



**Nyongesa v Engineers Board of Kenya (Constitutional Petition
E002 of 2020) [2023] KEHC 22975 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22975 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CONSTITUTIONAL PETITION E002 OF 2020**

REA OUGO, J

SEPTEMBER 21, 2023

**IN THE MATTER OF ARTICLES OF THE CONSTITUTION OF KENYA 1,2, (1),3
(1),10,22,23,27,35, 47,159(2),165 (3) (D) 259,**

**IN THE MATTER OF BREACH OF THE PROVISIONS OF THE CONSTITUTION OF
KENYA**

AND

**IN THE MATTER OF SECTION 3, 6,7,18,19, OF THE ENGINEERS ACT OF
2011 NO 43 OF 2011**

AND

IN THE MATTER OF ENGINEERS ACT OF 2011, NO 43 OF 2011

BETWEEN

FERDINAND CHIRURE NYONGESA PETITIONER

AND

ENGINEERS BOARD OF KENYA RESPONDENT

RULING

1. Ferdinand Chirure Nyongesa, the petitioner, sued the Engineers Board of Kenya , the Respondent, seeking the following orders in his petition dated October 23, 2020;
 - i. A declaration that failure by the respondent to register the petitioner as a Graduate Engineer is unconstitutional and in violation of the Petitioner’s legitimate expectation for registration as a Graduate Engineer after meeting the requirements of the Law.



- ii. An order that the respondent be compelled to register the petitioner herein as Graduate Engineer having acquired his academic certificates properly procedurally and in conformity with the Law and with the requirements of the Engineers Board of Kenya.
 - iii. Any other order that the Honorable Court ,may deem just and fir to ensure that Law and rule of law is upheld protect the constitutional rights of the petitioner and legitimate expectation of the Petitioner.
2. In a judgment dated the November 5, 2021 Justice Riechi declined to grant the orders sought. The Court held as follows;

‘ This action must fail for reasons that the respondent has not formally communicated its decision on the petitioner’s application and secondly, there is no evidence that the respondent has not adhered to the constitutional mandate under Article 47 of the *Constitutional*. Each party to bear his own costs’.
3. On the April 14, 2023 the petitioner filed a Notice of Motion seeking to be heard on the following;
 - i. Spent
 - ii. That a Ruling in this case was entered on November 5, 2021 dismissing the petition where the Hon. Judge relied on the fact that the respondent had not formally communicated the decision on the status of the petitioner’s registration for the petitioner to invoke the powers of the court.
 - iii. That the respondent has finally communicated the decision and with which the petitioner is dissatisfied.
 - iv. That this court be moved to review the Ruling of the petition delivered by Hon. Justice S.N. Riechi , Judge on November 5, 2021 in view of new evidence conveyed in the respondent’s communication.
 - v. That this Honorable Court be pleased to grant leave to the Applicant/ Petitioner to file the Respondent’s verdict on the Petitioner’s application for registration as Graduate Engineer to enable the court to full hearing and determination of the Petition.
 - vi. That cost of the application be provided for.
4. The application is supported by grounds on the face of the application and the supporting affidavit of the applicant dated the March 30, 2023. He depones as follows in the said affidavit; he rejects the verdict given by the respondent in response to his application for registration as a Graduate Engineer submitted on January 2, 2020 (‘F-1’). That the respondent’s verdict echoes the script handed to him after a similar application in1987 and which ignores the strides he has made in academic and professional journey in strict adherence to their own advice(reference to a letter from the Engineer’s Registration Board (ERB) dated 19/02/1987). That he qualifies for registration under section 18 of the *Engineers Act* 2011 which supersedes any other Rules and Regulations. That he is registrable under section 18(a) and (b) , his Bachelor of Science read together with Diploma (Electronic and Communication Engineering) is equated equivalent to Bachelor of Electrical Engineering, which is admissible for registration under the Act. That Kenya National Qualifications Authority (KNQA) executes the Kenya National Qualifications Framework (KNQF) Act No. 22 of 2014 and KNQF Regulations 2018 which is a body mandated to recognize and equate qualifications and that it has pronounced itself by issuing the necessary certificates that formed part of his application bundle and which are legally binding to the Board. That the Board referred to by the respondent’s as an Independent Review Team is unknown in law and consequently its verdict is null and void. That the



operations of the Independent Review Team remains mysterious as he was never involved at all and its findings if any therefore cannot be binding to him. That the attempt to respond to his application by the respondent was not conducted in strict compliance to the Act as pressure mounted by the Commission on Administrative Justice (Ombudsman) was brought to bear.

5. The respondent though served with the application, failed to file any response. The petitioner filed written submissions on the July 3, 2023. I have carefully read the said submission together with the Judgment he seeks to review, plus I have also considered the law under which a party can seek review orders. The petitioner reiterates his case in his written submissions and states that there are 3 issues for determination; whether the petitioner’s qualifications meet the threshold for Graduate Engineer registration, whether the respondent has any reservations and whether the respondent has considered the petitioner’s application in accordance to the law.
6. My understanding of the application before me is that the applicant/petitioner is seeking a review of the judgment delivered on the November 5, 2021 on grounds that he has new evidence. This new evidence is the letter dated September 7, 2022. I must point out that this letter was written by the respondent on the September 7, 2022 after the court delivered its judgment on the November 5, 2021. The letter refers to his application for registration as a Graduate Engineer. At paragraphs 4 the Board states as follows; ‘ During the 187th Ordinary Board Meeting, the report of the Independent Review Team was considered and the Board resolved that the Bachelor of Science degree from the University of Nairobi is not an engineering degree course recognized by the Board. Consequently, the Board declined your application for registration as a graduate engineer for failure to meet the qualifications espoused in the aforesaid provisions of the Engineers Act and Rules.
7. The petitioner terms the contents of the said communication from the Board as a new evidence and states that he is entitled to be heard on his petition. The court record indicates that on the April 15, 2021 the court directed that the petition will be canvassed by way of written submissions. The petitioner filed his written submissions and the court delivered a judgment on his petition. The court did not grant the orders he sought for reasons that the petitioner had not been served with the board’s decision.
8. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows:
 1. Any person considering himself aggrieved—
 - a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or 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.”
9. In Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 John M. Mativo Judge held as follows: -
 - i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
 - ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.



- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
 - iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
 - v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
 - vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
 - vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
 - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
 - ix. Section 80 of the *Civil Procedure Code* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Code* does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
 - x. The power of a civil court to review its judgment/decision is traceable in Section 80 *CPC*. The grounds on which review can be sought are enumerated in Order 45 Rule 1.
10. At the time the petition was filed the respondent had not communicated its decision to the applicant/petitioner. The petitioner claims that he now has the communication and that it is new evidence. A judgment was delivered after the petition was heard. The communication from the respondent which the petitioner seeks to rely was made after the judgment was delivered. It cannot be new evidence. A mere discovery of new and important matter or evidence is not sufficient to ground to review. Though the evidence was not within his knowledge at the time of the petition was heard, in my view the communication dated September 22, 2022 raises a new cause of action as the letter was written after the court delivered its judgment. The court did not make an error of mistake. In the case of *Evan Bwire V Andrew Aginda* Civil Appeal No. 147 of 2006 cited in the case of *Stephen Githua Kimani V Nancy Wanjira Waruingi T/A Providence Auctioneers* (2016) eKLR the Court of Appeal held as follows:
- “An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence.”
- 11 The letter the petitioner is relying on dated September 7, 2022 was written after the judgment was delivered November 5, 2021. Allowing the petitioner to rely on it would amount to reopening the petitioner’s case. The evidence he seeks to present before the court was not available because he did



not wait for the Board to communicate its decision on his application to be registered as a Graduate Engineer. It is not new evidence. I find no merit in the application dated the April 14, 2023. It is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 21ST DAY OF SEPTEMBER 2023.

R.E.OUGO

JUDGE

In the presence of:

Ferdinand Chirure Nyongesa/ Petitioner- Present

Respondent- Absent

Okwaro -C/A

