REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

PETITION NO. 3 OF 2019

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

IN THE MATTER OF ARTICLES 1, 2 (1), 3, 10, 19, 20, 21, 22, 23, 24, 79, 165 (3), 174, 175, 186, 201, 207, 227, 258 AND 259 OF THE CONSTITUTION OF KENYA

BETWEEN

THE COUNTY GOVERNMENT OF KITUI.....PETITIONER

AND

ETHICS AND ANTI-CORRUPTION COMMISSION.....RESPONDENT

RULING

1. On 30th May, 2019 after hearing this petition, I issued the following orders:

> **i. A DECLARATION that where County Governments seek guidance on procurement, the EACC has a duty to furnish the requested guidance within a reasonable time so as not to impede the procurement process.**
>
> **ii. A DECLARATION that the investigative powers of the Ethics and Anti-Corruption Commission (EACC) in respect of county governments and their procurement of goods and services should not impede the procurement process.**
>
> **iii. THAT an injunction does issue restraining the Ethics and Anti-Corruption Commission (EACC) from preferring any charges relating to the acquisition of the five trucks to support livestock farmers and traders in Kitui County until it renders its opinion on the petitioner's intention to acquire the said trucks.**
>
> **iv. THAT an order compelling the Respondent to render its opinion as regards the petitioner's intention to acquire the said trucks as regards the steps taken by the petitioner in that regard todate; the said opinion to be rendered within 30 days from the date of delivery of this judgement.**
>
> **v. In event of the failure by the Respondent to comply with (iv) above, an order of certiorari shall issue quashing the decision by the EACC to halt payment being made by the Petitioner over the acquisition of the five trucks to support livestock farmers and traders in Kitui County.**

2. The petitioner herein, **The County Government of Kitui**, (hereinafter referred to as "the County Government") is back before me vide an application dated 17th October, 2019 filed on 18th October, 2019 seeking the following orders:

> **1) THAT this application be certified as urgent and service thereof be dispensed with in the first instance;**
>
> **2) THAT this Honourable Court be pleased to review the decision of this Honourable Court delivered on May 30, 2019, and to make a declaration that the opinion rendered by the Respondent in compliance to the orders issued by Hon. Odunga, J on May 30, 2019, is incompatible with the Constitution of Kenya, 2010;**
>
> **3) THAT this Honourable Court be pleased to correct and/or review its judgment and make a declaration that the Petitioner complied with Article 201, 232(b), of the Constitution of Kenya 2010 in acquisition of the five trucks;**

4) <u>THAT</u> this Honourable Court be pleased to issue any other order that this Honourable Court may deem fit in the circumstances; and

5) <u>THAT</u> this Honourable Court does grant the Petitioner the costs of this application.

3. According to the Petitioner, following the delivery of the said judgement, the Respondent, EACC, filed its opinion dated June 20, 2019, before this Honourable court and served the Petitioner to which the Petitioner responded through a letter dated July 1, 2019, but filed on July 2, 2019.

4. According to the Petitioner, the opinion rendered by the Respondent, has brought to light new and important evidence, which after the exercise of due diligence, was not within the knowledge of the Petitioner at the time of filing of the Petition and that the said opinion could not be produced by the Petitioner prior to when the order of this Court was made. It was the Petitioner's case that due to the opinion of the Respondent, the Petitioner, desires to obtain a review of the judgment passed by the Court as the Respondent has misrepresented factual matters for which this Court should exercise it jurisdiction for the purpose of confirming whether or not the steps taken by the Petitioner in acquiring the five trucks are compatible with the provisions of the Constitution.

5. According to the Petitioner, the opinion of the Respondent has left the Petitioner in a position where they are unable to enjoy the fruits of the judgment or to make any further progress forward and the Petitioner is again faced with the risk of litigation and court claims by the supplier contracted to supply the five trucks to the Petitioner. The Court was therefore urged to evaluate whether the report by the EACC in fact remedies the constitutional infringement and whether it brings the Respondent into compliance with its constitutional obligations. The Petitioner urged the Court to consider the report by the Respondent vis-à-vis the response by the Petitioner on the matter, and in juxta positioning the two reports, render a determination on whether or not the Petitioner complied with the provisions of the Constitution and the relevant laws on procurement and public finance, when procuring the aforesaid trucks. The Petitioner lamented that the interest of the public are still at stake as the Petitioner still cannot proceed to take possession of the aforesaid trucks as the report by the Respondent is askew and the county officials have not been charged before a court of law with competent jurisdiction. It contended that the residents of Kitui County are still unable to transport their livestock to the market due to lack of the five trucks that were to be acquired.

6. The Petitioner averred that this Honourable Court is mandated to issue appropriate reliefs which the Petitioner, and the public are entitled to as per the provisions of Article 23 of the Constitution of Kenya, 2010 which appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced.

7. While appreciating that the Respondent has filed an appeal, being **<u>EACC vs. County Government of Kitui Court of Appeal, Civil Appeal No. 385 of 2019</u>**, at Nairobi, the Petitioner disclosed that it has not appealed the decision of this Court and in its view, no common ground exists in the appeal and this review that the Petitioner can present to the appellate court.

8. The Petitioner contended that this Application has been made without unreasonable delay; there has been discovery of new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; and there are sufficient reasons for the grant of this application.

9. Based on legal advice, the Petitioner's case was that this Court is mandated to consider the contested legal issues that are subsisting before it and that the review of the orders of this Court is to allow the acquisition of the five trucks by the Petitioner, and not intended to have this Honourable Court make a decision whose effect would be to exonerate the Petitioner from any wrongdoing that it might do in the process of procuring the said trucks since the Respondent's opinion is factually unsound and biased with the intention of defeating the Petitioner approaching this Court for appropriate relief.

10. After dealing with the Respondent's opinion and the Petitioner's response thereto, the Petitioner averred that based on the facts stated above, the Petitioner need to have a review of the orders issued by this Honourable Court on May 30, 2019.

11. In its response the Respondent averred that it complied with the orders issued by this court and further forwarded its recommendations of the results of the investigations to the Director of Public Prosecution. According to the Respondent being dissatisfied with this Court's decision it lodged an appeal to the Court of Appeal.

12. In the Respondent's view the present application does not meet the threshold in Order 45 of the ***Civil Procedure Rules***. According to it, its opinion was rendered pursuant to the orders of this Court and that the Court is therefore functus officio and cannot review its judgement. According to the Respondent, the Petition by the present application is seeking to amend its pleadings and prayers and to sanitize the procurement malpractices committed and turning this court into a trial court to evaluate the legality and/or correctness of the opinion rendered by the Respondent at the investigative stage hence usurping the mandate of the Respondent.

13. It was submitted on behalf of the Petitioner that the Petitioner/Applicant is entitled to a review of the judgment passed by this Court since the Petitioner has demonstrated sufficient grounds for the review of the judgment passed by this Honourable Court. According to the Petitioner, the opinion rendered by the Respondent was never within the knowledge of the Petitioner. Where the Respondent had advised the Petitioner in the manner it has done in the opinion, then the opinion would have been considered as evidence within the knowledge of the Petitioner, which could then be produced by the Petitioner when approaching this Court at the onset. The opinion of the Respondent, however, was rendered on June 20, 2019. It was submitted that the Respondent address several aspects of the process of procurement of the five trucks for livestock transportation by the Petitioner. The manner in which the Respondent addressed the process was not within the knowledge of the Petitioner. The Petitioner contended that the aspects raised in the opinion rendered by the Respondent relate to issues of facts which emerge from evidence, and therefore satisfy the requirement of new and important information which could not be produced by the Petitioner at the onset.

14. Based on the decision of the Supreme Court in **<u>Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3</u>**

Others [2013] eKLR, it was submitted that the opinion rendered by the Respondent, EACC, brought to light pertinent matters. This, satisfied the requirement on new and important information. Further, it can be categorized as sufficient reasons for this Honourable Court to review its decision. According to the Petitioner, in determining whether or not the steps taken by the Petitioner in acquiring the five trucks are compatible with the Constitution, this Honourable Court would effectively be issuing an appropriate relief as the circumstances of the case demand. It was the Petitioner's view that the nature of structural interdicts allows this Honourable Court to review its decision. It was therefore urged that this Court should grant the prayers sought in the Application filed on October 18, 2019.

15. For the Respondent it was submitted that crux of Applicant's Petition of 26th February, 2019 was seeking the court to compel the Respondent to issue guidance on procurement of supply and delivery of 5 trucks suitable for livestock transportation: Tender Reference No. CGO/KTI/118/2017-2018 within a reasonable time. This guidance was rendered by the Respondent on 20th June 2019 as ordered by court it its Judgment of 30th May 2019. The Respondent further acted swiftly in concluding its investigations and has since forwarded the report on recommendations of the results of the investigation to the Director of Public Prosecution (DPP). Subsequently, upon independent review of the report and the recommendations thereof, the DPP gave consent to charge the suspects with several offences under the Anti-Corruption and Economic Crimes Act, 2003 (*"the ACECA")*. The DPP further instructed the Respondent to arrest and present the suspects to be arraigned in court for plea taking.

16. Pursuant to the DPP's directions, the Respondent effected arrest of **Francis Nyalo Kea**, the Acting Chief Officer and Accounting Officer in the Trade, Co-operative and Investment Department at Kitui County Government and **Joshua Kalola Munyaka**, the Head of Supply Chain Management at Kitui County Government at Kitui County Government on 20.01.2020 and had them arraigned before Chief Magistrate **Hon. Mbungi** at Kitui Law Courts in Kitui Anti-Corription Case No.2 of 2020: ***Republic=vs=Francis Nyalo Kea & Joshua Kalola Munyaka.*** According to the Respondent, the present application has been overtaken by events and the Trial Court should accord an opportunity to the Trial Court to exercise its mandate by conducting the trial to term and the Notice of Motion dated 17th October, 2019 should be dismissed with costs to the Respondent.

17. It was submitted by the Respondent that in this application, the Applicant is not only asking this Honourable court to exercise its jurisdiction in confirming whether or not steps taken by the Petitioner in acquiring five trucks are compatible with the Constitution (which is an issue for trial, but also inviting this Honourable court to re-open, rehear and recall its decision of 30th May, 2019 and thereafter render a fresh determination. According to the Respondent, in the present case, whereas the Applicant alleges that the said opinion has brought to light new important evidence, which after the exercise of due diligence was not within the knowledge of the Petitioner, the Applicant does not categorically/specifically state with precision or highlight the "new important evidence" discovered upon reading the Opinion of the Respondent. It was contended that the majority relevant documents relied upon are not new to the Applicant as the same were either authored by and /or supplied by the said Applicant.

18. It was therefore submitted that there is no new and important evidence that could not be produced by the Applicant in the Petition dated 26th February 2019. Indeed, all the issues raised in the present Application are the same ones raised when the Petition was canvassed and upon which the court arrived at its determination on 30th May 2019. It was further submitted that whereas the Applicant did not prefer an appeal against the Judgment of 30th May, 2019, on 18th October 2019, three months later, the application filed for review with no explanation rendered on what occasioned the unreasonable delay and the Respondent relied on the case of **Chelimo Plot Owners Welfare Group & 288 others vs. Langat Joel & 4 others (sued as the Management Committee of Chelimo Squatters Group) [2018] eKLR**.

19. Further, it was submitted that Order 45(1) of the ***Civil Procedure Rules*** makes it mandatory for the Applicant to attach judgment and orders/decree sought to be reviewed. In this case the Applicant failed to attach the orders/decree sought to be reviewed thereby rendering the application fatally defective.

20. The Respondent's case was therefore that the Application does not meet the threshold in Order 45(1) of the ***Civil Procedure Rules*** which sets out the requirements for an application for review.

21. It was the Respondent's submissions that the court issuing this decree sought to be reviewed was rendered *functus officio* when it made its decision on 30th May 2019 and the orders complied with, therefore it cannot review the judgment as it is sought in the Notice of Motion dated 17th October 2019. The Respondent submits that the court had exercised its judicial function which is the very reason the Petitioner had moved this Honourable Court seeking declarations that the Court to settle/determine the said issues in controversy. The court has already decided and pronounced itself on matter in dispute and therefore *functus*.

22. Upon delivery of the judgment, the Applicant was well aware which orders were granted and which ones were not. If it was dissatisfied by the extent of the orders granted, it was open for it to appeal to the Court of Appeal against such part of the decision that it was dissatisfied rather than vex the same court by re-litigating the same issues afresh. In the main petition, the Petitioner painted a false picture of a public body genuinely interested in the advice of the Respondent in order guide it in procurement.

23. Upon the opinion being rendered, the true intention of the Petitioner has come out vide the present application. At paragraph 22 of the supporting affidavit, **Dr. Joshua Chepchieng** deposes that the true intention of the application is 'to allow the acquisition of the five trucks'. It is therefore patently clear that the true intention of the Applicant *ab initio* was not to be guided by the Respondent but to go ahead with the flawed procurement and through these proceedings, obtain judicial immunity from accountability. The court is being asked to substitute the opinion of the Respondent with that of its own. This it cannot do without usurping its mandate. It has been urged in many a decision that Courts should be slow to interfere with the mandates of other organs.

Determination

24. I have considered the issues raised in the present application.

25. In order to justify the Court in granting an application for review sought by the applicant under the provisions of Order 45 rule 1(b) of the ***Civil Procedure Rules***, certain requirements must be met. The said provision states 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***
>
> ***(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."***

26. It was contended that the application for review was incompetent because the decree was not annexed to the application. It was however not contended that there was no such decree extracted in the file. In my view I would go by the decision of the Court of Appeal in **Veronica Rwamba Mbogoh vs. Margaret Rachel Muthoni & Another [2006] 1 KLR 199; [2006] 1 EA 174** where it was held that:

> **"Where the decree ensuing from the Judgement was issued on the same day as the date of the application for review and the supporting affidavit was sworn and filed a day later, there was substantial compliance with the procedure and it was a drastic sanction to dismiss the application on the mere basis that there was no copy of the decree annexed to an application filed in the same record which bore the decree."**

27. **Koome, J** (as she then was) in **Peninah Wambui Mugo vs. Moses Njaramba Kamau Nakuru HCCS No. 238 of 2004** held that:

> **"The purpose of the decree or order to be reviewed being annexed is to enable the court appreciate the order or decree that the applicant is unhappy with. In this case the very decree is annexed to the replying affidavit by the plaintiff and therefore the court will not be at a loss as to what is to be reviewed as the order was extracted and signed."**

28. In my view, to dismiss an application for review based on the ground that the decree or order sought to be reviewed was not annexed to the application when it is not contended that the same was not drawn and extracted would amount to elevating procedural rules a to a fetish. In the premises I decline to disallow the application on that basis.

29. ***The Code of Civil Procedure,*** Volume III Pages 3652-3653 by **Sir Dinshaw Fardunji Mulla** states:

> ***"The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure…The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper."***

30. In **Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited Nairobi (Milimani) HCCC No. 532 of 2004, Okwengu, J** (as she then was) expressed herself as hereunder:

> **"In this case the court is being invited to review the order on the grounds that there is an error apparent on the face of the record or other sufficient reason the pleadings, in particular, the plaintiff's reply to the amended defence in which the plaintiff is alleged to have conceded that the defendant's fee policy was illegal and *contra statute* which was the basis of the Defendant's application for striking out the plaint. It is the defendant's contention that the plaintiff is bound by his pleadings and could not therefore depart from the same…It is my considered opinion that the pleadings went beyond the reply to the amended defence and to understand the matters which were in issue one has to look at the plaint *vis-à-vis* the amended defence and the reply to the amended defence. A careful reading of the ruling however, makes it clear that the court had the pleadings in mind and moreover, there is no basis for the conclusion that the court would have arrived at any different decision. The court was simply interpreting the provisions of Section 36 and 45of the Advocates Act as read with the Advocates Remuneration Order and it was not bound by any position taken by the parties. It may well be that the court was wrong in its interpretation or in the approach it took. However, that is not a matter that can be taken up on review as it is not an error apparent on the face of the record but ought to be subject of an appeal. Moreover to invite the court to set aside the order of dismissal and substitute it with an order striking out the plaint and dismissing the plaintiff's suit in effect is to invite the court to sit on appeal on its own ruling and make a complete turnaround which is not within the purview of Order 44 of the Civil Procedure Rules.**

31. That was the Court of Appeal's decision in Court of Appeal case of **Anthony Gachara Ayub vs. Francis Mahinda Thinwa [2014] eKLR** which quoted with approval the judgment of the High Court in **Draft and Develop Engineers Limited vs. National Water Conservation and Pipeline Corporation**, by stating:

> **"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 a 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 a 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 apparent on the face of the record even though another view was also possible."**

32. With respect to the other issues raised, the Court of Appeal in **Mahinda vs. Kenya Power & Lighting Co. Ltd [2005] 2 KLR 418** expressed itself as follows:

> **"The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry 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."**

33. The decision whether or not to review a court's decision was well captured by the Court of Appeal in **Mumby's Food Products Limited & 2 Others vs. Co-Operative Merchant Bank Limited Civil Appeal No. 270 of 2002,** where it was held 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 however 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 a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion. Misconstruing a statute or other provisions of the law therefore cannot be a ground for review.

34. That was the Court of Appeal's decision in **Anthony Gachara Ayub vs. Francis Mahinda Thinwa [2014] eKLR** which quoted with approval the judgment of the High Court in **Draft and Develop Engineers Limited vs. National Water Conservation and Pipeline Corporation**, by stating:

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35. In this case, it is clear that the Court did not issue any structural interdicts. Instead the Court issued final order. It issued and order of injunction restraining the Respondent from preferring any charges relating to the acquisition of the five trucks to support livestock farmers and traders in Kitui County until it renders its opinion on the petitioner's intention to acquire the said trucks. It further compelled the Respondent to render its opinion as regards the petitioner's intention to acquire the said trucks within 30 days from the date of delivery of the judgement and in default of so doing it directed that an order of certiorari would issue quashing the decision by the Respondent to halt payment being made by the Petitioner over the acquisition of the five trucks to support livestock farmers and traders in Kitui County.

36. What has provoked the present application is the opinion given by the Respondent pursuant to the said order. According to the Petitioner/Applicant, the opinion rendered by the Respondent has brought to light new and important evidence, which after the exercise of due diligence, was not within the knowledge of the Petitioner and that the opinion rendered by the Respondent could not be produced by the Petitioner when the order was made or during the hearing of the Petition.

37. When this Court delivered its decision, it was obvious that the Respondent's opinion had not been given. In fact it was, inter alia, the failure by the Respondent to give its opinion that led to the filing of the petition. Therefore, it cannot now lie in the mouth of the Applicant that there is a new and important evidence, which after the exercise of due diligence, was not within its the knowledge arising from the opinion given pursuant to the orders of this Court.

38. In the present application the Petitioner now seeks a declaration that the opinion rendered by the Respondent in compliance to the orders issued on May 30, 2019, is incompatible with the Constitution of Kenya, 2010 and to declare that the Petitioner complied with Article 201, 232(b), of the Constitution of Kenya 2010 in acquisition of the five trucks. As I have stated at the time of the judgement, the opinion in question was non-existent. I agree with **Warsame, J** (as he then was) in **Sara Lee Household & Body Care (K) Ltd vs. Damji Pramji Mandavia Kisumu HCCC No. 114 of 2004** that the essence of a review must ordinarily be to deal with straight forward issues which would not fundamentally and radically change the judgement intended to be reviewed, otherwise parties would lose direction as to the finality of a decision made by a particular court as on occasions a review may necessarily entail arriving at a decision different from the one originally arrived at. This was the position in **Atilio vs. Mbowe (1969) THCD** where it was held that an application for review should not be granted if it will result into the orders, which were not contemplated.

39. It is clear that the cause of action in this application is the opinion rendered by the Respondent which was not in existent at the time the judgement was being delivered. Its constitutionality or otherwise was not in issue at that time and it could not be because no one knew the nature of the opinion the Respondent was intending to give. It is therefore clear that what is being sought in this application was not and could not have been in contemplation of the court when it rendered its decision. In other words, the Respondent's opinion has given rise to a new cause of action i.e. its constitutionality. That is not an issue that can be dealt with by way of review. In the case of **Gurbachan Singh Kalsi vs. Yowani Ekori Civil Appeal No. 62 of 1958** the former East African Court of Appeal stated as follows:

> **"A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."**

40. The cause of action herein being the constitutionality of the Respondent's opinion was clearly not one of the facts which it was necessary for the Applicant to prove in order to support its right to the judgement. It arose after the judgement. If the Petitioner is aggrieved by it, it can only be the subject of a fresh suit.

41. In the premises I find that the present application is misconceived and is devoid of merit. It is hereby dismissed. As the Respondent did not furnish the soft copy of its Replying Affidavit, there will be no order as to costs.

42. It is so ordered.

43. This ruling has been delivered online with concurrence of both advocates for the parties due to the prevailing restrictions occasioned by COVID 19 pandemic.

Read, signed and delivered at Machakos this 15th day of April, 2020.

G V ODUNGA

JUDGE