REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

MISC. CIVIL APPLICATION NO 1531 OF 2005 (O.S.)

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS & FREEDOMS UNDER SECTIONS 70 (C), 84 (1) & (2) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

ABDUL WAHEED SHEIKH AND ABDUL HAMEED SHEIKH

AS TRUSTEES OF THE SHEIKH FAZAL ILAHI NOORDIN

CHARITABLE TRUST.....PLAINTIFF/APPLICANT

VERSUS

THE COMMISSIONER OF LANDS ..... FIRST DEFENDANT/RESPONDENT

THE MINISTER FOR LANDS & HOUSING..SECOND DEFENDANT/RESPONDENT

THE MINISTER FOR FINANCE.....THIRD DEFENDANT/RESPONDENT

THE REGISTRAR OF TITLES.....FOURTH DEFENDANT/RESPONDENT

HON. ATTORNEY GENERAL.....FIFTH DEFENDANT/RESPONDENT

AND

MR. NICHOLAS M. MBEVA.....INTENDED INTERESTED PARTY

RULING

Background.

1. The background information relevant to the determination of this application is that Judgement in this case was rendered on **18th** May 2012. By a notice of motion dated **16th** January 2017, the plaintiffs herein moved this Court under the provisions of sections **1A, 1B, 3A** and **99** of the Civil Procedure Act[1] seeking to amend the judgement and decree to correct a typographical error. On **16th** January 2016, the Court certified the application as urgent and directed that the same be served for *inter partes* hearing on **7th** February 2017.

2. In the intervening period, on **1st** February 2017 the applicant herein filed the application now under consideration seeking orders that:-

> *a. **That** the application be certified urgent and be heard inter parte together with inter partes hearing of the application dated **16th** January 2017 and scheduled for Inter Partes hearing on **7th** February 2017.*
>
> *b. **That** the honourable Court be pleased to enjoin **Mr. Nicholas M. Mbeva** in the proceedings herein as an Interested Party.*
>
> *c. **That** the Honourable Court be pleased to grant stay of execution of the decree of this honourable Court issued on **18th** May 2012 and all consequential orders made there from by this honourable Court in this mater pending the hearing and determination of this*

application.

*d. **That** this honourable Court be pleased to review and set aside its judgment and decree delivered and issued on **18th** May 2012.*

*e. **That** an early hearing date be fixed for the inter partes hearing of this application.*

*f. **That** the costs of this application be provided for.*

3. The plaintiffs' application dated **16th** January 2017 was heard on **7th** February 2017. However, **Mr. Mugo**, the applicant's counsel, though he was in Court, did not participate at the hearing of the above application because his client (now the applicant) was not a party in this case or the application. On **15th** February 2017 the Court allowed the said application as prayed. Immediately after delivery of the above ruling, **Mr. Mugo**, sought Court's directions for the hearing of this application. I directed that the same be heard on **18th** July 2018.

The Applicant's grounds.

4. The applicants core grounds can be summarized as follows:-

*i. **That** the applicant has discovered new and important evidence that was previously concealed and or intentionally hidden from the honourable Court by the Plaintiffs herein;*

*ii. **That** Sheikh Fazal Ilahi Noordin Charitable Trust, the registered owner of the parcel of land since 1943 up to 2000 or thereabouts obtained exemptions for payment of council rates and Land Rent to the detriment of both the government and the taxpayers on the understanding and basis that the land was to be used exclusively for charity purposes;*

*iii. **That** contrary to the terms of the said exemptions, the trust never developed the property; In addition the trust is not a charitable entity but is a cloak, a farce, a mask and a disguise that the trustees have been using to evade payment of taxes, rates and rent to the detriment of the government & that the trust has no beneficiaries; and, that the trust is a vehicle for trustees to evade payment of taxes, rates and rent;*

*iv. **That** the trust sold some properties it previously owned, that is **LR. No. 209/73/1, L.R. No. 209/73/6** and **L.R. No. 209/72/3** located at Chiromo Road which also enjoyed property rates and rents exemptions, and that the proceeds thereof never went to any charitable use or activity either for the benefit of itself or any other charitable organization, but the proceeds went to the private pockets of the trustees;*

***v. That** the trust never paid for the renewal of the lease and that since 1943, the trust did not develop the property, hence, it is not entitled to the renewal of the lease;*

*vi. **That** it is in the public interest that the decree herein be reviewed to take into account the above factors that were intentionally concealed from the Court and that there is material non-disclosure by the plaintiffs; Further, the plaintiffs suit is anchored on an illegality, unlawfulness, bad faith, void, unmerited, frivolous and is only meant to unjustly enrich the plaintiffs at the expense of the government and riding under the cloak of a charitable trust;*

*vii. **That** the intended party ought to be enjoined in these proceedings as a member of the general public to assist this Court to sufficiently determine the issues herein as the suit herein raises issues that are of great interest to the general public;*

*viii. **That** there are sufficient reasons to warrant the review of the decree, that the application has been brought without undue delay since the discovery of the facts; and there should be a stay of the execution of the decree otherwise the plaintiffs will be unjustly enriched.*

Plaintiff's Replying Affidavit.

5. **Abdul Waheed Sheikh**, an Advocate of the High Court of Kenya, and a trustee of *Sheikh Fazal Ilahi Noordin Charitable Trust* swore the Replying Affidavit dated **3rd** March 2017. He averred that:-

*a. **That** the application violates the law, that the applicant lacks locus standi in this case, that it is not made in public interest but in the applicant's pecuniary interest as a person seeking a letter of allotment; and that no new evidence has been advanced or discovered;*

*b. **That** the exemption from payment of rates was granted to the trust in 1993 and the same was published in the Kenya Gazette Legal Notice No**. 94** of 1993 dated **21st** April 1993, and that the exemption has been in the public domain for over **20** years. Further, there was no non-disclosure to the Court that rates were not paid nor was there concealment of the same nor was the information intentionally hidden. In any event the exemptions were published in the Kenya Gazette.*

*c. **That** that the allegation of depriving the government rates and that the issues raised are in public interest are false; and that the government and local authorities were at all material times aware of the exemptions as evidence by correspondence marked **AWS-3 (a) to (d).***

*d. **That** Trust's compliance with the terms and conditions of the lease from 1943 was considered by the defendants, and the lease was extended for a further period of **99** years from **21.3.2003**. Also, the power to decide whether there had been such compliance or not and is not vested in the applicant nor is it an issue in these proceedings, and in any event, the Court in the impugned judgement decreed that there is no lawful basis upon which the defendants should or could deprive the plaintiffs of the right to the ownership of the property.*

*e. **That** the applicant's allegations on non development of, and non charitable activity or purpose on the suit land, are false, and offend Rule **3** of the Valuation for Rating Rules as amended by Legal Notice No. **390/1990**, the Valuation for Rating (Amendment) Rules 1990.**[2]***

*f. **That** the suit land is vested to the plaintiffs as the Registered Trustees of the Trust, a Charitable Institution within the meaning of the provisions of the Valuation for Rating Act.**[3]***

*g. **That** the allegations on non development are false, and that the applicant has not presented any facts to this Court to warrant reviewing the judgment; and, that the application is a collateral attack on the judgment so as to reopen the issues determined in the judgment, and, is an abuse of Court process.*

Applicant's further Affidavit.

6. The applicant filed a further affidavit dated **20th** March 2017. He averred that:- ***(i)** Order **45** of the Civil Procedure Rules, 2010 empowers any person aggrieved by the decision of the Court to apply for Review of the decision so long as he can demonstrate the required grounds; **(ii)** that the applicant has not been guilty of latches but moved to Court soon after discovering the above facts; **(iii)** that there is no abuse of Court process; **(iv)** that the Rates exemptions were obtained through fraud; **(iv)** that the lease was extended through dubious means; **(v)** that no evidence was tendered to show that the property has been developed; **(v)** that no charitable activities take place on the property.*

The Respondents.

7. None of the Respondents' participated in this application nor did they file any Responses either in support or in opposition to the application despite being served.

Issues for determination.

8. Upon considering the parties' opposing positions, I have distilled the following issues:-

*a. Whether the applicant is "an aggrieved person" within the scope of Section **80** of the Civil Procedure Act and Order **45** Rule **1** of the Civil Procedure Rules, 2010;*

b. Whether the applicant has established any grounds to be enjoined in this case.

c. Whether the applicant has established any grounds to qualify for any of the orders sought.

a. Whether the applicant is "an aggrieved person" within the scope of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, 2010.

9. The applicant's counsel, **Mr. Litoro,** argued that the applicant *is aggrieved* by the judgement and decree rendered in this case on **18th** May 2012. He argued that the applicant saw a vacant plot, and, learnt that the lease for the plot had expired. He applied for a letter of allotment. Counsel also argued that the applicant learnt of the existence of the decree issued in this case, hence, this application.

10. The applicant's argument as I understood it is that section **80** of the Civil Procedure Act[4] and Order **45** Rule **1** of the Civil Procedure Rules, 2010 permit *"any person who considers himself aggrieved by the decree"* to apply for review. In short, the applicant's case is that he is aggrieved by the judgement in this suit. This argument raises a pertinent question of "who is an aggrieved person within the ambit of section **80** and Order **45** Rule **1**" which reads '*Any person who considers himself aggrieved."* Its common ground that the applicant was not a party in this case. This question warrants a proper construction of the foregoing provisions. I will attempt to do so.

11. Section **80** of the Civil Procedure Act[5] provides as follows:-

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 judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

12. Order **45** Rule **1** of the Civil Procedure Rules, 2010 provides 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 review of judgement to the court which passed the decree or made the order without unreasonable delay."

13. In construing the above provisions, the fundamental question that warrants consideration is whether the phrase "*any person considering himself aggrieved"* is wide enough to include a person who initially was not a party to the proceedings but at a later stage is affected or claims to be affected by an order or decree adverse to his interest(s). The applicants' argument as I understand it seems to suggest that the above provisions are wide enough to cover even a stranger, *the only essential requisite being that he must consider himself to be an aggrieved person*. Sadly, counsel for the applicant did not even attempt to explain the applicable tests, or address his mind to the question whether it is objective or subjective. Both counsels did not cite authorities to assist the Court on this pertinent issue, yet the determination of the this application rests on a proper analysis and resolution of the question under consideration.

14. The scope of review jurisdiction can be only utilized on the specific grounds mentioned in Order **45** Rule **1** of the Civil Procedure Rules 2010 and Section **80** of the Act. Section **80** gives the power of review and Order **45** sets out the rules. The rules in my view restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; ***(a)*** *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; **(b)** on account of some mistake or error apparent on the face of the record, or **(c)** for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.*

15. The important words to note in Order **45** Rule **1 (b)** are "*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 review of judgement to the court which passed the decree or made the order without unreasonable delay."*

16. In my view, a proper construction of the natural and ordinary meaning of the words *"was not within his knowledge or could not be produced by him at the time when the decree was passed"* and the words "*desires to obtain a review of the decree or order"* leads to the conclusion that the words refer to a person who was a party to the proceedings. It is beyond doubt that these words leave no room for doubt that the remedy of review could be availed of only by a person who initially was a party to the proceedings in which either a decree had been passed or an order had been made against him, otherwise the very essence of the grounds on which a review would be competent, would be rendered ineffective. It is, therefore, obvious that a stranger to the proceedings cannot be contemplated in true meaning of the above words especially the words *"was not within his knowledge or could not be produced by him at the time when the decree was passed."* These words are clearly referring to a person who was a party and participated in the proceedings. otherwise the use of the *could not be produced by him at the time when the decree was passed could be rendered useless since a stranger who was not a party cannot be said to have been in a position to produce the evidence at the time of passing the decree since he was not a party then.*

17. In view of the plain meaning of the above words, it is beyond argument that a stranger would not be permitted to avail of the grounds on which a review petition would be competent. I therefore, do not agree with the contention by the learned counsel for the applicant which suggests that a wider interpretation of the words *"any person considering himself aggrieved"* would be the only proper and reasonable interpretation. In fact, such a construction is totally illogical and can lead to absurdity since it would open the door for endless litigation since it implies that a stranger could easily walk in into already determined proceedings and re-open them.

18. A proper construction of the rule would entail reading the opening words, namely *"any person considering himself aggrieved"* together with *paragraphs (a) and (b).* The opening statement, that is, *"any person considering himself aggrieved"* cannot be read in isolation. Provisions of a statute need to be construed in a holistic manner so as to get the real intention of the legislature. It is my view that these words would have to be read and interpreted in the light of the main rule and when so done in my view their operation would be restricted and would cover the case of only those persons who initially were party to the proceedings.[6]

19. The touchstone of interpretation is the intention of the legislature. The language of the text of the statute should serve as the starting point for any inquiry into its meaning.[7]Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean.[8] If the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. In other words as was appreciated by the Court of Appeal in *Kimutai vs. Lenyongopeta & 2 Others****[9]*** citing Lord Denning:-[10]

"The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the "purposive approach". In all cases now in the interpretation of statutes such a construction as will "promote the general legislative purpose" underlying the provision is to be adopted. It is no longer necessary for the judges to wring their hands and say, "There is nothing we can do about it". Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind."(Emphasis added).

20. Adopting the construction advanced by the applicants counsel not only goes against the clear meaning of the rule as explained above but

also leads to an absurdity. It could not have been the intention of the legislature to create a situation whereby parties would litigate in Court, sometimes for years as has happened in this case and open the door for a stranger to move the Court to review, set aside or vary the judgment or decree, or re-open the proceedings. Such a scenario, would make nonsense the established principle of finality of Court determinations and make litigation endless.

21. The underlying rationale for my above argument is the need to give effect to the finality of judgments. Where a cause of action has been litigated to finality between parties, a subsequent attempt by one party or a stranger as in this case to proceed against the successful party on the same cause of action or issues which have been conclusively determined should not be permitted. The reason is simple. It is necessity to limit needless litigation and ensure certainty on matters that have been decided by the Courts.

22. As stated above, the words *was not within his knowledge or could not be produced by him at the time when the decree was passed or order made* certainly refer to the party who was before the Court at the time the decree was made or passed. *First*, a natural and ordinary construction of the foregoing provision leads to the irresistible and logical conclusion that the material or evidence could only have been produced by the person who was in Court at the time the decree was passed. *Second*, the words *"any other sufficient reasons"* used in Order **45** means a reason sufficient on grounds at least analogous to those mentioned in paragraphs **(a), (b),** and **(c)** of Rule **1** of Order **45**. As repeatedly stated by this Court, a review, by its very nature is not an appeal or a rehearing merely on the ground that one party or another conceives himself to be dissatisfied with the decision of the Court. It can only be granted for some sufficient cause akin to those mentioned in Order **45** Rule **1** of the Civil Procedure Rules 2010 which provisions incorporate the principles upon which a review can be granted. This fortifies my argument that a stranger may not easily successfully apply for Review since the grounds to be relied upon are analogous to each other and one wonders how a stranger would satisfy the first ground discussed above considering that he was not a party to the case.[11]

23. Its trite that the power to review a judgment or an order can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be reiterated that the expression "any other sufficient reason" means a reason sufficiently analogous to those specified in the rule.[12] Where the application is based on sufficient reason it is for the Court to exercise its discretion.[13]

24. Discussing the scope of review, the Supreme Court of India in the case of *Ajit Kumar Rath vs State of Orisa& Others*[14] had this to say:-

> *"the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" .... means a reason sufficiently analogous to those specified in the rule."*

25. A similar view was held in the case of *Sadar Mohamed vs Charan Signh and Another***[15]** where it was held that:-

> *"Any other sufficient reason for the purposes of review refers* ***to grounds analogous to the other two*** *(for example error on the face of the record and discovery of new matter)."*

26. **Mulla** in the *Code of Civil Procedure***[16]** (writing on Order **47** Rule **1** of the Civil Procedure Code of India), (the equivalent of our Order **45** Rule **1**), states that *the expression 'any other sufficient reason'....*means *a reason sufficiently analogous to those specified in the rule*. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.[17]

27. In my view, a decision once given cannot be reviewed subject to certain legal exceptions pursuant to the provisions as enumerated in Order **45** Rule **1** scope which can neither be enlarged nor can it be farfetched in view of the language employed in Order **45** Rule **1**. Its application would be only up to that limited extent and it cannot be unlimited. The powers of review are not wide but definite and limited in nature and must be confined to the four corners of the relevant rules or the phrase or for any other *sufficient reason*.

28. More important, the review jurisdiction as visualized must be traced to Order **45** which contains the prescribed conditions and limitations in terms of the requirement of the section and more so the power to review is not an inherent power. On a proper consideration it will be found that the principles underlying the limitations mentioned in Order **45** rule **1** are implicit in the nature of review jurisdiction and cannot be equated to that of a technical obstruction.

29. For arguments sake even if I were to find that the phrase *any person* is wide enough to cover the applicant, (which is impossible), I am not persuaded that he has established that he is *an aggrieved person* within the ambit of the Rule. His advocate submitted that the applicant saw a vacant plot, and applied for allotment. No evidence of the alleged application was tendered (and even if it was tendered), an application for allotment cannot *per se* have conferred upon him any rights on the plot nor can it be said that his application for allotment would have been successful. In my view, the applicant has not established any interest even in the slightest way to justify his assertion that he is *"an aggrieved person"* within the meaning of the above rule.

b. Whether the applicant has established any grounds to warrant being enjoined in this case as an Interested Party.

30. The applicant's seeks to be enjoined in this suit as an Interested Party. His *"interest"* to be enjoined is premised on several grounds. *First*, that his lawyer submitted that the applicant *"saw a vacant plot and applied for a letter of allotment."* He does not even annex a copy of his alleged application. He does not even state that he did some investigation to establish that the plot was free for allocation. He has not explained the basis of his assumption or imagination that a vacant plot is "free" for allocation by the Government. In my view, his alleged *"interest"* premised on his application to be allocated the plot is farfetched, imaginary and absurd. It cannot by a stretch of any imagination qualify to be the nature of interest contemplated under the law to entitle a person to seek to be enjoined in Court proceedings.

31. *Second*, he claims to be advancing public interest alleging failure by the plaintiffs to pay Government revenue. I will address this shortly. *Third*, he alleges discovery of new and material evidence which has just come to his knowledge. I will also address this shortly.

32. I find it fitting to seek guidance from the words of Devlin J. in *Amon vs Raphael Tuck & Sons Ltd*[18] where the learned judge put it succinctly as follows:-

> *"What makes a person a necessary party? It is not of course, merely he has relevant evidence to give on some of the questions involved; that would only make a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately....the court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to make a person a party to an action so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party."(Emphasis added)*

33. It must be recalled that there is no suit pending and the issues before the Court were settled and a decree issued, hence, there is no pending case. Even if the proceedings were pending, the elements to be satisfied where a party seeks to be enjoined in proceedings as an interested party are that:-

> *(a) the intended interested party must have "an identifiable stake"*
>
> *(b) or legal interest*
>
> *(c) or duty in the proceedings*

34. The test is whether the the intended interested party has *an identifiable stake*, or *a legal interest* or *duty in the proceedings.* A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights.[19] In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party the true test lies not so much in an analysis of what are the constituents of the applicant's rights, but rather in what would be the result on the subject-matter of the action if those rights could be established.[20] It is apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty in the proceedings directly identifiable by examining the questions involved in the suit.

35. In the case of ***Judicial Service Commission – vs – Speaker of the National Assembly & Another*** ***[21]*** the court, referring to the definition of an interested party under The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules stated that:-

> *"From the foregoing it is clear that an interested party … is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non partisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings."*

36. Judicial decisions, do more than merely decide disputes between, or determine the guilt or innocence of, individuals, hence the need for caution particularly where an applicant as in this case under the guise of review seeks to re-open an already concluded litigation. There is a real danger of busy bodies or guns for hire being used by unsuccessful litigants who could not mount an appeal or failed to appeal to re-open an already concluded case. The decision the applicant complains of was rendered in 2012 and none of the defendants lodged a appeal.

37. Even if the suit was pending, it is my conclusion that the applicant has not satisfied any of the requirements to qualify to be enjoined in the suit as an interested party.

38. The applicant also cites public interest. He argued that no premium was paid for the renewal of the lease and insisted that the decree offends Article **60** of the Constitution. He cited *William Charles Fryda vs Assumptio Sisters of Nairobi Registered Trustees*,[22] *JMK vs MWM & Another*,[23] *Wachira Karani vs Bildad Wachira*[24] & *Silah Enane Omututi vs Catherine Wanjiku Githiaka*.[25]

39. It does not escape the Courts attention that the applicants' counsel argued that the applicant saw a vacant plot and developed interest in it. He applied for a letter of allotment. At the same time, Counsel also cited public interest stating that government revenue was not paid, and or the waiver was obtained through fraud. No details of the alleged fraud were supplied. The law is that he who alleges fraud must prove fraud. The argument on the alleged non-payment of government revenue cannot stand because there is evidence that the plaintiffs were granted an exemption by the Government which exemption was Gazetted.

40. I should add that it is important to distinguish between two kinds of interested party interventions. *First*, those where the intervener is seeking to represent the public interest, and, *second* those were the intervener merely advances his or her own private interest. Generally speaking, a case may be appropriate for an intervention if it:- **(i)** it raises one or more issues of public importance; and **(ii)** there is a risk that this public interest may not be sufficiently well-addressed by the submissions of the parties alone. In short, any would-be public interest intervener must ask how they might assist the court in this case; or how they might *'add value' to the court's consideration of the issues*

before it.

41. The Hon. Attorney General represents public interest and he is a Respondent in this case. One wonders what public interest the applicant seeks to advance which could not be or was not advanced by the Honourable Attorney General and indeed the other Respondents who are Government Ministries.

42. Black's Law Dictionary[26]defines "Public Interest Litigation as "legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected."

43. The applicant has already disclosed his personal interest in the "alleged vacant plot." He applied for the plot to be allocated. He did not say he applied to use the plot for public purposes, unlike the plaintiff which runs charitable activities. It is evident that the applicant is simply advancing personal interest, hence, the attempt to hide behind public interest is not propelled by good faith.

44. While dealing with the question of "*bona fides"* of a party, especially in the case of a person approaching the Court in the name of Public Interest Litigation, the Indian Supreme Court in the case of *Ashok Kumar Pandey vs. State of West Bengal**[27]*** held as hereunder: -

> *"Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."*

45. Relying on the above case, the Supreme Court of India in the case of *Dr. Akhtar Hassan Khan vs. Federation of Pakistan**[28]*** held that the Court has to guard against frivolous petitions as it is a matter of common observation that in the garb of Public Interest Litigation, matters are brought before the Court which are neither of public importance nor relatable to enforcement of a Fundamental Right or public duty.

46. The Public Interest Litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and swift justice.[29] But the profound need of this tool has been plagued with misuses by persons who file Public Interest Litigations just for the publicity and those with vested political or personal[30]interests as in this case. The Courts therefore, need to keep a check on the cases being filed and ensure the *bona fide* interest of the petitioner and the nature of the cause of action, in order to avoid unnecessary litigations. Vexatious and mischievous litigation must be identified and struck down so that the objectives of Public Interest Litigation aren't violated. The constitution envisages the judiciary as "a bastion of rights and justice.

47. Public interest litigation is a highly effective weapon in the armory of law for reaching social justice to the common man. It is a unique phenomenon in the Constitutional Jurisprudence that has no parallel in the world and has acquired a big significance in the modern legal concerns. This technique is concerned with the protection of the interest of a class or group of persons who are either the victims of governmental lawlessness, or social oppression or denied their constitutional or legal rights and who are not in a position to approach the court for the redress of their grievances due to lack of resources or ignorance or their disadvantaged social and economic position.

48. Former Chief Justice of India A.S. Anand cautioned the over use of Public Interest Litigation and emphasized "Care has to be taken to see that Public Interest Litigation essentially remains public interest litigation and is not allowed to degenerate into becoming political interest litigation or private inquisitiveness litigation.[31]

49. It is the duty of the court to see whether a party who approaches the court has a *bona fide* intention and not a motive for personal gain, private profit or political or other oblique considerations.

50. Public interest remains likened to an "unruly horse" which may lead us from sound law. In 1824, in *Richardson vs Mellish*,[32] an English Judge (Burrough J) expressed the metaphor often since repeated, when counseling against reliance of public policy, that:-

> *"…it is a very unruly horse, and when you astride it you never know where it will carry you…it is never argued at all but when other points fail."*

51. I can only emphasize that nothing would serve public interest better than ensuring that all citizens adhere to the law and in particular only approach the court when they have justiciable claims but not to use court processes to evade their legal obligations.

52. Upon carefully analyzing the reasons advanced by the applicant, and upon due consideration of the law and authorities, I am persuaded beyond doubt that the applicant has not demonstrated a legal and identifiable interest or any grounds to warrant this Court to enjoin him in these proceedings. Further, I find that this application cannot be said to have been brought as a matter of public interest but it is essentially aimed at advancing private interest. To suggest otherwise would be a mockery of justice. Any in any event, the proceedings having been determined conclusively, there are no proceedings to be enjoined.

c. Whether the applicant has established any grounds to warrant the Review Orders sought.

53. Whereas counsel for the applicant maintained that the applicant has demonstrated sufficient grounds to warrant the orders sought, **Ifendi,** the plaintiffs' counsel argued that there is no basis for granting the orders sought. She maintained that the applicant seeks to re-open a concluded case. She cited *cited Shah vs Dharamchi*,[33] *Mbogo vs Shah*,[34] *Abdulraman Adam Hassa vs National Bank of Kenya*,[35] *Fracis Origo & Another vs Jacob Kumali Mungala*,[36] *Benjamin Kipketer Tai vs KCB*[37] and *The Trustees of Sheikh Fazal Ilahi Noordin Charitable Trusyt vs The Commissioner of Income Tax*[38]all of which I have considered.

54. The applicants core ground is alleged non-payment of premium to the Government. This issue was addressed by the plaintiffs who confirmed that they were granted an exemption by the government and the exemption was Gazetted as the law demands. To counter this, the applicants counsel argued that the exemption was fraudulently obtained. First, the exemption was gazetted, hence it cannot be said to be new evidence nor can it be said to have been unavailable at the time of the trial. Secondly, fraud must be particularized nd strictly proved.

55. The power to review a judgment or an order can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it.The expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule.[39] Where the application is based on sufficient reason it is for the Court to exercise its discretion.[40]

56. The applicant also sought an order to stay of execution of the decree of this honourable Court issued on **18th** May 2012 and all consequential orders made there from by this honourable Court in this mater pending the hearing and determination of his application. In all fairness, the applicant is a stranger in this case. He is yet to be enjoined. He has no legal basis to stay execution of a Court decree issued in a case in which he is not a party. The application now under consideration does not and cannot give him the capacity to pray for such an order before he is enjoined.

57. Stay of proceedings is a grave matter and can only be resorted to after an applicant satisfies the criteria laid down under the law. The grounds advanced by the applicant do not in my view satisfy any legal basis to warrant an order of stay. As stated above, the applicant is a stranger in this case. He seeks to be enjoined as an interested party long after delivery of judgement. Even if he were to be enjoined, the position remains that an Interested Party is not a principal party in the proceedings. The issues to be determined by the Court are those arising from the pleadings presented by the principal parties. In this case the issues presented by the principal parties were conclusively determined and a final judgment rendered.

58. An interested Party can only participate by assisting either of the parties or making submissions to help Court. This view is reinforced by the Supreme Court decision in the case of *Francis Karioki Muruatetu & another vs Republic & 5 others**[41]*** where the Court stated that in every case, whether some parties are enjoined as Interested Parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. *An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court*. Thus, the applicant cannot now at this eleventh hour come to the Court and purport to introduce new issues which were not presented to the Court by the principle parties. It follows that he cannot come to Court and seek to stay the judgment citing discovery of new grounds or evidence.

59. One of the principles for admission of an Interested Party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court nor can it be a ground to re-open already concluded litigation or be a basis to stay a judgment.

60. Whether or not to grant a stay of proceedings or further proceedings on a decree or order is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. There is no basis at all for this Court to exercise its discretion and grant the stay sought.

Final orders.

61. In view of my analysis of the issues enumerated herein above, the conclusion becomes irresistible that the application does not meet any of the tests for the Court to grant any of the orders sought. I find and hold that the application **1st** February 2017 is totally misguided, misconceived, frivolous and lacks merit and one that is fit for dismissal. Consequently, the application dated **1st** February 2017 is hereby dismissed with costs to the Plaintiffs.

Orders accordingly

Dated, Signed and Delivered at Nairobi this 10th day of September2018

John M. Mativo

Judge

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[1] Cap 21, Laws of Kenya.

[2]Rule **3** provides that "any land shall be deemed to be used for the purpose of a Charitable Institution if such land is vested for any tenure whatsoever and so long as it remains so vested in a charitable institution falling within the meaning of that expression as defined by the Rating (Exemption of Charitable Institutions from the Payment of Rates) Rules, 1990 and specified in the Schedule to such Rules."

[3] Cap 266, Laws of Kenya.

[4] Cap 21, Laws of Kenya.

[5] Ibid.

[6] See *Qaim Hussain vs. Anjuman Islamia PLD* 1974 Lah. 346.

[7]Katharine Clark and Matthew Connolly, Senior Writing Fellows, April 2006, *"A guide to reading, interpreting and applying statutes"* https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf.

[8] Plain meaning should not be confused with the "literal meaning" of a statute or the "strict construction" of a statute both of which imply a "narrow" understanding of the words used as opposed to their common, everyday meaning. Supra note 1.

[9] Civil Appeal No. 273 of 2003 {2005} 2 KLR 317; {2008} 3 KLR (EP) 72

[10] Lord Denning, *The Discipline of Law* ,1979 London Butterworth, at page 12.

[11] See *Chhaju vs. Neki* (AIR 1922 PC 112), *Iftikhar Hussain Shah vs. Azad Govt. of The State of J & K* (PLD 1984 SC AJ&K 111 and *Muhammad Ghaffar v. State* (1969 SCMR 10).

[12] *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608.

[13]*Tokesi Mambili and others vs Simion Litsanga* {2004} eKLR.

[14] 9 Supreme Court Cases 596 at Page 608.

[15] {1963}EA 557.

[16] Sir Dinshah Fardunji Mulla, *The Code of Civil Procedure*, 18th Edition, Reprint 2012, at Page 1147, paragraph 10 Civil Appeal No. 90 of 2001; {2001} LLR 6937 (cak).

[17] Ibid.

[18] {1956} 1 ALL ER 273 at pages 286 to 287.

[19] This is the test which has been applied in *Amon vs. Raphael Tuck and Sons Ltd*., 1956 - 1 All ER 273

[20] See Dollfus Mieg et Compagnie S.A. vs. Bank of England, 1950-2 All ER 605 at p. 611. **See also:** *Gokaldas Laximidas Tanna vs. Store Rose Muyinza, H.C.C.S No. 7076 of 1987 [1990 – 1991] KALR 21.*

[21] **{2013} eKLR.**

[22] {2017}eKLR.

[23] {2015}eKLR.

[24] {2016}eKLR.

[25] {2016}eKLR.

[26] Sixth Edition.

[27]AIR 2004 SC 280.

[28]{2012} SCMR 455.

[29]Public Interest Litigation: Use and Abuse, http://lawquestinternational.com/public-interest-litigation-use-and-abuse-0.

[30] Ibid.

[31]Abuse of Public Interest Litigation - A Major Threat on Judicial Process, http://www.legalserviceindia.com/article/l469-Public-Interest-Litigation.html.

[32] {1824} 2 Bing 229, 252 (Dixon J), {1824–1834} All ER 258, 266.

[33] {1981}KLR 560.

[34] {1968} EA 93.

[35] Kisumu High Court Civil Case No.446 of 2001.

[36] Civil Appeal No. 149 of 2001.

[37] Kisumu High Court Civil Case No. 87 of 2003.

[38] {1957} 1EA 616.

[39] *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608.

[40]*Tokesi Mambili and others vs Simion Litsanga* {2004} eKLR.

[41] {2016} eKLR.