



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 399 OF 2018**  
**(FORMERLY ELC PETITION NO.763 OF 2016)**

**DEWDROP ENTERPRISES LIMITED.....PETITIONER/APPLICANT**

**VERSUS**

**WILLIAM MUTHEE MUTHAMI.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF MAGISTRATE'S COURT,**

**MILIMANI COMMERCIAL COURTS.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Petitioner, Dewdrop Enterprises Limited, is through the notice of motion application dated 18<sup>th</sup> May, 2020 seeking the following orders:

- a) That the Honourable Court be and is hereby pleased to review the Judgement/Decree delivered herein on 28<sup>th</sup> March 2019;
- b) That this Honourable Court be and is hereby pleased to set aside the Judgement/Decree delivered herein on 28<sup>th</sup> March 2019;
- c) That this Honourable Court be and is hereby pleased to re-hear the Petition herein; and
- d) That the costs of this Application be provided for.

2. The application is based on the grounds set out on its face as follows:

- a) That the Petitioner is aggrieved by the Judgement/Decree delivered herein on 28<sup>th</sup> March 2019 and desires to obtain a review of the said Judgement/Decree;
- b) That no appeal has been preferred against the aforementioned Judgement/Decree;
- c) That there is new and important matter or evidence arising from CMCC NO. 1139 of 2013 (hereinafter referred to as the "Suit") which, after the exercise of due diligence was not within the Petitioner's knowledge or could not be produced by him at the time the decree was passed;
- d) That the 2<sup>nd</sup> Respondent delivered in the Suit a Judgement dated 28<sup>th</sup> November 2019 and a ruling dated 30<sup>th</sup> April 2020, which decisions are relevant to the proceedings herein because *inter alia* in paragraph 18 of its judgement the 2<sup>nd</sup> Respondent found the 1<sup>st</sup> Respondent to be in breach of Order No.2 of its directions issued on 12<sup>th</sup> June 2013 (hereinafter referred to as "the Unfulfilled Order") that was never overturned by way of review or appeal;
- e) That the 1<sup>st</sup> Respondent continues to disobey the Unfulfilled Order in a manner that contravenes the Petitioner's right to use and enjoy its property, undermines the rule of law and unjustly enriches the 1<sup>st</sup> Respondent to the detriment of the

**Petitioner in the amount claimed under prayer v of the Petition herein;**

- f) That the Judgement/Decree herein dated 28<sup>th</sup> March 2019 hinders the execution of the Unfulfilled Order, fails to advance the rule of law and fails to promote the rights and fundamental freedoms in the Bill of Rights;**
- g) That the Petitioner has paid herein the appropriate court filing fee for its claim in prayer v of the Petition;**
- h) That this Application has been made without unreasonable delay;**
- i) That it is fair and just to grant this Application.**

3. The application is also supported by an affidavit sworn by the Edward Thiongó Wachira who is the managing director of the Applicant company.

4. A brief history is necessary. The Applicant filed a petition dated 15<sup>th</sup> June, 2016 against William Muthee Muthami, the 1<sup>st</sup> Respondent and the Chief Magistrate's Court, Milimani Commercial Courts, the 2<sup>nd</sup> Respondent. The genesis of the matter was a relationship created through a tenancy agreement in respect of LR. No. 103/394, South C Mugoya Estate between the Applicant and the 1<sup>st</sup> Respondent.

5. Through the petition the Applicant sought the following reliefs:

**a) A declaration be and is hereby issued that the orders issued on 23<sup>rd</sup> March 2016 in Nairobi Milimani CMCC No. 1139/2013, William Muthee Muthami vs Dewdrop Enterprises Limited breached the Petitioner's rights and fundamental freedoms under the provisions of Articles 2(2), 10, 27, 40, 48, 50, & 159(2) of the Constitution of Kenya, hence void for all intents and purposes;**

**b) Judicial Review by way of an order of certiorari to remove into the Court and quash the orders issued on 23<sup>rd</sup> March 2016 in Nairobi, Milimani, CMCC No. 1139/2013, William Muthee Muthami vs Dewdrop Enterprises Limited;**

**c) A declaration be and is hereby issued that the initiation, maintenance and prosecution of the 1<sup>st</sup> respondent's application dated 1<sup>st</sup> October 2015 in Nairobi, Milimani, CMCC No. 1139/2013, William Muthee Muthami vs Dewdrop Enterprises Limited, in the manner intended, contravenes the petitioner's constitutional rights, is an abuse of the court process, malicious and oppressive;**

**d) An order be and is hereby issued prohibiting continuance of the 1<sup>st</sup> respondent's application dated 1<sup>st</sup> October 2015 in Nairobi, Milimani, CMCC No. 1139/2013, William Muthee Muthami vs Dewdrop Enterprises Limited, in the manner intended;**

**e) An order be and is hereby issued directing the respondents to pay the petitioner the sum of Kshs. 3,405,110/= together with interest thereon at the rate of Kshs.2000/= per week from 1<sup>st</sup> October 2014 until payment in full;**

**f) The respondents do bear the cost of this Petition.**

6. The petition was dismissed in a judgement delivered by this Court (Mwita, J) on 28<sup>th</sup> March, 2019. The Applicant being aggrieved by the judgement filed a notice of appeal on 29<sup>th</sup> March, 2019 and proceeded to inform the 1<sup>st</sup> Respondent of the intended appeal through a letter dated 15<sup>th</sup> April, 2019.

7. In support of the instant application, the Applicant avers that his suit was dismissed by the 2<sup>nd</sup> Respondent on 28<sup>th</sup> November, 2019 and through a ruling delivered on 30<sup>th</sup> April, 2020, the Magistrate's Court declined to execute the Unfulfilled Order. It is contended that the decisions of the 2<sup>nd</sup> Respondent are relevant to these proceedings because in paragraph 18 of the Judgement the 2<sup>nd</sup> Respondent found the 1<sup>st</sup> Respondent to be in breach of the Unfulfilled Order. The Applicant further states that the 1<sup>st</sup> Respondent continues to disobey the Unfulfilled Order in a manner that contravenes its right to use and enjoy its property thereby unjustly enriching the 1<sup>st</sup> Respondent. It is additionally the Applicant's case that the judgement delivered by this Court on 28<sup>th</sup> March, 2019 hinders the execution of the Unfulfilled Order.

8. The 1<sup>st</sup> Respondent opposed the application through grounds of opposition dated 11<sup>th</sup> January, 2021 as follows:

**a) That the Application is an abuse of the court process, frivolous, vexatious and a waste of quality judicial time;**

**b) That the Applicant has proved to be a vexatious litigant who should now be declared as such and barred from filing any further pleadings in Court; and**

**c) That the Application for review cannot be entertained when the Applicant did already file the Appeal, which Notice of Appeal was filed on the 29<sup>th</sup> March 2019 and served upon them on 8<sup>th</sup> April 2019, thus ousting the review remedy.**

9. The Applicant through submissions dated 27<sup>th</sup> January, 2021 urged that this Court has jurisdiction under Article 165(3)(d)(ii) of the

Constitution to hear any matter concerning the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or any law is inconsistent with or in contravention of the Constitution. It is further the Applicant's submission that under Article 165(3)(d) of the Constitution this Court has jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. The Applicant cited the decisions in the cases of **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate & 4 others [2013] eKLR** and **Abdisalam Hassan Ismail & 2 others v Kenya Railways Corporation & 3 others [2015] eKLR** in support of its assertions.

10. The Applicant additionally states that under Rule 82 of the Court of Appeal Rules, 2010 a civil appeal is deemed to have been properly preferred if it is filed in the appropriate registry within 60 days from the date the notice of appeal is lodged. The Applicant submits that Section 80 of the Civil Procedure Act as well as Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 allows this Court to review its own decisions.

11. Turning to the substance of the application, it is submitted that the 1<sup>st</sup> Respondent continues to disobey the Unfulfilled Order to the detriment of the Applicant. The Court is therefore urged to review its judgement. In support of this argument the Applicant relied on the case of **Africa Management Communication International Limited v Joseph Mathenge Mugo & another [2013] eKLR**. The Applicant submits therefore that this Court should hear the petition again and thereafter enter judgment against the 1<sup>st</sup> Respondent in terms of prayers v and vi of the petition.

12. The first issue to be considered in this application is whether the Court has jurisdiction to hear this application in view of the fact that the Applicant filed a notice of appeal against the judgement he now wants the Court to review. I am alive to the conflicting jurisprudence on the issue as to whether the filing of a notice of appeal denies the trial court the mandate to review its judgement or decree-see the discussion of the issue in **Abdisalam Hassan Ismail & 2 others v Kenya Railways Corporation & 3 others [2015] eKLR**.

13. On my part, I do not find it necessary to engage in a debate on the impact of a notice of appeal on an application for the review of a judgement or decree. I say so because the latest decision from the Court of Appeal holds that once a notice of appeal is filed, this Court has no jurisdiction to entertain an application for the review of its decision. This statement of the law is found in the case of **Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR; Civil Appeal No. 60 and 62 of 2017** where it was held that:

**“Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time when the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed it would then pursue the appeal. It was gambling with the law and judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place. There can be no place for review once an intention to appeal has been intimated by filing of a notice of appeal. (See: Kamalakshi Amma v A. Karthayani [2001] AIHC 2264). The respondent's application for review was therefore incompetent hence the court did not have jurisdiction to grant the orders sought under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.”**

14. The law as stated above should lead to the dismissal of the application at this stage. I will, nevertheless, proceed to consider the substance of the application for completeness of the matter. The question that follows is whether the application for review has met the threshold prescribed in the law.

15. This Court is empowered by Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, 2010 to review its own judgement or decree where there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by the applicant at the time when the decree was passed or the order made; there is some mistake or error apparent on the face of the record; or for any other sufficient reason.

16. In the case of **Republic v Anti-Counterfeit Agency & 2 others Ex-Parte Surgippharm Limited [2014] eKLR**, it was held that:

**“It is clear that unlike Order 45 (which is a delegated legislation), section 80 of the Civil Procedure Act, (which is the parent Act) gives the court wide and unfettered jurisdiction in the exercise of its powers of review and does not prescribe the conditions upon which an application for review may be granted. In the case of Official Receiver and Provisional Liquidator Nyayo Bus Service Corporation vs. Firestone EA (1969) Limited Civil Appeal No. 172 of 1998 the Court of Appeal held that section 80 of the Civil procedure Act enables a court to make such orders on review application which it thinks just so that the words “or any sufficient reason” as used in Order 44 [now Order 45] rule 1 of the Civil Procedure Rules are not ejusdem generis with the words “discovery of new and important matter” etc. and “some mistake or error apparent on the face of the record” and that those words extend the scope of the review.”**

17. In the case of **Evan Bwire v Andrew Nginda, Civil Appeal No. 103 of 2000, Kisumu, (2000) LLR 8340**, the Court noted that:

**“An application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case afresh.”**

18. In the case of **Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR** it was held that:

**“The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law or exercised his discretion would amount to exercise of Appellate Jurisdiction, which is not permissible.”**

19. The Court of Appeal while discussing the power of review of a judgment in the case of **National Bank of Kenya Limited v Ndungu**

Njau [1997] eKLR opined 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. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”**

20. A look at the instant application, the supporting affidavit and the annexures thereto does not disclose any new and important matter as alleged. The impression one gets is that the Applicant is trying to review the decision of the Magistrate’s Court through this application. He has not pointed out the new and important evidence that was not available to him when his petition was heard by this Court. The judgement and ruling that were delivered by the Magistrate’s Court long after the judgement of this Court was delivered cannot be categorized as new and important evidence. Those events can only be the subject of fresh appeals which cannot be connected to the decision in this matter.

21. The Unfulfilled Order which has brought the Applicant to these shores was issued in CMCC No.1139 of 2013 on 12th June, 2013 long before the petition was filed. If the Order was material at the time of the filing of this petition, then the Applicant ought to have included it in its pleadings. The Applicant cannot plead that the Unfulfilled Order was not within his knowledge and any shortcoming in respect of the Order can only be attributed to failure to exercise the necessary due diligence as is required.

22. The Applicant does not claim that there is an error on the face of the judgement and neither does he seek a review of the judgement for any other sufficient reason.

23. A reading of the application shows that the Applicant also wants this Court to overturn the judgement in its entirety and order for a fresh hearing of the petition. The Applicant has not established the grounds for setting aside the judgement. The Applicant seeks a review of the judgement and at the same time prays that the judgement be set aside. Unfortunately, the Applicant has not met the conditions for the grant of any of the orders sought.

24. The Judge gave clear reasons for dismissing the petition when he stated that:

**“35. In the present petition, the petitioner had first to exhaust the process of appeal provided for under the Civil Procedure Act and Rules or demonstrate that the alternative remedy provided for was not sufficient. Only then could it file the present petition. The above position is also in line with the provisions of section 9 (2) of the Fair Administrative Action Act, 2015 that a review of an administrative action will not be entertained unless the alternative remedy has been exhausted.**

**36. It is therefore clear that this court cannot intervene in the circumstance of this case. I say so because the petitioner has not demonstrated that the Magistrate’s court acted outside its constitutional or legal mandate; that it was unconstitutionally constituted or that the impugned decision was ultra vires. Only then would this court exercise its jurisdiction of judicial review and deal with the impugned decision. The petitioner still has a remedy in the form of appeal which it can pursue.**

**37. In conclusion, having considered this petition, submissions and the law, I am not persuaded on its merit. And as I have already adverted to herein above, the petitioner has not established that the 1st respondent violated its rights. The 2nd respondent on the other hand, was exercising its constitutional and legal mandate and made a decision in that regard. If there was an error of fact or law, that was an issue to be pursued on appeal. It could not justify the filing of a constitutional petition.”**

25. I need not say more in order to reach the inevitable conclusion that the Applicant has not established any ground to warrant a review or the setting aside of the judgement delivered in this petition on 28<sup>th</sup> March, 2019. The appropriate order is to dismiss the Applicant’s notice of motion dated 18<sup>th</sup> May, 2020. Having dismissed the application, it follows that the Applicant will meet the 1<sup>st</sup> Respondent’s costs in respect to the application.

**DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF JULY, 2021.**

**W. Korir,**

**Judge of the High Court**

**DATED, COUNTERSIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF JULY, 2021.**

**J. A. Makau,**

**Judge of the High Court**