REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CONSTITUTIONAL MISC. PETITION NO. 31 OF 2013

IN THE MATTER OF HABEAS CORPUS OF MOSES NDENDA

AND

IN THE MATTEROF THE CONSTITUTION OF KENYA ARTICLES 22, 23, 49 AND 51

ERNEST AMUGUNI SIVA ……...…….. PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION ……. RESPONDENT

MOSES NDEDA ……..…… THE SUBJECT

RULING

The Applicant herein being **The Director of Public Prosecutions** filed in court the Ex Parte Notice of Motion dated 24th August, 2015 seeking inter alia the following orders:-

> ***"2 THAT there be a stay of execution for the decree issued on 25th May, 2014 together with the certificate of costs issued on 25th May, 2015 pending the hearing and determination of this application.***
>
> ***3 THAT the ruling made on 26th November, 2013, the decree issued on 5th May, 2015 together with the certificate of costs issued on 25th May, 2015 and all other consequent and or subsequent orders as against the Director of Public Prosecutions (DPP) be reviewed and/or set aside.***
>
> ***4 THAT the costs of this application be awarded to the Applicant herein"***

The court did on 26/8/2015 grant interim orders of stay in terms of prayer (2) of the petition. The petition was disposed of by way of written submissions. **MS OMWENYO** Advocate appeared for the Petitioner/Respondent whilst the learned State Counsel represented the DPP. Parties did duly file their written submissions and highlighting of these submissions was heard by the court on 16/12/2015.

BACKGROUND

This application arises from the ruling of my learned senior brother **Hon. Justice Anyara Emukule**

which ruling was delivered in Nakuru on 26th November, 2013. The ruling was in respect of a petition dated 18th June, 2013 which had been filed by one **MR. ERNEST AMUGUNI SIVA** (the Petitioner/Respondent herein).

In his petition the Petitioner/Respondent claimed that his son **MOSES NDEDA** (the subject) had been arrested and detained by police officers on 22nd May, 2013. After said arrest the subject apparently disappeared and his whereabouts remain unknown to date. In his ruling **'Hon. Justice Emukule'** found that the OCS Bondeni Police Station, OCS Central Police Station, Nakuru, the OCPD Nakuru Police Division, the District Criminal Investigation Officer, and their respective officers were fully aware of the circumstances of the arrest of the subject, **'Moses Ndeda'**. The learned Judge therefore issued an order of ***'habeas corpus'*** directed to the DPP to produce forthwith the body or the person of the said **'Moses Ndeda'.**

The order of Habeas corpus was not complied with and the Judge proceeded to grant the alternative prayers in the petition vide his judgment delivered on 10th October, 2014. In that judgment the court issued a declaration that the arrest, detention and subsequent disappearance of the subject amounted to a violation of his constitutional rights. The court further ordered the State through the Kenya Police to compensate the subject's estate and his family members in the amount of Ksh 1,800,000/- (one Million Eight Hundred Thousand only). The decree arising from this judgment issued on 25th May, 2014. The Respondent/Applicant then moved to court and filed this Application.

The present application was supported by the annexed affidavit of **'Nicholas Kilatya Mutuku'** an Ag Director of Public Prosecutions sworn on 24th August, 2015 as well as a Further Affidavit sworn on 22nd September, 2015. The application is premised on the following grounds:-

a. ***That the ruling dated 26th November, 2013, the order dated 5th December 2013, decree dated 10th December, 2014 and the certificate of costs dated 5th May, 2015 were not served on the Respondents personally;***
b. ***According to the investigations file the subject was not arrested by the police and was not held following an investigation for a criminal offence. He is still missing and it had not been determined whether he is dead or alive;***
c. ***The court's finding in the ruling dated 26th November, 2013, was that the police were aware of the circumstances of the arrest of the subject. The court did not apportion any liability to the Respondent. Notwithstanding, it proceeded to issue an order of habeas corpus against the Respondent.***
d. ***The order and the ruling were not in tandem with the prayers sought in the petition'***
e. ***The mandate of the DPP is only to direct an investigation to be done, the order should have been directed to the person, office or institution in whose custody the body of the subject was allegedly being held that is the police not the Director of Public Prosecutions.***
f. ***There was an error apparent on the face of the record because the order of habeas corpus was wrongly directed at the Respondent instead of the Inspector or Police and the Director of Criminal Investigations. In addition, the mandate of the Respondent under Article 157 of the Constitution is only limited to prosecution of and representing the government in criminal cases. The Attorney General's office established by Article 156 of the Constitution should have been sued on behalf of the government in these proceedings.***
g. ***The Applicant has no powers over the police and could not compel it to comply with the order of habeas corpus;***
h. ***That entry of judgment against the Applicant for the alleged disappearance of the subject otherwise than in the course of prosecution in criminal offence was wrongful;***
i. ***It is the Attorney General who is in custody of the funds for compensation of damages and the Applicant is unable to comply with the order;***
j. ***The Respondent is not a legal representative of the estate of the deceased hence the proceedings were unprocedural;***
k. ***The Respondent ought to have filed a civil claim for compensation and the orders are not available by way of miscellaneous petition for habeas corpus***

The Petitioner/Respondent opposed the application by way of a Replying Affidavit sworn on 9th September, 2015. The Petitioner/Respondent contend that there was no need to serve the DPP personally and argued that service is proper if it is effected on persons who have been nominated to act for the Applicant under Article 157(a) of the Constitution.

The Petitioner/Respondent further contended that the DPP was the proper party to sue in these proceedings as Article 154 (4)(b) of the Constitution expressly limits the powers of the Hon. Attorney General to act in criminal proceedings. He argued that this was a mere technicality which had no bearing on the matters in issue.

Finally the Petitioner/Respondent argued that the DPP had powers under Article 157(4) of the Constitution to issue directions to the National Police and he opined that these would include directions to settle decrees. He submitted that the present application had not been brought in a timeous manner and that the orders issued on 26th November, 2013 were not appropriate for review, two (2) years after they were made.

ANALYSIS AND DETERMINATION

I have carefully considered the submissions made by both parties in respect to this matter. Although no express provision of law exists giving the High Court powers of review in a constitutional petition, a court may review its decree or judgment in appropriate circumstances where sufficient reasons have been advanced to so review.

In several decisions including **ANDERS BRUCE t/a KENYA CIVIL AVIATION AUTHORITY & ANOTHER [2013] eKLR, WANANCHI GROUP LTD Vs COMMUNICATION COMMISSION OF KENYA & OTHERS [20140 eKLR** and in **OKIYA OMTATAH OKOITI Vs COMMUNICATIONS AUTHORITY OF KENYA & 15 OTHERS [2016] eKLR**, the courts have adopted a purposive construction of the provisions of Articles 22, 1nd 159(2) (d) of the Constitution and have opined that these provisions do grant courts authority to review its orders and/or decrees.

The circumstances in which a review may be sought and the ground thereof are governed by Section 80 of the Civil Procedure Act, Cap 21, Laws of Kenya and by order 45 of the Civil Procedure Rules, Section 80 of the Civil Procedure Act provides that any party who is aggrieved by an order or decree from which an appeal is allowed by the Act but from which no appeal has been preferred or by a decree or order from which no appeal is allowed by the Act, may apply to court for a review of the judgment which passed the decree or made the order. The court is authorized upon such application for review being made before it to make such orders as it deems fit.

Order 45 provides the grounds upon which a review will be granted. These include:-

a. ***Where there has been the 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 which the decree was passed or the order was made***
b. ***Where there is shown to have been some mistake or error apparent on the face of the record; or***
c. ***For any other sufficient reason; and***
d. ***The application for review must be brought without unreasonable delay.***

The court in **PANCRAS T. SWAI Vs KENYA BREWERIES LIMITED [2014] eKLR,** extensively discussed the powers to review and held that that the grounds stated above relate only to matters of law. It was held in this case that a court cannot review its decision on account of an error of law predicated on correct facts (this to my mind would be a ground for appeal not review). The court held as follows:-

> ***"The High Court is presumed to know the law. That is why the Constitution has conferred on the High Court in Article 165(3)(a) unlimited original jurisdiction in Civil and Criminal matters and in Article 20(3)(a) jurisdiction to develop the law and in Article 20(3)(b) the mandate to interpret the Bill of Rights. It was expected that counsel, in getting up on the brief would come***

up with the law and authorities including the Treaty and the case-law. But he failed to do so. It was the duty of the Court to have before it the relevant law and to apply it correctly. Njagi, J. was not well served. He seems to have made an error of law. The appellant's right to seek review, though unfettered, could not be successfully maintained on the basis that the decision of the Court was wrong either an account of wrong application of the law or due to failure to apply the law at all.

……..The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 (now Order 45 in 2010 Civil Procedure Rules) relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the court is deemed to be alive to."

The Court of Appeal also in the **PANCRAS T-SWAI** case also affirmed its earlier division in **Civil Appeal No. 211 of 1996**. **NATIONAL BANK OF KENYA LIMITED Vs NDUNGU NJAU [U/R].**

"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 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 be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a stature or other provision of law cannot be a ground for review.

……..In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the Respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in Appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it." (my own emphasis)

The Applicant/Respondent submitted that it had no powers under the Constitution to compel the police to produce the missing subject in court as its mandate was limited only to prosecution of and representation of the government in criminal cases and to directing the police to carry out investigations. They submitted that the court therefore erred in directing the DPP by order of *habeas corpus* to produce the subject. The Applicant further contented that the office of the Attorney General ought to have been enjoined as a party in the original petition to represent the Kenya Police as it is only the Hon. Attorney-General who is vested with the duty to act for the government in civil claims.

The question of mis-joinder and non-joinder of parties is a question of law that is predicated upon the powers vested in the various bodies by the Constitution and by Statute. Likewise the locus of the petitioner to represent the estate of the subject, and the question of the competence of the petition in so far as it sought compensatory damages by way of a miscellaneous application for *habeas corpus* are all matters of law which cannot form the subject of a review. The court making the orders (which are sought to be reviewed) is deemed to be aware of the law relating to the filing of a claim on behalf of the estate of a deceased person. The court is also presumed to be aware of the procedural law for seeking compensation for violation of fundamental rights and freedoms. These are all matters of law premised on correct facts and cannot therefore form the basis of a review.

The second ground upon which a review may be granted is on account of errors apparent on the face of the record. In the case of **NYAMOGO AND NYAMOGO ADVOCATES Vs KAGO [2001] 1 EA. 173**, the court defined an error on the face of the record in the following manner

"An error apparent on the face of the record cannot be defined precisely and exhaustively,

there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judiciously 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 is possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

This holding was also relied on in **Muyodi Vs Industrial and Commercial Development Corporation and Another E.A.L.R [2006] 1 EA 243** where the court further stated thus-

"Further one to succeed in having an order reviewed for mistake or error apparent on the record; he must demonstrate that the order contains a mistake that is there for the whole world to see. It is not enough for an applicant to say that he is dissatisfied with the decision or that the same is wrong. Such opinions ought to be the subject of an appeal."

The Applicant submitted that there existed an error on the face of the record because the order of ***'habeas corpus'*** was directed at the wrong party *ie* the order was directed at the DPP instead of to the Inspector of Police and the Director of Criminal Investigations.

The applicants argued that the court in giving such orders failed to consider the scope and extent of the powers of the DPP under Article 157 of the Constitution. However, the learned Judge made the Order of ***'habeas corpus'*** only after considering the entire evidence placed before him.

The applicant is aggrieved by the fact that the court found it liable. The applicant contends that the learned Judge misapprehended the evidence before it and made a wrong finding with regard to the liability of the DPP. It was argued for the applicant that there was no evidence that the subject had been arrested following an investigation to a criminal offence or in the court of prosecution (in which case liability may have been implicated to the DPP). However a careful reading of the court's ruling reveals that the court did not apportion liability to the Applicant regarding the disappearance of the subject. The court made a specific finding that it was the police who knew of the circumstances of the arrest and detention of the subject.

I find that the issues being raised by the Applicant in support of its prayer for review are all matters of law which the court is deemed to have had knowledge of at the time it was making its decision. These grounds cannot form the basis for a review. The Applicant is in effect asking the court to re-examine the evidence by arguing against the merits of the court's decision. These arguments are in the purview of an appeal not review. Once a court has pronounced itself on the issues before it and its judgment has been perfected, then that court becomes *'**functus officio'*** and may not review or alter its ***'ratio decidendi'.*** This is a function reserved exclusively for the appellate court, in this case the Court of Appeal.

Order 45 only allows a party who has discovered **new evidence** which was not available to him or which could not be procured by him at the time of hearing even upon exercise of due diligence to present these facts for the basis for a review.

No such **new evidence** has been presented before this court. The applicant is only arguing on the basis of the same facts which had been presented in the original petition. Evidence which should have been submitted but was not and matters that were not raised at the hearing cannot be considered after the decision has been delivered. This court cannot reappraise the evidence and set aside decision as this would amount to sitting on appeal over a decision of a court of equal and concurrent jurisdiction.

Regarding the question of liability I note and it is clearly stated by **Hon. Justice Emukule** in his judgment of 10th October, 2014 that before that judgment was delivered the Applicant was invited

severally by the court to file its submissions but failed/declined to comply. Raising those issues now amounts to trying to **'shutting the stable door after the horse has bolted'** – it is too late. It amounts to an afterthought in a clear attempt to circumvent the courts judgment. This is tantamount to abusing the court process and will not be countenanced by this court.

Order 45 allows for a review of an order and/or decree where sufficient grounds are advanced to do so. In the case of **KIMITA Vs WAKABIRU [1975] KLR 317**, the court held that

> ***"The words "for any other sufficient reason" have therefore to be construed 'ejusdem generis' with the ground of discovery to which I have referred. See Tanitalia Ltd Vs Mawa Handels Anstalt, (1951) E.A215. In other word that the words, "for any other sufficient reason" in order XLIV rule 1 are hence confined to a reason which would be regarded as akin to those specified immediately previously in the order: see Ahmed Hassan Nivlji Vs Shirinbai Jadavi (1963) E.A 217, Yusuf Vs Nokrach (!971) E.A. 104.***
>
> ***I see no reason why any other sufficient reason need be analogous with the other grounds in the order because clearly section 80 of the Civil Procedure Act confers an unfettered right to apply for a review and so the words "for any other sufficient reason" need not be analogous with the other grounds specified in the order."***

The same court held in **Pancras T. Swai Vs Kenya Breweries Limited [2014] eKLR** the court held as follow-

> ***"As repeatedly pointed out in various decisions of this court, the words, "for any sufficient reason" must be viewed in the context firstly of Section 80 of the Civil Procedure Act, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order".***

The other sufficient reason advanced by Applicant was failure of service. The applicant complained of lack of personal service of the order dated 29th November, 2013 and the order dated 5th December, 2013, the decree dated 10th December, 2014 and the Certificate of Costs dated 5th May, 2015. The applicant also contended that it had no means of satisfying the decree for damages as the funds to satisfy such a decree against the government are in the custody of the Hon. Attorney-General. Again a close perusal of the judgment of 10th October, 2014 reveals that the order for payment of damages was directed to the Kenya Police **and not to** the DPP. Paragraph 27 of the judgment states clearly as follows:-

> ***"There shall therefore issue a declaration that –***
>
> a. **…….**
> b. ***The State, through the Kenya Police do compensate the subjects estate and family members in damages for wrongful conferment, mental torture….***

Therefore the applicants' appear to have misread the judgment as directing the DPP to compensate the family. The order of compensation was made against the Kenya Police. I find that the grounds advanced by the Applicant do not constitute valid grounds for a review of the orders. Rather the Applicants are merely advancing reasons/excuses for non-compliance with the court's orders. None of the grounds for review as listed in order 45 rule 1 of the Civil Procedure Rules has been satisfied. I find no merit in this application. The same is hereby dismissed. I make no order on costs.

Dated in Nakuru this 1st day of July, 2016.

Maureen A. Odero

Judge