



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CONSTITUTIONAL PETITION NO. 3 OF 2020

IN THE MATTER OF ARTICLES 2(1), 3(1) & (2), 10(1) & (2), 19, 20(1) & (3) 21, 23 35.

174, 175, 176, 196, 200(2)(d), 232 & 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTIONS 3, 8 & 14 OF THE COUNTY GOVERNMENTS ACT

AND

IN THE MATTER OF STANDING ORDER NO. 24, 25, 26 & 36 OF THE COUNTY ASSEMBLY OF BUNGOMA

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 2(1), 3(1) & (2),

10(1) & (2), 21, 35, 174, 175, 196 (1) OF THE CONSTITUTION

AND

IN THE MATTER OF CONTRAVENTION OF STANDING ORDER NO. 24,

25, 26 & 36 OF THE COUNTY ASSEMBLY OF BUNGOMA

AND

IN THE MATTER OF ILLEGAL SITTING BY THE COUNTY

ASSEMBLY OF BUNGOMA ON THE 14TH MAY, 2020.

BETWEEN

JOHN MAJOR MUKENYA.....PETITIONER

AND

THE CLERK COUNTY ASSEMBLY OF BUNGOMA.....1ST RESPONDENT

THE SPEAKER COUNTY ASSEMBLY OF BUNGOMA.....2ND RESPONDENT

COUNTY ASSEMBLY OF BUNGOMA.....3RD RESPONDENT

AND

FLORENCE FULANO WEKESA.....1ST INTERESTED PARTY

EVERLYNE NABWELELEA MUTYEMBU.....	2 ND INTERESTED PARTY
LUKE OPWORA.....	3 RD INTERESTED PARTY
JOSEPH NYONGESA JUMA.....	4 TH INTERESTED PARTY
MESHACK SIMIYU WEKESA.....	5 TH INTERESTED PARTY
JOSEPH MAGUDA.....	6 TH INTERESTED PARTY

RULING

By a judgement of this court delivered on 4/8/2021, the court gave the following orders;

- a. A declaration is hereby given that the 3rd respondent's sitting of the 14th May, 2020 was unconstitutional and contrary to the Bungoma county assembly standing orders for failure by the 2nd respondent to gazette the sittings.***
- b. The purported changes of leadership of the county assembly is hereby quashed and the status-quo obtaining before the 14th May, 2020 regarding the 1st to the 3rd parties be maintained.***
- c. There shall be no order as to costs.***

Thereafter, the respondents filed a Notice of Motion application dated 11/8/2021 seeking the following reliefs;

- a. That there be a temporary stay of execution of the judgement delivered on 4/8/2021 and dated 30/7/2021 as it is not possible to implement it in its current form as it was overtaken by the communication made on 9/6/2020 on the floor of the house.***
- b. That the court be pleased to review/vary the judgement as there is an apparent error on the face of the record.***
- c. Any other order***
- d. Costs be in the cause.***

The application is supported by the affidavit of Emmanuel Mukhebi Situma, the 2nd respondent and the speaker of the County Assembly. He depones *inter alia* that the judgement cannot be implemented in its current state as it has been overtaken by the events of 9/6/2020 which include the resignation of the 1st interested party from the position of majority leader. That on the same date, he also rescinded and expunged from the Hansard all the proceedings of the 14/5/2020 over the failure to gazette the special sitting.

That the current house majority leadership took office on the said 9/6/2020 pursuant to communications of the day and not on the basis of the sitting of 14/5/2020. That the judgement will bring confusion.

That there is an error apparent on the face of the record and new material facts that had not been brought to the attention of the court before the judgement was delivered. He depones that the NASA coalition which provided the house majority leadership has since been dissolved making the implementation of the judgement complex.

The application is supported by the 3rd, 4th, 5th and 6th interested parties.

The petitioner/respondent opposed the application on the grounds that there is no error apparent on the face of the record but rather a narration of events which require an argument before it can be established and could have preferred an appeal rather than a review.

That from the annexed documents, the applicant is seeking to introduce new evidence which was not available before the 14/5/2020 whereas the court merely concerned itself with the events prior to that date and cannot be sanitized by the events of the 9/6/2020. That the court had barred the events of 9/6/2020 and the sitting of the day was illegal.

The application was canvassed by way of written submissions which are on record. The court has considered the same.

The issue that commends itself for determination is whether the applicant has satisfied the grounds for a review of the judgement.

The power of the court to review a judgement is found in Section 80 of the Civil Procedure Act which provides;

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.

Order 45 Rule 1 of the Civil Procedure Rules provides;

1. (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.

It is clear that the judgment of the court has been overtaken by the events of 9/6/2020 where the assembly in its regular sitting rectified the sitting of 14/5/2020 which has been declared unconstitutional by the court.

The court agrees with the petitioner/respondent that the judgement related only to the sittings of the 14/5/2020 and the resolutions made pursuant thereto. At the time of delivery of the judgement, the parties had not appraised the court of the subsequent sitting which regularized the impugned sitting with the resultant effect being that the court acted on the material placed before it. This does not however take away the finding that the sitting of 14/5/2020 was un-procedural.

The grounds upon which a court can entertain an application for review are now well settled as provided for in Order 45 as;

1. 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 him at the time when the decree was passed or the order made or;

2. On account of some mistake or error apparent on the face of the record, or

3. For any other sufficient reason.

In this application, neither of the above grounds has been established by the applicant to warrant this court to review the judgment. The present application is without merit and the same is dismissed with costs to the respondent in this application.

DATED AT BUNGOMA THIS 3RD DAY OF NOVEMBER, 2021

S. N. RIECHI

JUDGE