



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**

**JR. MISCELLANEOUS APPLICATION NO. 459 OF 2004**

**REPUBLIC .....APPLICANT**

**VERSUS**

**PUBLIC SERVICE COMMISSION OF KENYA....1<sup>ST</sup> RESPONDENT**

**PERMANENT SECRETARY/DIRECTOR DIRECTORATE OF**

**PERSONNEL MANAGEMENT.....2<sup>ND</sup> RESPONDENT**

**AND**

**SOSPETER NYAGWANSA ARASA**

**(FORMER PS, MINISTRY OF RESEARCH SCIENCE AND  
TECHNOLOGY)**

**KAREGA MUTAHI**

**(FORMER PS, MINISTRY OF RESEARCH TECHNICAL  
TRAINING AND TECHNOLOGY)**

**JAMES MURUMBASI MON'GONI**

**(FORMER AG. DIRECTOR, KENYA INDUSTRIAL  
RESEARCH AND DEVELOPMENT INSTITUTE)**

**EX PARTE GEOFFREY SHERIDAN OUMA**

**RULING**

**Introduction**

1. By a Chamber Summons dated 6<sup>th</sup> February, 2012, the applicant herein, **Geoffrey Sheridan Ouma**, seeks the following orders:

**a. The Judgment/Order of Lady Justice Roselyn Wendoh delivered on the 4<sup>th</sup> day of May 2009 be reviewed and set aside**

**b. The original Notice of Motion be heard *de novo* according to law.**

**c. Cost be provided for.**

2. The application was supported by an affidavit sworn by the applicant on 6<sup>th</sup> February, 2012.
3. According to the applicant, having read the judgment by **Lady Justice Roselyn Wendoh** of 4<sup>th</sup> day of May 2009 he was convinced the affidavit sworn by the Secretary, Public Service Commission distorted all the evidence and resulted into a mistaken judgment which upon review, will change the cause.
4. According to him, he was not re-called back by the Ministry but was said to be re-deployed to the then Ministry of Research Science and Technology thus the said re-deployment was malicious, as reasons given later was that it was to give KIRDI a National outlook. If that were so, he contended that that could only be considered at the time of appointment and preparation for the Applicant and must be preceded by that requirement in the advertisement.
5. He however deposed that the Ministry of Research Science and Technology was part of the Interviewing Board of KIRDI and being part thereof, had the opportunity to raise the issue of National outlook if it deemed it important at the time of the interview.
6. In his view, having considered the Civil Procedure Rules under which Judicial Reviews are transacted he was sure that there was no mistake in correcting the “Statement” which had not been served and that the issues raised by the Judge are inconsistent with the statute.
7. It was therefore his view that a revisit of the statute will exonerate all his efforts and acts and once parties are ordered to file affidavits, a different judgment will be given in his favour.
8. The application was not opposed by the Respondents. However the mere fact that an application such as an application for review is not opposed does not make an otherwise unmerited application, merited.
9. In her judgement dated 4<sup>th</sup> May, 2009, the learned Judge found that the applicant’s application was incompetent on the grounds that some of the grounds relied upon were not contained in the statement; that the facts relied upon were not contained in the affidavits as required by the law but were in fact contained in the statement; that the applicant amended his statement without leave; that documents were filed without being incorporated in an affidavit and that a further affidavit was filed without leave of the Court.
10. Despite that finding the learned Judge nevertheless proceeded to determine the application on merits and after evaluating the material before her found no merit in the application and dismissed the same.
11. The instant application is expressed to be brought under the provisions of Order 45 of the **Civil Procedure Rules**, sections 3 and 3A of the **Civil Procedure Act**.
12. The known provisions which deal with review are section 80 of the **Civil Procedure Act** and Order 45 of the **Civil Procedure Rules**, both of which however do not apply to judicial review matters since judicial review proceedings are neither civil nor criminal. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486**, the Court held that Judicial review is a special procedure and as the Court is exercising neither a civil or criminal jurisdiction in the strict sense of the word, the invocation of the

provisions of section 3A and order 1 rule 8 of the *Civil Procedure Rules* render the application wholly incompetent.

13. In order to justify the Court in granting an application for review sought by the applicant under the provisions of Order 45 rule 1(b) of the *Civil Procedure Rules*, certain requirements must be met. The said provision 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

**(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”**

14. In the instant case the decision sought to be reviewed was made on 4<sup>th</sup> May, 2009 while the instant application was not filed until 6<sup>th</sup> February, 2012, some two and half years later. No reason has been given why it took the applicant such a prima facie long period of time before making the application. Without any explanation on what is manifestly a long delay, it is clear that the applicant has not satisfied the conditions necessary for the Court to exercise its discretion in his favour.

15. The Court of Appeal in **Biren Amritlal Shah & Another vs. Republic & 3 Others [2013] eKLR** expressed itself on section 8(5) of the *Law Reform Act* as follows:

**“It is therefore quite clear that appeals in respect of orders made under judicial review lie with the Court of Appeal. Therefore, in answering the question whether the High Court had jurisdiction to entertain a review application, we agree with the learned judge of the High Court that, in exercising its special jurisdiction under the *Law Reform Act*, the High Court had no jurisdiction to review its previous order.”**

16. Whereas the same Court however held in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR** that the superior court in the matter before the court has the residual power to correct its own mistake, in my view to the extent that the Court has no powers under Order 45 of the *Civil Procedure Rules* to review its orders made on judicial review, I agree that the Court of Appeal’s decision in **Biren Amritlal Shah & Another vs. Republic** (supra) cannot be faulted.

17. The decision whether or not to review a Court’s decision was well captured by the Court of Appeal in **Mumby’s Food Products Limited & 2 Others vs. Co-Operative Merchant Bank Limited Civil Appeal No. 270 of 2002**, where it was held that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must however be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion. Misconstruing a statute or other

provisions of the law therefore cannot be a ground for review.

18. In this case, the applicant seems to fault the learned judge for having misconstrued the provisions of Order 53 of the *Civil Procedure Rules*. Assuming that that position was correct, though in my view the learned judge's decision was on all fours with the decision of the Court of Appeal, that would not justify this Court in interfering with the said decision. In **Ndungu Njau vs. National Bank of Kenya Limited Civil Appeal No. 257 of 2002**, the Court of Appeal expressed itself as follows:

**“Neither in the application, its grounds or supporting affidavit nor in the instant appeal was or has been raised any important matter or evidence which was not within the knowledge of the appellant at the time the decree was passed in spite of exercise of due diligence which requires strict proof... Nor was there any submission before the Court about any mistake or error apparent on the face of the record to warrant an order of review which was sought. The error or omission on record must be self evident on the part of the court and should not require elaborate argument in order to be established... There was no reference to such mistake or error before the trial Court and the grounds of appeal in the instant appeal do not point to any such omission or error.”**

19. Similarly in **National Bank of Kenya vs. Ndungu Njau Civil Appeal No. 211 of 1996 [1995-98] 2 EA 249**, the same Court expressed itself as follows:

**“In an application for review, it is particularly necessary that the application should disclose in the body of the notice of motion the ground or grounds on which the review is being sought. Although this was, in the court's view, a fatal omission, yet the court in the broad interest of justice, asked counsel for the appellant on which ground under Order 44 he had argued the said notice of motion in the Superior Court and he replied that he had sought the review on the ground that there was a mistake or error apparent on the face of the record of the Superior Court... 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 and the error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground of review that another judge could have taken a different view of the matter. Nor can it be a ground of review that the Court proceeded on an incorrect exposition of the law and reached erroneous conclusion of the law... Misconstruing a statute or other provision of the law is not a ground for review... In the instant case the matters in dispute had been fully canvassed before the Learned Judge who 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 would be a good ground for appeal but not for review. Otherwise the learned Judge would be sitting in appeal on his own judgement 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.”**

20. Having considered the grounds relied upon by the applicant in this application it is my view that the issues raised ought to have been raised in an appeal rather than in a review application. Apart from the incompetency of the application resulting from the failure by the applicant to bring himself within Order 45 of the *Civil Procedure Rules* with respect to the unexplained long delay in filing the application, it is also my view that the application for review is unmerited as it is an appeal couched as an application for review.

21. In the premises the Chamber Summons dated 6<sup>th</sup> February, 2012 fails and is dismissed but with no order as to costs.

**Dated at Nairobi this 4<sup>th</sup> day of March, 2015.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***The Applicant in person***

***Cc Patricia***