REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 240 OF 2015

BETWEEN

BETHWEL OMONDI OKAL.....PETITIONER

AND

MANAGING DIRECTOR KPLC & COMPANY.....RESPONDENT

R U L I N G

Background:

1. The Petitioner/Applicant herein, **BETHWEL OMONDI OKAL** filed a petition herein dated 2nd June, 2015 citing the Respondent, The Managing Director Kenya Power and Lighting Co. Ltd for illegal trespass into his property in Migori County through construction of power transmission lines over his property resulting in crop damage and sought compensation over the same.Besides compensation he also sought what he describes as;

> ***"structured injunction prescribing restorative measures to address punitive, aggravated and exemplary damages."***

2. By a judgment dated and delivered on 15th July, 2016 **Hon. Justice Lenaola** while acknowledging the enthusiasm exhibited by the Petitioner in seeking redress for alleged violations of his rights, nonetheless dismissed the petition for being untenable in law. However he directed that assessment of crop damage if any be carried out and ***"pay such compensation as is lawful, fair, reasonable and appropriate."***

3. The Petitioner apparently dissatisfied with that judgment delivered in this court on 15th July, 2016, filed an application dated 23rd August, 2016 seeking review of the said Judgment but that application was disallowed vide a ruling of this court dated 15th November 2017. This court stated that the grounds for review under **Order 45** of **Civil Procedure Rule** were not met as the grounds cited in court's view were grounds for appeal rather than review.

4. The applicant herein undeterred filed another application dated 29th November 2017 which is the subject of determination herein and before the said application was determined, he filed another application dated 19thOctober, 2018. This court on 23rd October 2018 directed that both applications be canvassed contemporaneously.

5. In the Notice of Motion dated 29th November 2017 the applicant sought a number of reliefs and some

of the discernible prayers are as follows:-

a) That a proper hearing be held as provided under Article 50 of the Constitution together with Rule (13 (1) (2) (3) (5) and (7) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.

b) That this Honourable court do order for compensation for the long delay in determining the review petition (read application).

c) That judgment entered in this petition be declared utra vires pursuant to provisions of **Article 48 & 50** of the **Constitution** as read with **Article 10** of **Constitution**.

d) That the two applications dated 15th May 2017 and 9th October, 2017 be dispensed with before other procedural matters are attended to.

5. The grounds for the above reliefs as listed in the said application are as follows:-

(i) That the honourable Judge employed all means at his disposal to curtail the applicant's right to fair hearing notably shooting down all applications under certificate of urgency without giving consideration, the rules of natural justice, the rule of precedence and due process.

(ii) That the honourable Judge changed the Judgment date backwards from 11th December, 2017 to 15th November, 2017 which in his view smacked of judicial authoritarianism and contrary to national values and principles of governance espoused under Article 10 particularly the rule of law, non discrimination, human rights, transparency, accountability and equity.

(iii) That there was no judicial accountability and independence in disallowing his review application.

(iv) That courts should not act in a manner that will render the right to fair trial and the right to reasonable time guaranteed by the Constitution nugatory.

(v) That review application and appeals are legal available mechanisms for dispute resolutions and the right of choice is not a prerogative of the courts but lie with the petitioner for obvious reasons.

6. The applicant has supported the grounds with Supporting Affidavit sworn on 29th November, 2017. The applicant has delved much on his misgivings and complaints about the decision made by honourable Judge on 15th November, 2017. However the choice of words and adjectives used are really oppressive, scandalous to this court and an infringement of **Order 19 Rule 6** of the **Civil Procedure Rules**. The rule provide that any affidavit containing anything scandalous, irrelevant or oppressive may be struck out of an affidavit. For that reason, the offending paragraphs (paragraphs 3, 4, 6, 8, 9, 10, 16, 17 and 26) are liable to be struck out for violating the cited law. This court in determining this application has no jurisdiction or the mandate to inquire into the veracity or otherwise of allegations therein on those cited paragraphs. This Court shall nonetheless consider the other paragraphs of the affidavit as well as other grounds listed on the application on their merit purely in the interest of justice.

7. The applicant has justified his choice to file an application to review the Judgment delivered on 15th July 2016 by honourable Justice Lenaola on grounds that the same was a means to access administration of justice. He has further deposed that the change of date of the ruling from 11th December, 2017 to 15th November, 2017 led to miscarriage of justice because he was not notified and accused the court for absconding from the principles espoused under **Article 160.**

8. The applicant contends that he has a Constitutional right to pursue his application for review and this

court cannot block him from seeking redress through application for a review and has cited **Article 22** of the **Constitution** to back up his claims.

9. The applicant has further criticized the judgment delivered on 15th July 2016 stating that the same violated the provisions of **Article 159(2)** of the Constitution which gives this court general principles that guide its exercise of judicial authority.

10. The applicant further contends that his quest to get justice was delayed leading to miscarriage of justice.

11. The applicant has passionately asked this court to re-hear the application for review in order to inquire into the reasons underlying his reasons for review. He contends that his application for review was premised on his right to access justice and a fair hearing as espoused under Article 48 and 50 of the Constitution.

12. The respondent has opposed this application through the grounds of opposition dated 8th December, 2017 and the written submissions dated 20th July, 2018. The respondent has faulted the applicant for moving this court in a carte blanche manner contending that the applicant has not cited any specific provision of law allowing the court to reinstate an application for review which has been dismissed. It is the respondent's contention that the application dated 29th November, 2017 is not supported by law because where a litigant challenges a court's finding on law and fact, the only way is to appeal.

13. The respondent has further contended that the applicant's arguments and more specifically the grounds relied on, can only be subject of an appeal and in his view, the correct forum should be an appeal.

14. The respondent has also pointed out that the applicant has not demonstrated existence of any new and important matter or evidence not available to him at the time when the application was heard. It is further contended that the petitioner has not demonstrated a mistake or error apparent on the face of record sufficient enough to justify a review by this honourable court. The respondent has backed up his contention, on the decision of ***Zensational Holdings Ltd -vs- Stephen Kimani Gakenia [2017]*** where the court observed that it is trite law that a court has to be moved under the correct provisions of the law.

15. The respondent has further faulted the applicant's attempt to have this court review its order stating that the issues raised in the previous applications seeking review and the petition itself are substantially the same and having been determined fully and competently by two previous judges of this court, there is no further room for a further review. The respondent has cited the provisions of **Order 45 Rule 6 Criminal Procedure Rule** which bars this court from reviewing an order made on a review. The respondent has also accused the applicant for occasioning a multiplicity of suits and has cited ***Petition No.571 of 2017,*** where the applicant has sued the respondent over the same issues. According to the respondent, the applicant is guilty of an abuse of court process.

16. This court has considered the applicant dated 29th November 2017 and the grounds upon which it has been brought. I have also looked at the grounds in opposition and submissions of both parties. There is no doubt that the application has an avalanche of complaints/grievances both at the decision delivered by **Honourable Justice Isaac Lenaola** on 15th July 2016 and the ruling delivered by **Honourable Justice John M. Mativo** on 15th November, 2017. In his application, he has majorly cited the provisions of Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 commonly referred to as ***"Mutunga Rules"*** claiming that **Honourable Justice Lenaola** based his analysis on a repealed law and that according to the ***"Mutunga Rules"*** such a decision can be invalidated due to lack of procedural fairness.

17. The applicant in this application has substantially repeated his grievances advanced in his Notice of Motion dated 23rd August 2016 only this time adding into the mix his grievances against the ruling delivered by Honourable **Justice John M. Mativo.** He has in his element, going by what is on record, used some few choice words to disparage and besmirch the decisions made by Honourable Judges in this

petition.

18. The applicant appears convoluted in his quest for Justice because looking at his various application in this cause it is difficult to really know what the applicant really wants or expects from this court.

This court wishes to put record straight with a view to making the applicant who is understandably a layman and therefore may not really know the law and its procedures. The petition No.240/15 herein is spent because this court heard the petition through a full hearing and made a determination of all the issues that arose from the petition presented by the applicant against the respondent herein. Themapplicant apparently was dissatisfied with thedecision of Honourable **Justice Lenaola** delivered on 15th July 2016. That is why made a futile attempt vide a Notice of Motion dated 23rd August 2016 to review the said Judgment. As I have observed above, this court through a ruling delivered on 15th November, 2017 found no merit on the application for review. This court found that the grounds advanced by the applicant were grounds for appeal not for review and pursuant to the provisions of **Order 45 Rule 1 Civil Procedure Rules** this court found that this court's power under **Section 80** of **Civil Procedure Act** to review its order or Judgment is really limited in scope as set out under **Order 45** of the civil procedure Rules. The limitations are as follows:

> ***" (a) Discovery of new and important matter or evidence which after 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 order made, or***
>
> ***(b) On account of some mistake or error apparent on the face of the record or***
>
> ***(c) For any other sufficient reason desires to obtain a review of the decree or order."***

19. In this application, the applicant is now seeking to review the ruling on review by **Justice Mativo** and the decision by **Justice Lenaola** dated 15th July, 2016 and the issue before me is whether the same is tenable in law. It is important to note from the onset that a court of law is clothed with jurisdiction and mandate to operate and issue orders that are within specified parameters or scope that are well defined by the Constitution and the law. A party cannot certainly ask for anything under the sun and expect to be granted. A party should cite specific provision(s) of the law that empowers the court to so grant the order or the relief before moving the court for the same.The application dated 29th November 2017 is non specific on what rule or law the applicant wants the court to invoke in granting reliefs which to a large extent are vague and difficult to discern.

20. The power to review an order is donated under **Section 80** of **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 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 passed the order and the court may make such order thereon as it thinks fit."***

The procedure and the scope for moving the court is provided under Order **45 Rule 1** which I have cited above. However under **Rule 6** of **Order 45** Civil Procedure Rule there is a clear bar of subsequent application for review once a decision or a ruling is made on an application for review. Simply put, a court while exercising its jurisdiction for review cannot be asked to review a review order because the law does not allow it.

21. To go back again to the application dated 29th November, 2017, the grounds upon which the applicant has moved this court are essentially grounds of appeal because the applicant is aggrieved by the manner in which this court handled his petition and his application for review. In his view this court decided his matter contrary to the law and curtailed his rights to a fair trial. In the case of ***National Bank of Kenya***

Ltd –vs- Ndungu Njau (1996) KLR Page 469, the Court of Appeal made the following guiding observations;

> ***"In my discernment, an order cannot be reviewed because it is shown that the Judge decided the matter on a foundation of an incorrect procedure and or that his decision revealed a misapprehension of the law or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that all other of co-ordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue. In my opinion the proper way to correct a Judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise for discretion is to appeal the decision unless the error can be apparent on the face of the record and therefore requires no elaborate argument to expose (emphasis added for clarity.)***

The application dated 29th November, 2017 is clearly bad in law because apart from offending **Order 45 Rule 6** of the **Civil Procedure Rule** the application is beyond the scope and parameters of **Order 45** as the applicant has totally failed to establish any of the grounds envisaged under **Section 80** of **Civil Procedure Act** and **Order 45 Civil Procedure Rule**. That application is therefore unsustainable in law and cannot stand.

22. Turning to the application dated 19th October, 2018, the applicant has prayed for the following prayers namely;

> (***i) That the respondent be compelled to stop intimidation and threats to the petitioner and his family.***
>
> ***(ii) That the respondent be compelled to remove the installation of electrical cables that interferes with his trees.***
>
> ***(iii) That this honourable court do issue punitive measures to compensate his family for damages occasioned by violation of environmental rights, privacy rights and damages arising from violation of privacy and family life.***
>
> ***(iv) Punitive damages be awarded to the applicant owing to "electrocution" and attendant black outs.***

23. The grounds upon which the above prayers are sought are as follows namely:-

> ***a) That the respondent is continuing to play extra judicial measures to mess up the right to access justice through judicial process.***
>
> ***b) That the respondent as a public outfit is by law conditioned to act at all time in good faith and the employment of extra judicial means is out of malice and must be terminated with positive measures.***

24. The Respondent has supported the above grounds with an affidavit sworn on 19th October, 2018 where he has deposed that the respondent on 16thSeptember 2018 disconnected power to his house by cutting electric cables leaving his family in darkness. He complains that the respondent has been harassing and intimidating him by using police in Rongo Police Station to arrest the family members on fictitious charges.

25. The respondent has further averred that the respondent's acts are ultra vires and faulted it for acting as if it was above the law. He further depones that the actions have violated **Article 21** of the Constitution**.**

26. This court has considered the application dated 19th October, 2018 which clearly shows a separate

cause of action distinct from the petition herein. The applicant is complaining about alleged disconnection of power from his premises on 16th September 2018 and the alleged harassment visited on his family in some time in June 2015. It is therefore obvious even without looking into the merits of the allegations that the application which has been presented on interlocutory basis is clearly irregular and improper in the sense that the petition filed herein regarding claims of trespass and damages arising therefrom were canvassed in this court and a determination made by **Justice Lenaola** vide the Judgment delivered on 15th July, 2016. The question of trespass and the damages arising from the tort if they relate to the time prior to the filing of petition, is in my view a matter that has already been adjudicated upon and decision rendered with finality. The matter would therefore be *res judicata* and **Section 7** of the Civil Procedure Act clearly bars this court from re-trying the matter. On the other hand and if the issue of trespass and the attendant damages occurred after the determination of the petition herein, as is apparent from the applicant's affidavit in support sworn on 19th October, 2018 and the annextures, then the same forms or constitutes separate cause of action. The applicant in that event cannot file an interlocutory application within a petition that has been decided but ought to file a separate cause because it is a distinct and separate cause of action. This court finds that either way the application dated 19th October 2018 is improper and incompetent. The same for the reasons afore stated is liable to be struck out.

27. On the question of damages sought against the respondent for allegedly delaying the finalization of his petition against the provisions of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, (Rules) and various cited articles in the Constitution of Kenya 2010, this court has noted from the record that on various dates to wit, 2nd December 2016, 25th January 2017, 22nd March 2017, 2nd May 2017, 9th May, 2017 and 30th May, 2017, the matter did not proceed as scheduled and though reasons for adjournments are not clear from the record it is likely that the change of advocates at some stage could have led to the matter being adjourned but what is more important is that the delay of the petitioner's case from the record cannot be attributed to the respondent and the applicant himself appearing in person never raised any issue during the pendency of the petition that his matter was taking unusually long. I therefore find no basis to make an award of damages against the respondent because no evidence has been tendered to show that;

(i) It was responsible for any delay if any

(ii) The applicant had raised the issue of delay during the pendency of his petition and application for review.

28. The applicant has extensively cited various Constitutional rights and what is now known as Mutunga Rules (The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.) However the cited rules do not operate in a vacuum. They exist within a legal framework and are meant to facilitate avenues to access justice. Under **Rule 21 (3)** of cited rules the court is given discretion to give directions as maybe necessary for the expeditious disposal of a case. **Rule 3(8)** thereof provides that nothing in the Rules shall prevent the court from making any orders necessary to prevent abuse of court process. It is quite apparent that the applicant has in the two applications (29th November, 2017 and 19th October, 2018) cited the said Rules out of context. He has contended that this court should review the order given on 15th November, 2017 and re hear the petition under **Rule 22** of the cited Mutunga Rules but reference to **Rule 22** is erroneous as the rule relates to filing of written submissions and not review of Judgment or rulings made by courts.

In the end, this court finds that both applications dated 19th October, 2018 and 29th November 2017 are unsustainable in law. For the reasons I have advanced above, the application dated 19th October, 2018 is struck out with costs to the respondents for being incompetent, bad in law and improper. The application dated 29th November, 2017 is dismissed for being an abuse of court process and lacking in merit. The respondent shall also have costs.

Dated, signed and delivered at Nairobi this day of, 2019.

R.K. LIMO

JUDGE

Dated, signed and delivered at Nairobi this 11th day of February, 2019.

E C MWITA

JUDGE