Objection be dealt with first before engaging in a merit consideration of the review application. Thus, in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors* [1969] EA 696, it was held:

“... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

- (14) Accordingly, the issues for determination are:

- (a) Whether the Court has jurisdiction to order the inclusion of the persons named in the Notice of Motion dated 19th September 2022 as successful petitioners; and if so,
- (b) Whether the applicants have satisfied the grounds for review of the judgment dated 15th October 2020.

A. On jurisdiction:

- (15) That the issue of jurisdiction is primordial cannot be gainsaid. In the *Owners of Motor Vessel "Lilian s" v Caltex Oil (K) Ltd* [1989] KLR 1:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

- (16) Hence, where the jurisdiction of the Court is impugned, the Court must make a determination as to whether it does have the power to entertain the dispute. And, as pointed out by the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR:

“A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power on Parliament to set the jurisdiction of a court of law or



tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

- (17) The jurisdiction of the Court has been impugned from the standpoint of the doctrine of *functus officio*. The respondents' contention is that, having made a final determination on the merits of the Petition, the Court has no jurisdiction to order the joinder of the applicants as petitioners and award them the reliefs given herein in favour of the 1st 2nd and 3rd petitioners *vide* the judgment dated 15th October 2020. The principle of *functus officio* was considered by the Supreme Court in the case of *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission, Ahmed Issack Hassan, Uhuru Kenyatta & William Samoei Ruto* (Petition 5, 4 & 3 of 2013) [2013] KESC 8 (KLR) (Civ) (24 October 2013) (Ruling), where court cited with approval an excerpt from an article by Daniel Malan Pretorius, in "The Origins of the *functus officio* Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832 stating:

"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."

- (18) Similarly, in *Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)* (*supra*), the Court of Appeal held as follows on the *functus officio* doctrine:

"Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of *Chandler v Alberta Association Of Architects* [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);

"The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In re St. Nazaire Co., (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

Where there had been a slip in drawing it up, and,

Where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. v J.O. Rose Engineering Corp.*, [1934] S.C.R. 186"

- (19) There is no denying that the Petition herein has already been heard on its merits and a final determination made by the Court (Hon. Ogola, J.). What the applicants are seeking is to re-litigate a fully decided matter in which the court has already rendered a conclusive judgment in respect of their rights. It is in plain then that the Court is *functus officio* and cannot grant the orders prayed for by the applicants.



B. On whether a case for review has been made:

[20] The foregoing notwithstanding, it is permissible under Order 45 of the *Civil Procedure Rules* for the Court to review its decision if the circumstances of the case warrant such an action. Indeed, Order 45 Rule 1 of the *Civil Procedure Rules* states:

- “(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.”

(21) The foregoing provisions are anchored on Section 80 of the *Civil Procedure Act*, which states as follows:

- “Any person who considers himself aggrieved—
- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

(22) In this case, the applicants have relied on the ground that the attached fisherman licenses comprise new and important evidence which was not within their knowledge when the judgment was passed. Thus, in the case of *Dock Workers Union & 2 others v Attorney General & another Kenya Ports Authority & 4 others (Interested Party)* [2019] eKLR, a 3 judge bench of the court held: -

“...for a Court to review its own orders, it must be demonstrated that there is discovery of new and important matter or evidence. It must also be shown that the new evidence was not within the knowledge of the party seeking review or could not be produced at the time the orders were made. Such party must also satisfy the Court that this was the case even after exercise of due diligence. A Court will also review its orders if it is demonstrated that there is some mistake or error apparent on the face of the record, or for any other sufficient reason. The error must be evident on the face of the record and should not require much labour in explanation. An application for review must also be made without unreasonable delay.



- (23) Likewise, in *London Distillers (K) Ltd v Cabinet Secretary, Ministry of Education & 4 others* [2022] eKLR, Hon. Odunga, J (as he was then) while dealing with an application for review on the discovery of a new important matter held:

“...firstly, the applicant must also establish that the new and important matter or evidence was not within its knowledge after the exercise of the normal diligence required of any conscientious litigant; secondly, the new and important matter and evidence must be something which existed at the date of the decree, hence the section does not authorise the review of a decree which was right when it was made on the ground of the happening of some subsequent event; thirdly the Court would decline to grant the application where the applicant is not seeking to give effect to its intention at the time the decision was made but to open the doors to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made; Fourthly, such new and important matter or evidence is of such nature that it would lead any court of law applying its mind to the facts and the law applicable to the case reach a determination that if the court which heard the original application had the advantage of the new evidence, it would have reached a different decision other than the one that was rendered; and lastly, it must be proved that the applicant had acted with due diligence and the existence of the evidence was not within his knowledge and the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing...”

- (24) In this case, the question of fisherman licenses is not new evidence that the applicants have just discovered. From the look of things, they were aware of the licenses as they clearly indicate that the same had been surrendered to their chairman for purposes of compensation. The reason given for not attaching the licences was that the applicants were at loggerheads with the said chairman. There is however no proof of the efforts made to recover the documents. It is, therefore, my finding that the applicants have not demonstrated to this court that they were unable to discover this so-called new and/or important evidence.
- (25) On whether there are other sufficient reasons for review, the Court of Appeal held in *Rose Kaiza v Angelo Mpanju Kaiza* (*supra*) that:

“...An application for review under Order 44 r 1 must be clear and specific on the basis upon which it is made. The motion before the superior court was based on the discovery of new facts. However, it is not every new fact that will qualify for interference with the judgment or decree sought to be reviewed. In the words of the rule itself, it is

“.....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.....”

The construction and application of that provision has been discussed in many previous decisions but we shall take it from the commentary by Mulla on similar provisions of the Indian Civil Procedure Code, 15th Edition at page 2726, thus:

“Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the



formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made...”

- (26) In the light of the foregoing, it is plain that the application dated 19th September, 2022 is utterly devoid of merit. The same is hereby dismissed. However, given the circumstances of the application and the plight of the applicants, it is hereby ordered that there be no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2023

OLGA SEWE

JUDGE

