REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 96 OF 2016

JEREMIAH CHELANGA (Suing as the Guardian Ad Litem of

JOHN CHELANGA CHEPKONGA……..……..PLAINTIFFT

VERSUS

THE BOARD OF MANAGEMENT

KAMATONY PRIMARY SCHOOL……...1ST DEFENDANT

THE SUB COUNTY COMMISSIONER

TRANS-NZOIA EAST……...…….....2ND DEFENDANT

THE CHIEF, SUWERWA LOCATION..……3RD DEFENDANT

THE HON. ATTORNEY GENERAL…….4TH DEFENDANT

RULING

(On review and setting aside of judgment)

The Application

1. On **23/7/2021**, the Second Defendant (**2nd Defendant/Applicant**, herein Referred to as **the Applicant**) filed in this Court a Notice of Motion dated the same day. The Motion was filed under Certificate of Urgency. It was bought under **Articles 47** and **159 (2)** of the **Constitution of Kenya**, **Sections 1, 1A, 1B, 3, 3A** and **80** of the **Civil Procedure Act, Cap 21** and **Order 12 Rule 7** and **Order 45 Rule 1** of the **Civil Procedure Rules 2010.** It sought the following orders:

> **(i) …spent**
>
> **(ii) That the directions given on 12/3/2020 be stayed and delivery of judgment date be arrested forthwith pending the hearing and determination of this application**
>
> **(iii) That the proceedings and directions made herein on 12/3/2020 when the court directed that the defendants' case be closed be reviewed, set aside and or vacated forthwith**
>
> **(iv) That the court do re-open the defendants' case and allow the defendants to avail their witnesses to testify**
>
> **(v) That in the alternative the judgment be reviewed, set aside and or vacated forthwith as the submissions of the defendants was not brought to the attention of the court when the impugned judgment was made.**
>
> **(vi) That costs of the application be in the cause.**

2. The Applicant is a State Office represented by the Office of the Attorney-General, through the State Counsel. The State Counsel, one **Mr.**

Peter Kuria, swore an affidavit on **23/7/2020** (underline for emphasis) in support of the Application. Attached to the application were annextures which were to evidence the facts deponed to. It is noteworthy that on **14/6/2020** the Deputy Registrar issued a Notice regarding all matters in which submissions had not been filed. This one was one of them (**Serial No. 14**). Then a month later, on **17/7/2020**, the Applicant filed submissions dated **14/7/2020**. Judgment was delivered on **30/7/2020** yet the affidavit in support of the Application herein was sworn a week earlier, on **23/7/2020**, but nothing was done by the Applicant. It then took a year to bring the instant Application (refer also to **Paragraph 29** below).

3. It is the Applicant's contention that it was condemned unheard in violation of **Article 47** of the **Constitution** and the rules of natural justice. Counsel gives the reason for the failure of the Applicant being heard. He states that it was due to the fact that he did not capture the date in both his manual and e-diaries. This, he depones, occurred on **17/10/2019** when he was supposed to note to attend court on **12/3/2020.** That he did not know of this error due to the onset of the Covid-19 Pandemic which caused matters not to be fixed for mention for over a year. Therefore, to him the failure is excusable in the circumstances. He urges the court to consider the Applicant's amended defence filed on **28/3/2017.** Further, he argues that there is an error apparent on the face of the record that warrants the Court to review, set aside or vacate the proceedings and directions of **12/3/2020** and considers the Applicant's amended defense and Counter-claim filed on **28/03/2017** and list of documents filed on record; that the learned judge made a determination on "the erroneous assumption that the Defendant have not filed their submissions when rendering himself on the merits of the suit in the judgment" (see Ground iv of the Application) (*with emphasis added*) and that it is in the interest of justice that the judgment be reviewed so as to allow the court to avail itself on the **1st** to the **6th** defendants' submissions and render a new judgment based on all issues raised in the applicants' (*sic*) submissions.

4. Upon filing of the instant application, the court gave directions thereon on **23/7/2021.** These included that the application be certified urgent, the Respondent to file a response within **7 days** of service and the matter was fixed for mention on **23/9/2021** for further directions. Further, the court issued an order for stay of execution pending the hearing and determination of this Application.

The Response

5. The Application is opposed by the Plaintiff. He, **Jeremiah Chelanga,** swore a Replying affidavit on **6/8/2021** to support his contention. His response is that the application is incompetent, a mere afterthought and only intended to delay him from enjoying the fruits of the judgment; that the hearing date of **12/3/2020** was fixed by consent in court in the presence of **Mr. Kuria** on **17/10/2019;** that due to counsel's absence on the **12/3/2020**, and/or presence of any representative, the court ordered that the defence case be closed and the filing of submissions done; that it is now one (1) year since the court delivered its judgment and the applicant has not given sufficient reasons for both their absence in court and delay in moving the court; that staying judgment delivered one year ago does not serve any purpose, the defendants having been given chance to defend their case but failed to do so; that the Plaintiff will be prejudiced if the orders sought are granted since they have been in court for 5 years; that the Respondents should not be made to suffer for the actions of the Applicant and that justice delayed is justice denied and litigation should come to an end.

Submissions

6. This Court gave directions for parties to file submissions in respect to the instant application. By **23/9/2021,** the Respondents had filed theirs. The Applicant, however, did not. It was granted a further **14 days**. But, as at the time this file was given a ruling date and as at the time of writing this ruling there was none on record. And there is no explanation or any prompting by the Applicant on what went wrong with the filing or has been done since it was given extension to file them on that day. However, the presence or otherwise of the submissions does not impact negatively on the merit of the Application. This Court is able to study the Application and response thereto, analyze the law applicable and determine the Application. Perhaps the absence thereto may affect the award of costs only in the event that the Application succeeds.

Determination

7. To begin with, I will address **Prayer Nos. (ii)** and (**iii)** of the Application. The Applicant seeks an order of setting aside the directions given on **12/3/2020.** The prayer is specifically to the effect that the delivery of this court's judgment arrested pending the hearing and determination of this application and that the directions be set aside or vacated forthwith. Upon perusal of the record, I note that this Court delivered its judgment on the **30/7/2020** whereas this application was filed on **23/7/2021.** Since there was no interim prayer for the "arrest" of the judgment and that did not occur, in my view the prayer cannot be legally obtained by the Applicant and or granted for the obvious reason it is already overtaken by events. The Court does not grant prayers or give orders in vain. Any orders of a court must be directed at a definite subject and be capable of yielding a result. My understanding of the term "arrest" as used in the instant Application is that this court was required to issue an order suspending the "delivery of the judgment". That now cannot be possible since judgment has long been delivered. In a nutshell, the prayer is now moot. It is therefore a non-issue in so far as dispensing justice herein is requires. But I have one thing to say below about how the prayer was crafted.

8. The prayer was worded in part as follows "…**the directions given on 12/3/2020 be stayed and delivery of judgment date be arrested forthwith pending…"** From the phrase, it implies that it was the **"judgment date"** that was to be **"arrested"**. That means the Court would proceed to write the judgment but suspend or stop the arrival of the date and not the delivery of the judgment. Why would the Court write the judgment and then stop the "delivery of the date" and not the delivery of the judgment? Dates must keep moving. That is the ordinary course of nature: and that the Court takes judicial notice of.

9. Only the Being in charge of nature can cause "the delivery of judgment date" to be stopped or suspended. Well, if that is what the Applicant meant, I am afraid that to me is impossible. If that were to happen, this Court could have been given the powers of the Creator of the universe. I know not who under the sun can give that power. Even if we as a nation take pride in having given to ourselves one of the best modern Constitutions in the world in 2010, and by that Document, under **Article 1 (1)**, all sovereign power belongs to the people (as a collective), and they donate that judicial power to the Court, we cannot, however many in millions or billions we be, access that power to "arrest" the "judgment date"). There is One Infinite Sovereign of the universe (for those who believe in the existence of the Divine) and we as a nation are only one of many finite sovereigns of earth. It is only Him who can alter the course of nature. For instance, He did that during the time of Joshua when the children of Israel were at war with the Amorites when he 'arrested' the movement of the sun or earth (whichever

that stopped) until the Israelites won the war (See. **Joshua 10:12**, in the **Holy Bible**). This Court is incapable of doing this. Such simple errors occur, as I have said in other rulings, due to inadequate attention being paid when drafting documents.

10. I could have said more about how **prayer Nos. (iii)** and **(iv)** of the Application also contained issues in terms of crafting, for instance, why it is not necessary to restate in **Prayer No. (iii)** what the Court said or did ("…*when the court directed that the defendants' case be closed…"*) and the use of the word "**do**" and not "does" in **Prayer No. (iv)** but time does not allow me to teach drafting and grammar. I have to move onto the main issues herein. But the parting shot is that errors in or poorly drafted pleadings and documents can have far reaching implications. Of course, I have said in the **paragraph 7** above that I understood what the Applicant intended the court to give in that prayer.

11. Having said that, and upon careful consideration of the application, the affidavits in support and in opposition, the submissions filed herein (Respondents') and the case law relied, the only issues left for determination are:

(a) Whether the proceedings and directions of 12/3/2020 should be reviewed, set aside and or vacated.

(b) Whether the court should re-open the defendant's case.

(c) Whether the court should review, set aside or vacate its judgment dated 30/7/2020.

12. The first and second issue basically speak to the same point hence shall be discussed jointly. But I will first tackle the third issue because ordinarily, the other issues largely depend on the outcome of the third one.

(a) <u>Whether the court should review, set aside or vacate its judgment dated 30/7/2020</u>

13. First, it is correct that a court can, under certain circumstances, review its judgment or set aside one. But the two terms are not synonymous with each other. They refer to two different actions or steps which occur different spheres. But my understanding of what the Applicant wants this Court to do is to review its judgment. I say so because the entire prayer has to be interpreted as a whole. It states that "…*<u>in the alternative the judgment be reviewed, set aside and or vacated forthwith as the submissions of the defendants was not brought to the attention of the court when the impugned judgment was made.</u>*" This means that the desire of the Applicant is to have the judgment reviewed. The aspect of setting aside that he prays for is, in my view, peripheral and subsequent to and dependent on the success of the review.

14. Thus, starting with the first and main desire of the Applicant, the law governing the review of a court's judgment is set out in **Section 80** of the **Civil Procedure Act** and **Order 45 Rule 1(1)** of the **Civil Procedure Rules. Section 80** provides as follows:

"Any person who considers 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 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.

15. The honourable court is vested with the power and discretion to issue review orders on its judgments or rulings. In adds the Court of Appeal held that *"…the court has unfettered discretion to review its own decrees or orders for any sufficient reason."* Sufficient reasons have been explained not to be analogous to the grounds in the Rule since that would fetter the discretion of the Court [see ***Wangechi Kimita & Another vs Mutahi Wakabiru*** **CA No. 80 of 1985** (unreported)]. However, while the Court has such wide discretion, that discretion must be exercised judiciously.

16. Order 45 Rule 1(1) of the **Civil Procedure Rules** which provides as follows:

1) any person considering himself aggrieved-

a) by a decree or order from which an appeal is allowed but which no appeal is preferred; or

b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of a 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.

17. The conditions to be satisfied which are derived from the said **Order 45 Rule 1(1)**. They are basically three each of which must be looked at jointly with the fourth one, as summarized below:

(a) There must be discovery of a new and important matter or evidence which the applicant would not know of despite exercising due diligence and therefore not produce at the time of passing the decree; or

(b) There was a mistake or error apparent on the face of the record; or

(c) There is other sufficient reason to warrant that, and

***(d) The application must be made without unreasonable delay*.**

18. The pertinent issue for determination herein therefore, is whether the applicant has brought itself within any of the above conditions and their relationship as explained. The basic reason why the Applicant wants the judgment of the Court reviewed is explained in **Prayer No. (iv)** itself[u1] . It is to the effect that the Court did not consider the submissions by the Applicant. They argued that this was an error apparent on the face of record which obligates the Court then to review the judgment. Put differently, the applicant's contention is that there was an error apparent on the record for the reason that their submissions were not considered when the court drafted its judgment. They do not raise any issue as to the desired review being base on the other grounds in the Rule. Thus, the Court will consider the ground they raised, together with the issue of delay in bringing the Application.

19. In **Muyodi -v- Industrial and Commercial Development Corporation & Another (2006) 1 EA 243**, the Court of Appeal described an error apparent on the face of the record in the following terms:

> ***"....in Nyamogo & Nyamogo -v- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal..."***

20. Thus, an error apparent on the face of record must be one that is obvious to the eye, and it must be one which when looked at does not yield two results. It shows itself to the read ordinary reader of the record and not the one looking for something hidden or obscure: yeah, ***"… an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions."*** (See ***Chandrakhant Joshibhai Patel v R [2004] TLR, 218***). The question is: is failure to consider submissions if they are on record and are not brought to the attention of the Court fatal to a decision? To answer that, another question begs an answer: what is the purpose of submissions in any proceedings? I will begin my answer to this question by citing an excerpt from the Court of Appeal decision in ***Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR***. In the case, their Lordships had this to say:

> ***"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."***

21. From the quotation above, it is clear that submissions have a part to play in any proceedings before the Court. But, they do not and cannot take the place of pleadings and evidence by the parties. They are a party's parting shot in any issue before the Court. They constitute his voice on the opinion he holds on the issue. This does not mean that the opinion is final or a command to the court to ensure that it follows them or considers them. They may be right or wrong about the issue for determination. They may even be misleading or skewed on the point in issue. The court is not bound to take them into consideration. As the Court of Appeal rightly stated in the decision cited above, "there are many cases decided without hearing submissions but based only on evidence presented." So, submissions are only a small voice in any proceedings, which can be ignored: the big voice and which steers the court is in the pleadings and evidence.

22. Thus, I now go back my first question, is failure to consider submissions on record an error apparent on the fact of record? The simple and straight answer is, "yes". Courts are enjoined to consider submissions on record. They may not be bound by them, as stated above but it is important that they consider them. In the persuasive authority of ***Paul Odhiambo Onyango & another v Kalu Works Limited [2020] eKLR*** it was stated: ***"Failure to take into account submissions which are not on the court record is not an error apparent on the face of the record. It would have been only if the submissions were on record but in error the court failed to consider the same."*** But is that error fatal to the decision of the Court hence to warrant a review of a court's decision? "No", except if they raise a point which the Court, in its analysis, should have considered but it failed to so do hence in not considering them the court arrived at a decision which was obviously wrong.

23. It has been stated so in the persuasive authority of ***Bernard Kiiru Mwangi v Faulu Microfinance Bank Limited [2021] eKLR*** that ***"It is further worthy to note that submissions are not pleadings and the failure to consider the same would not be fatal if the Court has considered all the facts and issues that arise from the pleadings."*** I agree with my sister on this point. Since submissions only try to oil the he parts of the cog wheel of justice failure to consider them is not fatal to the decision unless it is obviously manifest that such failure has occasioned prejudice to the party who tendered them. But it is worthy of emphasis here that where there are no submissions on record, whether by the failure on the part of the party to file them or other, that does not constitute an error apparent on the face of the record.

24. I have perused the application, the Affidavit and the annexures thereto. I agree with counsel but only on one part: that the submissions were not considered by the court. But why did that happen? Because they were not on record during the preparation of the judgment. **Paragraph 8** of the said judgment states ***"the plaintiff filed his submissions on 18/5/2020. I have perused through the court file and found no submissions filed on behalf of the defendants. I have considered the amended plaint, the evidence and the submissions."*** The court prepared its judgment when the defendants had not filed their submissions. But the Court is clear that even in the absence of the submissions, it considered the pleadings and evidence. I have keenly perused the court record and found that indeed there are submissions filed on the **14/7/2020** on behalf of the defendants. However, the said submissions were filed long after the court gave directions on **27/5/2020;** and also, that they were filed 16 days before delivery of the judgment. It is not clear as to when they finally found their way onto the record since the

trial judge was clear that they were not on the record when he was writing his judgment. The defendants' counsel was duty bound to file the submissions on time so as to avoid miscarriage of justice.

25. Moreover, I have looked at the submissions and I am of the view that even if they would have been on record at the time of writing the judgment, the Court would not have arrived at a different decision since they only echo what the pleadings are and the evidence on the record.

26. Not every error apparent on the face of record leads a review of a judgment or ruling. Some of the errors are so minor that they will be subject to correction by the Court, under the power granted by **Section 100** of the **Civil Procedure Act**. Some of the errors may not necessitate an amendment for, for instance, where they are so insignificant that they do not affect the real issues between the parties. Only those errors apparent on the face of record that decapitate the real issues between the parties or go to the root of the issues in the matter will lead to the automatic right of a party benefitting from the Court's exercise of its wide discretion as explained above.

27. An illustration of the above point is worth giving here. Often, I have come across situations where some of my brothers and sisters from some communities (identity withheld) in Kenya misspelling and even not pronouncing my name "*Nyagaka*" wrongly. One would misspell the name as "*Nyagak*" and another "*Nyakaga*". I have no issues with that because I love the diversity of our cultures, tribes and communities: I actually enjoy it. Now, supposing while citing any of the decisions of this Court, one picks it in the manner explained as a misspelling, and delivers a decision with that error in the name and then a party reads and notes that, and the party goes shouting, "*Eureka, Eureka, there is an error apparent on the face of this record!"*. Will the party be heard to move the Court successfully to review that Court's decision?

28. The straight answer to the above question is negative. That would be like a person discovering some soil rolling down from the top of a mole-hill that is midway up Mt. Kenya and goes shouting to the entire community living on the mountain to evacuate because to him the mountain is coming down on them and there is a likelihood of a catastrophe.

29. Additionally, I have looked at the Affidavit in support of the Application herein and the Application itself. I am surprised that the Applicant swears to evidence that is non-existent. This will be evident as I analyze the issue of delay or otherwise in bringing the instant application to court. But to begin with such non-existing facts, I wish to quote **Paragraph 13** of the Affidavit sworn on **23/7/2020** in support of the Application. It is stated therein "***That it is in the interest of justice that the 4th Defendant who is a defender of public interest be heard on the suit dated 2/11/2016 through factual exposition in the defence and counter-claim***" (emphasis added by way of underline). I have combed through the entire file severally to find which suit was being referred to as dated **2/11/2016** and where a counter-claim was filed by the Applicant in this matter. Thank God the file is not bulky! There is none. Only an amended Defence dated **28/3/2017** was filed by them on **30/3/2017**. That amended defence contains no counter-claim.

30. I now turn to the issue of delay. Although the Applicant does not, in the prayers refer to the date of judgment, upon perusal of the court record it is evident that judgment was entered on **30/7/2020.** The instant Application was filed on **23/7/2021.** Again, as stated in **Paragraph 1** above, the Affidavit in support of the Application was sworn on **23/7/2020**. That is to say, it took the Applicant **one** (**1) year** after judgment was delivered, and **1 year** and **4 months** after the impugned Directions of **12/3/2020** to move the Court.

31. The Applicant has not explained the reasons for the delay save that counsel for the defendant has struggled to convince the court that he did not diarize the matter on the **17/10/2019** and thus were not aware of the date the directions were taken on **12/03/2020**. What counsel attached to his Affidavit in relation to **Paragraph 4** thereof as evidence of failure to diarize the mention of the suit on **12/3/2020** was an incomplete document of what he termed as an e-diary - **Annexture PK 1a** and another one page of a Diary purporting to show insertions of entries on a page reading as 12 March Thursday - **Annexture PK 2b**. **Annexture PK 1b** does not show anywhere that it is an extract of a diary from the State Law Office or it belongs to Peter Kuria.

32. Also, I conclude that **Annexture PK 1a** is incomplete because the document - titled "State Law Office, Civil Litigation Department, Schedule of Cases," which was meant to show to the Court the entries for the month of **March 2020** starts with entries of **Serial No. 27** - ***KTL, Pet 5/2017 Michael Bett Siror, 12/3/2020, MLS/142/2017, Odongo***. It is curious that the first page with **Serial Nos. 1-26** which should have showed continuity to **Serial No. 27** is missing of left out. Whether it was by design or other reason is a matter not within the Court's knowledge. Could it have been that it had other entries bearing the date of **12/3/2020** of which the suit in issue was listed as one? I say this because, Mr. Peter Kuria, wants this Court to believe that what he refers to as the e-diary mirrors that which he refers to as the manual diary.

33. Granted that the above is the position, then all that was captured in the manual diary should be reflected in the e-diary. But, the entries of **12/3/2020** in the e-diary annexed are only **4** (**Serials No. 27-30**) while the manual one has eleven (**11**) with the twelfth (**12th**) crossed. Of these, **only Serial Nos. 29** and **30** in the e-diary appear in the manual diary or in common. At best, the contents in the two documents are diverse from the other and cannot assist the Court to arrive at the truth about a mix-up in diarizing.

34. Moreover, although counsel gave a reason in **Paragraph 7** of the supporting Affidavit that it was until **29/06/2021**, and in **Paragraph 9** that the Plaintiff served the Defendant with a mention notice dated **17/06/2021** and gave a judgment date for **22/06/2021**, all these depositions are far from the truth. There is no record of a judgment date of **22/06/2021**. From **Paragraph 9** of Peter Kuria's Affidavit sworn on **23/7/2020** the mention notice purportedly (*I term it purported because there is none attached to the Affidavit*) marked as **Annexture PK 1** was to show that judgment was to be delivered on **22/6/2021**. Even if it would be taken that counsel referred to **22/06/2020**, there was no judgment delivered on that date. Thus, the mention of **29/06/2021** referred to in **Paragraph 7** does not exist. The suit was mentioned before the Judge on **30/6/2021**. Again, regarding the mention notice dated **17/6/2021** referred to in **Paragraph 9** of the Affidavit of Peter Kuria to indicate service for a judgment date of **29/06/2021** none was attached to the Affidavit (*I have looked at even the documents that were filed online and there is none*): the Paragraph is therefore hollow. Also, the record shows that rather the suit was mentioned, among others, before the Deputy Registrar on **22/6/2020** via Zoom to fix a judgment date. The notice was for the mention was issued on **4/6/2020.** Judgment delivered on **30/07/2020**. The Applicant was either confused or it did not pay keen attention to what it was moving the Court on and for.

35. Furthermore, the case does not belong to the Advocate/the State Counsel. Thus, he is not blameworthy. It is the role of the clients to follow up their case thus waiving their right to be heard. Notably, on the **12/3/2020** when the defendants' case was closed, the defendants'

witnesses were present in court chose to remain silent and watch. They waived their right to be heard. They failed to explain the whereabouts of their advocate and did not even request the court for an adjournment; they sat down watching their case closed. Thus, it is not true as argued by the Applicant's counsel that his client was condemned unheard hence that **Article 47** right under the 2010 Constitution was violated. The Court did not bar them from presenting their case on that date. This court being an impartial arbiter would not compel the Applicant to tender evidence or conduct its case if they (the representatives in court) chose to remain silent. **Article 50(1)** also provides for fair hearing, which would encompass the right of a party to remain silent in his matter before an impartial arbiter. There was no technicality applied or used by the Court when the directions were granted so as to avail the Applicant of its arguments along **Article 159(2)** of the Constitution.

36. After the case proceeded on **12/3/2020**, the Applicant never did anything. If what counsel depones to in the Affidavit (according to **Paragraph 7** thereof) in support of the Application is anything to go by, then the Applicant never contacted its lawyer, the state counsel/state law office, soon thereafter or at all, until he discovered on **29/6/2021** that the judgment was delivered (although it is worth remembering here that judgment was delivered a year earlier - on **30/7/2020** and the Affidavit was sworn a month before). How possible is that? Again, if that is true, then they are not interested in this matter. It is not explained that they informed their Advocate of the court proceedings on the material date. They too, as their counsel, did nothing but waited for the judgment to be delivered. They slept on their rights and failed to be diligent. To date no one on behalf of the Applicant has sworn an Affidavit on behalf of the Applicant to explain what happened: on the state counsel. That, to this court, tells a lot about their interest in this matter.

37. Any delay by a party in complying with timelines set either by law or a judicial body must be explained and satisfactorily so. Otherwise why, for instance, do applicants for job get disqualified from any consideration for shortlisting when they make their applications out of time? Or, why do successful job candidates get turned away by prospective employers when they purport to accept job offers after the time stipulated on the offers lapses? It means that where time is stipulated for doing something, time of essence. If the ordinary world in their usual business is keen on 'enforcing' the timelines they set, much more the courts. In the case of **John Agina v. Abdulswamad Sharif Alwi C.A Civil Appeal No. 83 of 1992** the court stated as follows:

> **"an unexplained delay of two years in making an application for review under Order 44 Rule 1 (now Order 45 rule 1) is not the type of sufficient reason that will earn sympathy from the court."**

38. In my considered view therefore delay of **1 year** and **4 months** which is unexplained amounts to unreasonable delay.

39. Lastly, an issue that raises interest, and which makes the Application herein to be an afterthought is that the Applicant was aware of the directions of **12/3/2020**, it actually indirectly or implicitly agreed to them by filing the submissions which it called on the Court to consider, and it insists that the Court should (in the alternative) take them into account in setting aside the judgment herein. Having participated in a step towards furthering the Directions of **12/3/2020**, that is to say, the preparation and filing of submissions, they are deemed to have agreed to the orders of that day. That amounted to acquiescence. They cannot be heard now to turn around and say that the directions of **12/3/2020** be reviewed. At the same time, if they wished the Court to review its orders as prayed, then they needed to file the Application before filing of the submissions. I add here that although **Paragraph 10** of the supporting Affidavit referred to the submissions and an email that forwarded them (both as **annextures PK 2a** and **b**), no annexture known as **PK a** was attached to the Application. (This also I have looked at even the documents that were filed online and there is none). Again, they could not have urged the Court to consider the submissions, as a basis for seeking an order of review on account of the Court's alleged failure to consider the submissions. This is what is known as blowing hot and cold at the same time or having one's cake and eating it at the same time. It is never permitted.

40. The upshot is that the Application lacks merit and is therefore dismissed with costs to the Respondent. The orders of stay of execution granted on the **23/7/2021** are hereby vacated.

It is so ordered.

Dated, signed and **delivered** at **Kitale via electronic mail** on this **10th** day of **November, 2021.**

DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE.

Further Note and Order

This Ruling is delivered electronically in view of the restrictions regarding court operations due to the **COVID-19 Pandemic**. More so, the step is pursuant to the directions issued by His Lordship, the Chief Justice on **15/3/ 2020** and those of **21/1/2020**, that judgments and rulings shall be delivered through video conferencing or via email. Parties having been duly notified of the same waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**.

HON. DR. *IUR* FRED NYAGAKA,

JUDGE, ELC, KITALE