Republic v Nairobi Metropolitan Services (NMS) & 5 others; Metro Trans EA Limited (Interested Party); Kaka Travellers Co-operative Savings and Credit Society Limited (Ex parte Applicant); Omurwa (Contemnor) (Judicial Review E131 of 2022) [2025] KEHC 15707 (KLR) (Judicial Review) (3 November 2025) (Ruling)

Neutral citation: [2025] KEHC 15707 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW E131 OF 2022

RE ABURILI, J

NOVEMBER 3, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

NAIROBI METROPOLITAN SERVICES (NMS) ..... 1ST RESPONDENT

ROADS PUBLIC WORKS & TRANSPORT,NMS ..... 2ND RESPONDENT

THE DIRECTOR OF ENFORCEMENT,NMS ..... 3RD RESPONDENT

THE INSPECTOR GENERAL OF POLICE ..... 4TH RESPONDENT

THE DTO, CENTRAL POLICE STATION ..... 5TH RESPONDENT

THE HON ATTORNEY GENERAL ..... 6TH RESPONDENT

AND

METRO TRANS EA LIMITED ..... INTERESTED PARTY

AND

KAKA TRAVELLERS CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LIMITED ..... EX PARTE APPLICANT

AND

ROSANA OSCAR OMURWA ..... CONTEMNOR

RULING

1. The Notice of Motion dated 11th March 2024 and filed on the even date is brought under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules and Article 51 of *the Constitution*.

2. The application seeks that the order extracted by the ex parte applicant and issued by the Court on 2nd November 2022 be and is hereby expunged. It also seeks that the entire contempt of court proceedings herein, and the ruling dated 23rd February 2023 on contempt of court be set aside.

3. The applicant also seeks that the warrants of arrest issued against the applicant contemnor, Rosana Oscar Omurwa, be set aside. Further, that this court does reprimand and or sanction the ex parte applicant for the irregular extraction of the court order issued on 2nd November 2022.

4. The application is supported by the affidavit of Rosana Oscar Omurwa sworn on 11th March 2024.

5. In his affidavit, Mr. Omurwa deposes that he was not one of the original parties to these proceedings but that he was directly involved in the proceedings for the first time in December 2022 when the ex parte applicant made an application to punish him for alleged contempt of court. It is his case that prior to his direct involvement in the proceedings, he was sometime in November 2022 served with an order dated 1st November 2022 and issued by the court on 2nd November 2022.

6. That following an application dated 8th December 2022 by the ex parte applicant alleging disobedience of the court order of 1st November 2022 on the part of the applicant/ contemnor herein, the High Court (Ndungu J) by a ruling delivered on 23rd February 2023 held him and the Interested Party in contempt of court for disobedience of the order of court issued on 1st November 2022.

7. He alleges that both the application dated 8th December 2022 and the ruling of 23rd February 2023 referred to the words of the order extracted by the ex parte applicant, and that in particular, order 6 thereof. According to Mr. Omurwa, it is this order that the Interested Party and him were held by the court to have disobeyed. He claims that he has subsequently borne the brunt of the order extracted by the ex parte applicant and the ruling of the court of 23rd February 2023.

8. Further, that warrants of arrest have been issued against him and he is currently going through sentencing proceedings. It is his case that his liberty and his property are at risk as he may be imprisoned and/or fined by the court. He states that following a court attendance on 28th February 2024, which he missed due to illness, he was informed by James Tugee who is a partner at Munyao Muthama & Kashindi Advocates, his advocates on record, that during the court attendance, the ex parte applicant sought an extension of the order of 1st November 2024, which was objected to by the interested party's advocates.

9. He also states that the court directed the parties to file brief submissions on the question of extension of the orders of 1st November 2022. It is his case that he had also requested his counsel to follow up on a request that had earlier been made by his previous advocates for the typed proceedings to facilitate an intended appeal against the ruling and order dated 20th December 2023.

10. The contemnor/applicant further states that his advocates on record by a letter dated 1st March 2024, made a request for the typed proceedings so as to fully appreciate the history of the proceedings as they had not been involved at all from the inception of the matter in August 2022 to February 2024 when they came on record, to understand the context in which the order of 1st November 2022 was

made, to enable them to prepare submissions on the question of possible extension of the order of 1st November 2022 which issue came up during the court attendance on 28th February 2024, as directed by the court, and to also follow up on the request earlier made by his previous advocates, pursuant to his instructions.

11. The contemnor/ applicant's counsel is said to have obtained typed and certified proceedings from the court on 8th March 2024 and that upon perusal of the typed and certified proceedings, counsel noticed that the order extracted by the ex parte applicant and the basis upon which the contempt proceedings were initiated, was irregular. It is the contemnor/applicant's case that the order was extracted through deceit and or trickery by the said ex parte applicant.

12. It is claimed further that the said prayer 3 of the chamber summons application dated 29th August 2022 sought the following specific order:

> " That leave be granted to the Ex Parte Applicant to seek by way of Judicial Review, that an order of prohibition do issue, prohibiting the Respondents and the Interested Party (Metro Trans E.A. Ltd, or any other party or entity acting at their behest and/or agency), from unlawfully blocking the Ex Parte Applicant's and its members' PSV vehicles operating as such PSV along the Githunguri - Nairobi CBD route, access to, from (and at) the Applicant's designated Tom Mboya slated passenger-picking and dropping off bay, or any other place within their licensed Road Service Licensed (RSL) route."

13. Paragraph 6 of the order extracted by the ex parte applicant dated 1st November 2022 and issued by the court on 2nd November 2022 is said to read as follows:

> " That an interim Order of Prohibition be and is hereby issued prohibiting the Respondents and the interested Party (Metro Trans E.A Ltd or any other party or entity acting at their behest and/or agency), from unlawfully blocking the ex-Parte Applicant's and its members' PSV vehicles operating as such PSVs along Githunguri-Nairobi CBD route, access to, from (and at) the Applicant's designated Tom Mboya Street slated Passenger picking-up and drop off bay or any other place within their licensed Road Service Licensed (RSL) route pending further Orders of this Court."

14. It is asserted that the order granted by the Court was deliberately changed by omission of part of Prayer 3 of the Chamber Summons dated 29th August 2022 with the result that the meaning and effect of the order granted by the Court was altered to grant an undue benefit to the ex parte applicant. Mr. Omurwa argues that he knows that the ex parte applicant is fighting him and the interested party which is a company which he used to be a director.

15. Further, that the ex parte applicant is keen to ensure that the interested party does not operate on the Nairobi–Kiambu route and that the exparte applicant remains the sole PSV operators on that route. He asserts that he is suffering all this harm and damage due to business rivalry between the ex parte applicant and the interested party.

16. It is the contemnor's/applicant's case that the contempt application by the ex parte applicant, the contempt proceedings, the ruling holding him and the interested party in contempt, warrants of arrest issued against him and the subsequent sentencing sessions are all irregular and manifestly unjust as they are based on a court order obtained irregularly through deceit, connivance and trickery and ought to be stayed, set aside, discharged, lifted, revoked and or varied. He depones that he has been terrorised by warrants of arrest, with the police seeking to arrest him.

17. It is also his case that the ex parte applicant applied for an order and the Court directed that he be attending Court regularly, and this has caused him prejudice since he has to physically be present in court even though he is represented by an advocate. The contemnor prays for a reversal of the contempt order and also seeks that his name be struck out of these proceedings as he has not done anything to warrant him to be included in the proceedings.

18. He further argues that any issues that the ex parte applicant and the interested party have can be best resolved between themselves without victimising him. He also seeks that the Court looks into the matter keenly and establishes how the irregular order was extracted. It is his request that the court to, after carefully considering the matter, punish all persons who are guilty of generating the irregular order and inflicting harm on him.

19. The contemnor filed two sets of submissions, one is dated 1st July 2024 but erroneously titled notice of motion and, the other is dated 29th September 2025.

20. In the submissions, the contemnor/ applicant submits that the order granted by the Court was deliberately changed by omission of part of Prayer 3 of the Chamber Summons dated 29th August 2022 with the result that the meaning and effect of the order granted by the Court was altered to grant an undue benefit to the ex parte applicant.

21. It is submitted that under section 3A of the *Civil Procedure Act*, nothing shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of process of the court.

22. Mr. Omurwa's application is brought under, inter alia, Order 45 Rule 1 of the Civil Procedure Rules which provides for the instances where a party may apply for the review of a decree, judgment, order, or ruling.

23. The contemnor/applicant further submits that Order 45 Rule 1 of the Civil Procedure Rules which provides for review is, inter alia, an acknowledgement that human beings even courts or judges are fallible and can therefore make mistakes. He relies on the Court of Appeal decision in Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited [2014] eKLR where the court is said to have held that the essence of review lies in recognizing human fallibility and the potential for error or bias that may result in a miscarriage of justice.

24. On the error apparent on the face of the record, he relies on the case of Zablon Mokua v Solomon M. Choti & 3 others [2016] eKLR, where the High Court is said to have allowed an application for review and cited with approval the holding in National Bank of Kenya Ltd v Ndungu Njau where according to the contemnor, the court held that a review will be granted where it is necessary to correct a clear and self-evident error or omission by the court, one that is obvious on the record and does not call for detailed argument to establish.

25. The contemnor/applicant submits that in this case, the error or mistake is self-evident on the face of the record itself as the ruling of 23rd February 2023 which held him in contempt of court cited the wording of the irregular or erroneous order issued on 2nd November 2022 as opposed to the correct/ actual order made on 1st November 2022. This mistake, it is submitted, is not one that requires any long-drawn argument, as the order made by the court on 1st November 2022 clearly referred to "prayer 3 in the chamber summons application dated 29thAugust 2022 which wording is easily ascertainable.

26. It is submitted that to the extent that the court relied on the irregular/erroneous order to hold Mr. Omurwa in contempt of court, there is an error apparent on the face of the record which constitutes a proper ground for review.

27. Also, that Mr. Omurwa, who was not a party or present when the order of 1st November 2022 was made, relied in good faith, on what appeared to be a valid court order served upon him. That he only later discovered, through his new advocates upon obtaining the typed proceedings on 8th March 2024, that the order issued on 2nd November 2022 differed from the one actually made by the court, constituting new and material evidence not previously within his knowledge.

28. That where an application for review is based on the ground that there is sufficient reason for such review, the court is called upon to exercise its discretion, and to support this position the alleged contemnor relies on the case of Republic v Cabinet Secretary for Interior and Co-Ordination of National Government ex parte Abullahi Said Said [2019] eKLR.

29. It is argued that such sufficient reason for review need not be analogous to the grounds for review that are specifically stated at Order 45 Rule 1 of the Civil Procedure Rules. This, according to him, is as was held by the Court of Appeal in Wangechi Kimita vs. Wakibiru Mutahi [1985] eKLR where Nyarangi JA (as he then was) is said to have stated that the phrase "any other sufficient reason" under section 80 of the *Civil Procedure Act* is not limited to grounds similar to those expressly listed, as the provision grants the court broad discretion to review its decisions on any justifiable basis.

30. It is submitted that in addition to the fact that there is an error apparent on the face of the record and discovery of new and important evidence, there are also additional sufficient reasons for review of the ruling and order of 23rd February 2023, including the need to correct the injustice that the ruling, which was based on an irregular/erroneous order, has visited upon the contemnor/applicant herein.

31. He further states that the fact that a failure to review the ruling and set aside the order will expose him to punishment by the court for disobedience of an order that was irregularly extracted and obtained, and whose wording does not reflect the actual order made by the court.

32. It is also submitted that it would be absurd for the court to decline to review and set aside a ruling that quotes and is based on the alleged disobedience of an order that was not in fact made by the court.

33. The contemnor/applicant submits that court orders indicate the date on which they were made or pronounced and the date on which they were issued by the court and these dates are often different. Further, that the order made by the court on 1st November 2022 is not the order that was subsequently extracted and issued by the court on 2nd November 2022.

34. He further submits that he has no issue whatsoever with the order that was made by the court on 1st November 2022, his issue is with the erroneous version of the order that was irregularly extracted and issued by the court on 2nd November 2022.

35. On whether or not his application is res judicata, the contemnor/applicant submits that the same is not as no previous application had been made by him based on the same issue(s) and also, that none of the previous applications referred to by the ex parte applicant in the grounds of objection and the replying affidavit relate to the same order, the basis of the application of 11th March 2025.

36. Additionally, that even more importantly, this court has wide powers and discretion under section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules to review its previous decisions, which powers and discretion of the court have been properly invoked by him in addition to invoking the court's inherent jurisdiction to make orders for the ends of justice.

37. To support this position, the contemnor/ applicant relies on the case of Zablon Mokua v Solomon M. Choti & 3 others [2016] eKLR, where the High Court is said to have allowed an application for review and cited with approval the holding in National Bank of Kenya Ltd v Ndungu Njau, where the court

is said to have observed 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. It is argued that the ex parte applicant has therefore failed to demonstrate that his application is res judicata.

38. On the issue of a notice of appeal having already been filed, it is submitted that this contention is wrong both factually and legally as from a factual perspective, the contemnor/applicant's notice of appeal relates to the order made by the Court on 20th December 2023 while the present application relates to the erroneous order issued by the court on 2nd November 2022. It is submitted that there is no notice of appeal filed against the order issued on 2nd November 2022.

39. It is also the contemnor/applicant's case that a notice of appeal is merely an expression of intent and does not amount to filing an appeal. Further, that under Section 80 of the Civil Procedure Rules, the right to seek review is only barred once an actual appeal has been filed. Therefore, that even if a notice of appeal had been lodged against the orders in question, a review would still be competent. He relies on the case of Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Ltd & Others [2020] KECA 633 (KLR), where the Court of Appeal is said to have affirmed that a notice of appeal does not constitute an appeal and does not oust the High Court's jurisdiction to hear a review application.

40. It is submitted that no evidence of an appeal in the Court of Appeal has been presented, and that indeed, no appeal has been filed by the contemnor/applicant or any other party emanating from this matter.

41. The contemnor submits that the ex parte applicant similarly complains about an application for stay of proceedings in this matter filed in the Court of Appeal, being Nairobi Court of Appeal Civil Application No. E081 of 2024 Rosana Oscar Omurwa v Kaka Travellers Co-operative Savings and Credit Society Limited. It is submitted that firstly, the application in the Court of Appeal was filed purely to preserve the subject matter of the intended appeal against this Court's ruling and order of 20th December 2023, and that the present application before this Court does not relate to the ruling and order of 20th December 2023 but the erroneous order issued on 2nd November 2022.

42. The contemnor/applicant argues that both the High Court and the Court of Appeal have power to stay proceedings where necessary to prevent a matter from being rendered moot. He explains that the stay sought before the Court of Appeal was to enable him to pursue an intended appeal against the ruling of 20th December 2023, while the stay sought before this Court concerns the contempt proceedings pending determination of his application to correct the erroneous order of 2nd November 2022.

43. He further states that the Court of Appeal application was filed before the discovery, upon obtaining certified proceedings on 8th March 2024, that the order extracted on 2nd November 2022 was fictitious and did not reflect the actual order made on 1st November 2022.

44. Accordingly, he maintains that there is no overlap between the two applications and that the ex parte applicant has failed to prove otherwise, having not produced the alleged Court of Appeal application. Finally, he submits that it is illogical to suggest that he is estopped from challenging the erroneous order merely because he initially believed it to be proper, since estoppel cannot validate a non-existent order; an order never made by the court must be set aside ex debito justitiae.

Response

45. Opposing the application for review, the ex parte applicant contends that the contemnor's/applicant's motion dated 11th March 2024 is res judicata, having already been determined through several prior applications. It is argued that the contemnor had previously opposed the contempt application by a

replying affidavit sworn on 15th December 2022, which application was ruled upon on 23rd February 2023, yet he did not then challenge the order of 1st November 2022. Further, that he filed similar applications on 3rd March 2023 and 11th October 2023, both of which were dismissed, and that therefore, the present motion is therefore a fourth attempt to re-litigate the same issues.

46. The ex parte applicant maintains that the application is incompetent and without merit, as the court has already declared Mr. Omurwa guilty of contempt of court by an order of 23rd February 2023, which remains in force and has not been set aside or been appealed against. It is further argued that the motion is a backdoor attempt to delay or obstruct enforcement of the contempt order in violation of the constitutional principle of the rule of law, and that the grounds raised properly belong to an appeal, not a review, which this court lacks jurisdiction to entertain.

47. The ex parte applicant contends that the contemnor's motion dated 11th March 2024 improperly seeks review of this Court's order of 23rd February 2023, which found him guilty of contempt and led to his being sentenced by Justice Chigiti SC, disguised as an application to set aside the order of 1st November 2022. They argue that the motion is frivolous, vexatious and an abuse of process, since the contemnor has already exhausted the available avenues for review and has filed a notice of appeal, thereby barring him from invoking the court's review jurisdiction under Section 80 of the *Civil Procedure Act*.

48. It is further submitted that the contemnor applicant herein has a pending application before the Court of Appeal seeking a stay of his sentencing, which demonstrates that this application duplicates the same issues and amounts to abuse of process. The ex parte applicant adds that the motion is incompetent, as the sentencing order remains lawful and unchallenged, and that the contemnor is estopped under Section 120 of the *Evidence Act* from denying or resiling from his acceptance of the order of 1st November 2022. Finally, it is contended that no unlawful or erroneous order was extracted on 2nd November 2022, as alleged.

49. The ex parte applicant argues that the contemnor's motion dated 11th March 2024 is grossly incompetent because it refers to a non-existent order allegedly made on 2nd November 2022, whereas the valid order was issued on 1st November 2022. The motion is said to be a misuse of the review process and a disguised attempt to revisit matters already determined, including the contempt finding and subsequent sentencing. The ex parte applicant maintains that the contemnor has already exhausted all review avenues, including the filing of a notice of appeal, and that he therefore cannot invoke review jurisdiction under Section 80 of the *Civil Procedure Act*. The application is described as frivolous, vexatious, and a gross abuse of court process, intended to delay enforcement of existing court orders.

50. The ex parte applicant contends that the contemnor's Motion dated 11th March 2024 is a misuse of the court process, filed despite a pending Court of Appeal application (Civil Application No. E081 of 2024) seeking to stay his sentencing. It is argued that the motion improperly targets a non-existent order of 2nd November 2022, while the genuine orders of 1st and 21st November 2022 issued and reaffirmed by A.K. Ndung'u J remain valid and enforceable. The ex parte applicant insists that no unlawful order was extracted and that court orders are prepared by the Registrar's office, not by the parties, under post–Covid-19 procedures.

51. The exparte applicant maintains that the contemnor has shown acquiescence to the valid orders and is estopped from denying them, yet continues to breach the same orders by facilitating the operations of Metro Trans E.A. Ltd along Tom Mboya Street, contrary to express court prohibitions. This ongoing defiance has allegedly disrupted the ex parte applicant's PSV operations, undermined the authority and dignity of the court, and brought its orders into public disrepute.

52. The ex parte applicant therefore urges that the contemnor's motion be dismissed, that he be committed to civil jail for persistent disobedience, and that the court uphold its authority under Article 27(1) of *the Constitution* and Rule 39 of the High Court (Organization and Administration) (General) Rules to punish contempt and protect lawful court orders.

53. The ex parte applicant also filed written submissions dated 30th April 2025. In the submissions it is urged that the Motion dated 11th March, 2024 is incompetently before the Court as the Court issued an order for the sentencing of the contemnor, which has also not been set aside and hence the Applicant cannot by his motion seek to stay that which is lawful.

54. It is also submitted that Mr. Omurwa is guilty of acquiescence and his conduct amounts to estoppel, and that pursuant to Section 120 of the *Evidence Act*, he cannot resile from his acceptance of the Order of 1st November, 2022 herein issued and never set aside.

55. The ex parte applicant relies on Mulla, Code of Civil Procedure 18th Ed. 2012, at p.293 where according to the ex parte applicant, it is stated that the doctrine of res judicata ensures finality in litigation by preventing parties from repeatedly relitigating issues already determined by a competent court, thereby safeguarding judicial time, resources, and the integrity of the justice system.

56. The exparte Applicant also relies on the cases of In The Independent Electoral and Boundaries Commission vs. Maina Kiai &5 Others [2017] eKLR and Siri Ram Kaura v M.J.LE. Morgan, CA 71/1960 (1961) EA 462 where the court is said to have observed that the principle of res judicata bars a party who has lost a case from reopening the same litigation merely by introducing additional or similar facts, unless such new facts fundamentally change the case and could not have been discovered earlier with reasonable diligence, thereby preventing parties from evading the doctrine by rephrasing issues or adding new parties.

57. The ex parte applicant relies on several other cases where the courts have addressed the doctrine of res judicata and these include ET vs. Attorney General & Another (2012) eKLR, Pop In (K) Ltd & 3 others & Habib Bank Zurich Civil Appeal No 80 of 1988 [1990] KLR 609, Omondi v National Bank of Kenya Limited and others (2001); EA 177, Nancy Mwangi T/A Worthlin Marketers vs. Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others [2014] eKLR, Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR ,Lotta v Tanaki [2003] 2 EA 556 and Gurbachan Singh Kalsi v Yowani Ekori Civil Appeal No 62 of 1958[1958] EA 450.

58. The ex parte applicant contends that after repeatedly changing advocates from Mukami Law to Marube Law vide a Notice of Change of Advocates dated 3rd November, 2023 and filing multiple similar applications challenging the same contempt order of 23rd February 2023 all of which were dismissed and that the applicant has now filed the motion dated 11th March 2024 in an attempt to re-litigate matters already determined, despite having filed a notice and pending appeal before the Court of Appeal, rendering the motion incompetent, frivolous, and an abuse of the court process.

59. Further reliance is placed on Gab International Construction Co; Ltd v Zachary Kabucho Ndungu (Civil Appeal E032 of 2022) [2023] KEHC 17549(KLR) (19th May 2023) (Judgment) where the court is said to have held that the appellant's appeal was bound to fail because having chosen to seek a review of the trial court's ruling instead of appealing, the appellant could not later file an appeal over the same decision, as doing so constituted an abuse of the court process.

60. The ex parte applicant submits that at any rate, the contemnor/Applicant is guilty of acquiescence and his conduct amounts to estoppel, and hence he cannot resile from his acceptance of the order of 1st November, 2022 herein issued and which he has never set aside. Reliance is placed in the case

of Kenya Commercial Bank v M'Mionki (Environment and Land Appeal 1 of 2024) [2024] KEELC 5782 (KLR) (24 July 2024) (Judgment), where the court is said to have held that the doctrines of estoppel and waiver prevent a party from asserting a right they knowingly chose to forgo, as affirmed in Serah Njeri Mwobi vs. John Kimani Njoroge [2013] eKLR and Seascapes Ltd vs. Development Finance Co. (K) Ltd, Civil Appeal No. 247 of 2001.

61. The ex parte applicant further relies on the holding in the English case, Pickard v Sears 112 E.R. 179 where Lord Denman C is said to have crystallized the doctrine of estoppel.

62. The ex parte applicant submits that from his conduct in these proceedings, Mr. Omurwa has not been prejudiced in any manner by the processes of the Court effecting and demanding obedience of the Order of 1st November, 2022 and affirmed again on 22nd November 2022 with his full participation.

63. It is submitted that no step of the proceedings has been vitiated at all. Further, that Mr. Omurwa stands bound by his conduct in the proceedings through active and uninhibited, unconditional participation, in the issues relating to the enforcement of the order of 1st November, 2022 amounting to estoppel by conduct.

64. The ex parte Applicant also relies on the Court of Appeal decision in Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR where the court is said to have held that the doctrine of estoppel bars a person from denying or contradicting what their previous actions or statements have implied.

65. The ex parte applicant argues that having fully participated in the proceedings leading to the order of 1st November 2022, Oscar Rosana Omurwa is estopped from claiming prejudice, as the order was properly drawn by the Court's Deputy Registrar under the current procedure, and that therefore, his motion of 11th March 2024 should be dismissed, the contempt order enforced and the contemnor committed to civil jail for non-compliance.

66. It is also submitted that the motion dated 11th March, 2024 must fail and reliance is placed on the case of Assets Recovery Agency v Jared Kiasa Otieno [2020] eKLR where the Court is said to have observed that given that those were unique times and justice demands that courts should not act in a vacuum overlooking the wider picture that courts serve the course of justice, that it was justified in promptly reinstating the lapsed orders once courts resumed, as this ensured justice and caused no miscarriage of justice. According to the ex parte applicant, the motion dated 11th March, 2024 must fail as the extraction of orders has long since changed into the Judiciary taking control of the process.

Analysis and Determination

67. I have considered the application filed before this court on 11th March 2024, the response by the ex parte applicant and the submissions both oral and written and I find that the following issues are for determination;

    i. Whether the Motion dated 11th March 2024 is barred by res judicata or amounts to an abuse of the court process

    ii. Whether the differences in the date the order was made by the court (1st November 2022) and the date that the order was signed/issued by the Deputy Registrar (2nd November 2022) affects the validity of the order or renders the subsequent proceedings irregular

    iii. Whether the court (Ndung'u J) acted within its powers and discretion in issuing the interim order of 1st November 2022 and therefore whether that order as issued was irregular

    iv. What orders this court should make

68. The present matter has been pending before the Judicial Review Division since August 2022, when the ex parte applicant filed the chamber summons dated 29th August 2022. It has been handled at various stages by Hon. Justices Anthony Ndung'u and Chigiti, SC.

69. Following the recusal of Justice Chigiti, SC on account of a conflict of interest that had arisen after he had made orders in the matter that he took over from Justice Ndung'u, Chigiti J (SC) directed that the matter be mentioned before the Presiding Judge, Ngaah J. However, before the mention could take place, Ngaah J was transferred to another station. Consequently, the matter landed on my desk for mention and after subsequent proceedings, the present ruling date was fixed.

70. At the center of the dispute before this court is the order of A.K. Ndung'u J dated 1st November 2022 and the order signed/issued/certified by the Deputy Registrar on 2nd November 2022, arising from the proceedings of 1st November, 2022.

71. I shall briefly take the parties back to when the proceedings before Justice Ndung'u were commenced and what transpired up to the filing of the instant application, to appreciate the issues involved and why at the end of it all, I must make the decision that I have made.

72. The ex parte applicant herein filed a chamber summons application dated 29th August 2022 seeking the following orders:

> "1. That this application be certified as urgent and service thereof on the Respondents and the Interested Party be dispensed with in the first instance, on account of the demonstrated urgency.
>
> 2. That leave be granted to the Ex Parte Applicant to seek by way of Judicial Review, that an order of mandamus do issue, compelling the 3rd and 4th Respondents to jointly and/or severally forthwith remove and cause to be forthwith removed, or towed off the Interested Party's (Metro Trans E.A, Ltd) bus and/or buses blocking and obstructing the Ex Parte Applicant's and its members PSV vehicles operating as such PSVs along the Githunguri - Nairobi CBD route, access to, from, and at the Applicant's designated Tom Mboya slated passenger-picking and dropping off bay, as a designated PSV bus stop, bus lay- by and terminus along the Applicant's stated licensed route, or any other place within the Applicant's licensed Road Service Licensed route.
>
> 3. That leave be granted to the Ex Parte Applicant to seek by way of Judicial Review, that an order of prohibition do issue, prohibiting the Respondents and the interested Party (Metro Trans E.A. Ltd; or any other party or entity acting at their behest and/or agency), from unlawfully blocking the Ex Parte Applicant's and its members' PSV vehicles operating as such PSV along the Githunguri-Nairobi CBD route, access to, from (and at) the Applicant's designated Tom Mboya slated passenger-picking and dropping off bay, or any other place within their licensed Road Service Licensed (RSL) route.
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> 4. That owing to the monumental losses and the severe suffering by the 166 members of the Ex Applicant on account of the grounding of their PSV buses in consequence of the inaccessibility of their passenger pick-up and drop off point along Tom Mboya Street unlawfully taken up by the Interested Party herein as complained of, these proceedings be fast tracked and the time within

which to lodge the substantive Notice of Motion upon the grant of leave herein be truncated to the minimum time prescribed.

5. That the costs of these proceedings be to the Applicant in any event."

73. The court (Ndung'u J) in his ruling of 31st August 2022 ordered as follows:

> "I have perused the Notice of Motion dated 29th August 2022 and the Chamber Summons of even date. For reasons stated, I certify matter as urgent and admit the same for hearing during the current court recess
>
> Upon considering the Chamber Summons, am satisfied that an arguable case is established to warrant the grant of the leave sought. I grant leave in terms of prayers 2 and 3 thereof.
>
> The substantive Motion be taken out and served within 7 days. Responses be filed within 7 days of service.
>
> Mention on 14.9.22 for directions."

74. From the above it is obvious that the court had granted the following orders as seen from the prayers sought in the chamber summons;

> "2. .that leave be granted to the Ex Parte Applicant to seek by way of Judicial Review, that an order of an order of mandamus do issue, compelling the 3rd and 4th Respondents to jointly and/or severally forthwith remove and cause to be forthwith removed, or towed off the Interested Party's (Metro Trans E.A, Ltd) bus and/or buses blocking and obstructing the Ex Parte Applicant's and its members PSV vehicles operating as such PSVs along the Githunguri - Nairobi CBD route, access to, from, and at the Applicant's designated Tom Mboya slated passenger-picking and dropping off bay, as a designated PSV bus stop, bus lay- by and terminus along the Applicant's stated licensed route, or any other place within the Applicant's licensed Road Service Licensed route.
>
> 3. That leave be granted to the Ex Parte Applicant to seek by way of Judicial Review, that an order of prohibition do issue, prohibiting the Respondents and the interested Party (Metro Trans E.A. Ltd; or any other party or entity acting at their behest and/or agency), from unlawfully blocking the Ex Parte Applicant's and its members' PSV vehicles operating as such PSV along the Githunguri-Nairobi CBD route, access to, from (and at) the Applicant's designated Tom Mboya slated passenger-picking and dropping off bay, or any other place within their licensed Road Service Licensed (RSL) route."

75. Later, when the matter came up for mention before Ndung'u J on 14th September, 2022, it became apparent that the respondents and the interested party had not filed their responses and that the ex parte applicant had filed the substantive motion. During the said date, Mr. Kinyanjui Harrison, advocate representing the ex parte applicant informed the court that due to the acts of the respondents, his clients were suffering greatly losing 3 million shillings a day. In response, counsel for the respondents Mr. Kariuki argued that he did not have instructions, and he also informed the court that the functions of the Nairobi Metropolitan Service had reverted to the County Government. He stated that at the material time, he had no instructions on interim orders.

76. Ndung'u J in giving directions ordered as follows:

> " Ruling 19.9.22
>
> Ruling Notice be served on interested party with a rider that they file response within the intervening period."

77. On 19th September 2022, when the matter came up before the same Judge for the ruling as set, Mr. Kinyanjui Harrison advocate informed the court that he sought for a hearing date and that he could file his submissions on the same day. Mr. Kariuki on the other hand informed the court that the respondents had not filed their response. Consequently, the court made the following orders:

> " In light of the urgency in the matter, and noting the prejudice likely to be suffered by the ex parte applicant and as noted in my earlier Ruling, this matter ought to be expedited. I make the following directions:
>
> 1. There be personal service on the interested party by close of business today.
> 2. Responses be filed by the 23rd September 2022.
> 3. The applicant to file submissions within 2 days of service of responses and serve.
>
> The Respondents and Interested Party to file rejoinder submissions within 2 days of service of rival submissions. Timelines... cast in stone.
>
> M 29.9.22 to reserve a judgment date."

78. On 27th September 2022, the court, Ndung'u J gave directions in chambers that he would not be sitting on 29th September 2022 and as such, he rescheduled the matter to be mentioned on 5th October 2022. On 6th October 2022, the Hon. C.A. Muchoki Deputy Registrar in the division further directed in chambers that the matter be mentioned on 1st November 2022 as Ndung'u J was away on official duty.

79. When the matter came up before the court on 1st November 2022 Mr. Kinyanjui expressed his frustration with the delay of the matter on the part of the other parties and also stated that he had not been served.

80. Mr. Kariuki on the other hand informed the court that Nairobi Metropolitan Services was defunct and as such, even if a court order was to be issued, it would be difficult for execution to be done. It was also his submission that the functions of the Nairobi Metropolitan Services had been transferred to the County Government. Mr. Gitahi informed the court that he had filed a notice of appointment and a replying affidavit.

81. Upon conclusion of the submissions by counsel for the parties, the court rendered a ruling and made the following order:

> " Consequently, I will direct that the notice of appointment be served physically upon the ex parte Applicant.
>
> To balance the scales of justice the ex parte Applicant shall have leave to file a supplementary affidavit and submissions if desired within 3 days hereof.
>
> In view of the urgency of the matter, a ruling date is to be reserved as the diaries of the parties and the court may permit.

> Further in lieu of the stated losses being suffered by the ex parte applicant and noting the delay in this matter has solely been caused by the respondents and interested parties, justice shall be properly served by having the issuance of an interim order in terms of prayer 3 in the chamber summons dated 29.8.22 pending further orders of this court.
>
> Ruling 24.11.2022" [emphasis added]

82. It is the above underlined part of the ruling made on 1st November, 2022 by the learned Judge that is at the center of Mr. Omurwa's case. He argues that the order granted by the Court was deliberately changed by omission of part of Prayer 3 of the Chamber summons dated 29th August 2022 with the result that the meaning and effect of the order granted by the Court was altered to grant an undue benefit to the ex parte applicant.

83. Further, it is his case that the contempt application by the ex parte applicant, the contempt proceedings, the ruling holding him and the interested party in contempt, warrants of arrest issued against him and the subsequent sentencing sessions are all irregular and manifestly unjust as they are based on a court order obtained irregularly through deceit, connivance and trickery and ought to be stayed, set aside, discharged, lifted, revoked and or varied.

84. It is worth noting that following the court's ruling of 1st November 2022, the ex parte applicant filed an application dated 8th December 2022 seeking for Mr. Rosana Oscar Omurwa to be enjoined in the proceedings as the cited person/contemnor, that he appears before court physically to show cause why he should not be held in contempt of the order made by the court on 1st November 2022, that he be held to be in contempt of court for having acted and acting in breach of paragraph 6 of the said order, that he issues a public apology to the ex parte applicant and the Judiciary of Kenya.

85. The court Ndung'u J in his ruling of 23rd February 2023 held as follows:

> " From the foregoing and for reasons above stated i find that the Interested Party and its Chief Executive Officer (CEO) Rosana Oscar Omurwa wilfully disobeyed a valid court order. As held by Musinga J (as he then was) in Moses P.N. Njoroge & Others vs. Reverend Musa Njuguna and Another, Nakuru HCCC No. 247"A" of 2004, wilful disobedience of court orders undermines the authority and dignity of the Courts and must be dealt with firmly so that the Court's authority is not brought into disrepute. I therefore allow the application dated 8thDecember 2022 to the extent that the Interested Party and Rosana Oscar Omurwa are held in contempt of court for disobedience of the order of court issued on 1st November 2022. The Interested Party and Rosana Oscar Omurwa are directed to appear before this court on a date to be appointed to show cause why they should not be committed to civil jail and/or fined in lieu thereof. The Applicant shall have the costs of this application."

86. Subsequently, Mr. Omurwa filed applications, one dated 3rd March 2023 seeking to set aside, review or vary the court's orders of 23rd February 2023 claiming that he had resigned from being the CEO/ Managing Director of the interested party, which application was dismissed by the court.

87. He also filed an application dated 11th October 2023 seeking to have the warrants of arrest issued on 11th October 2023 by Justice Chigiti SC set aside which application was also dismissed with costs by the court.

88. The contemnor is now before this court seeking to expunge the order issued on 2nd November 2022, but made on 1/11/2022, to set aside the contempt proceedings, ruling and warrants of arrest against him, and to have the ex parte applicant sanctioned for allegedly irregularly extracting the said order.

89. The above is the background to this matter and having laid the foundation, I will now address the issues identified for determination as framed above.

Whether the Motion dated 11th March 2024 is barred by the doctrine of res judicata or amounts to an abuse of the court process

90. The ex parte applicant contends that the motion is res judicata, as Mr. Omurwa has already filed multiple applications on the same matter which applications were dismissed by the court.

91. It is argued that the present motion seeks to reopen issues already determined, including the contempt ruling of 23rd February 2023 and the warrants issued in July and December 2023.

92. Further, the ex parte applicant asserts that the motion is an abuse of court process, designed to delay enforcement of the contempt orders and frustrate the authority of the court.

93. It is highlighted that Mr. Omurwa has a pending appeal, yet he continues to file applications targeting the same orders, which compounds the abuse. The ex parte applicant maintains that the application is incompetent and without merit, as the court has already declared Mr. Omurwa guilty of contempt of court by an order of 23rd February 2023, which remains in force and has not been set aside or appealed.

94. It is further argued that the motion is a backdoor attempt to delay to obstruct enforcement of the contempt order in violation of the constitutional principle of the rule of law, and that the grounds raised properly belong to an appeal, not a review, which this court lacks jurisdiction to entertain.

95. It is also contended that the contemnor/ applicant herein has a pending application before the Court of Appeal seeking a stay of his sentencing, which demonstrates that this application duplicates the same issues and amounts to abuse of process. The ex parte applicant adds that the motion is incompetent, as the sentencing order remains lawful and unchallenged, and that the contemnor is estopped under Section 120 of the *Evidence Act* from denying or resiling from his acceptance of the order of 1st November 2022.

96. In a rejoinder, Mr. Omurwa's counsel argues that the previous rulings did not address the legality of the interim order of 1st November 2022, which forms the basis of the contempt proceedings and warrants issued against him. He further asserts that he is not re-litigating but merely seeking to correct a fundamental irregularity that affects his liberty and property rights.

97. On the issue of a notice of appeal having already been filed, it is submitted that this contention is wrong both factually and legally as from a factual perspective, his notice of appeal relates to the order made by the Court on 20th December 2023 while the present application relates to the erroneous order issued by the court on 2nd November 2022. It is argued that there is no notice of appeal filed against the order issued on 2nd November 2022.

98. Upon reviewing the application dated 3rd March 2023, I note that Mr. Omurwa in his application had sought for the contempt orders issued against him to be reviewed, varied or set aside as he claimed to no longer be the CEO/MD of the interested party. In the application dated 11th October 2023, he sought to set aside the warrants issued against him by the court on the same grounds raised in the application of 3rd March 2023. Both of these applications were procedural in nature, challenging enforcement rather than the legality of the order of 1st November 2022.

99. In contrast, the 11th March 2024 motion seeks to challenge the legality of the interim order itself, claiming it was irregularly extracted and that it materially altered the prayers sought. This raises a distinct legal issue that was not directly addressed in the earlier applications.

100. The Black's Law Dictionary (10th Edition), defines res judicata as an issue that has been definitively settled by judicial decision, requiring three essentials and these are an earlier decision on the issue, a final judgment on the merits, and the involvement of the same parties or parties in privity with the original parties.

101. The principle of res judicata prevents the reopening of litigation on the same cause of action, ensuring there is no multiplicity of actions involving the same parties. As observed in Njangu v Wambugu (Nairobi HCCC No. 2340 of 1991, unreported), if parties are allowed to endlessly litigate the same issue, it would defeat the purpose of the doctrine res judicata. Furthermore, in Siri Ram Kaura v M.J.E. Morgan (CA 71/1960), the Court of Appeal emphasized that the discovery of fresh evidence, without new circumstances, does not justify bypassing res judicata. To reopen a case, the new fact must substantially alter the case and could not have been discovered with reasonable diligence at the time of the original proceedings.

102. The doctrine of res judicata, as codified under section 7 of the *Civil Procedure Act*, bars a court from trying "any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

103. In the present case, while the order of 1st November 2022 formed the foundation of the contempt proceedings culminating in the ruling of 23rd February 2023, and the subsequent rulings of 20th July 2023 and 20th December 2023, the record does not show that the question of the validity or regularity of that order was ever directly raised, heard or finally determined in those proceedings. The prior determination concerned disobedience of an existing order, not its procedural propriety or issuance.

104. Consequently, my finding is that the current motion does not satisfy the strict ingredients of res judicata in so far as the issue now raised is not identical to the ones that were previously adjudicated upon with finality.

Whether the differences in the date that the order was made by the court on 1st November 2022 and the date that the order was extracted and signed by the Deputy Registrar on 2nd November 2022 affects the validity of the order or renders the subsequent proceedings irregular

105. There is a pull-and-push between the ex parte applicant and the alleged contemnor regarding the discrepancy between the dates on which the court order was said to have been delivered and issued. On one hand, the ex parte applicant contends that Mr. Omurwa's application is grossly incompetent as it purports to challenge an order issued by the court on 2nd November 2022, yet no such order was made, the valid order being that made on 1st November 2022.

106. On his part, Mr. Omurwa's Counsel argues that this contention is a misapprehension of his application and a possible attempt to mislead the court, noting that his application dated 11th March 2024 expressly refers to the order issued by the court on 2nd November 2022 and not the court order issued on 1st November 2022. He maintains that court orders indicate the date on which they were made or pronounced and the date on which they were issued by the court and these dates are often different. Further, that that the order made by the court on 1st November 2022 is not the order that was subsequently extracted and issued by the court on 2nd November 2022.

107. It is also his case that he has no issue whatsoever with the order that was made by the court on 1st November 2022, his issue is with the erroneous version of the order that was irregularly extracted and issued by the Deputy Registrar on 2nd November 2022.

108. I have considered the rival arguments on the matter. In this court's view, the issue of the different dates is a non-issue, as it is clear that the order referred to in the order extracted and signed on 2nd November 2022 emanates from the same decision of the court delivered on 1st November 2022. It bears emphasis that Deputy Registrars do not give court orders when they extract and sign the orders issued by the Judge. They merely sign and authenticate the orders on behalf of the court, which is the proper authority that issues judicial orders.

109. A judicial order becomes effective upon its pronouncement by the judge, not upon its extraction or signing by the Deputy Registrar. The Deputy Registrar's role under Order 21 Rule 8 of the Civil Procedure Rules is limited to approving, signing, and sealing formal decrees and orders to reflect the decision of the court and not to issue new or independent orders. They derive their authority for this from the original judgment or ruling delivered by the judge, not from any judicial power of their own.

110. Section 25 of the *Civil Procedure Act* clearly states the sequence: "The court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow". Further, Order 21 Rule 7 of the Civil Procedure Rules on the contents of a decree or order mandates that (1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

111. On dating of decrees, Order 21 Rule 8 of the Civil procedure Rules provides that (1) A decree shall bear the date of the day on which the judgment was delivered. Similarly, under sub rule (6), Any order, whether in the High Court or in a subordinate court, which is required to be drawn up, shall be prepared and signed in like manner as a decree. [emphasis added]

112. In this case, the record reflects that the substantive decision was made by the Judge on 1st November 2022 and the extracted order was signed, certified and issued by the Deputy Registrar on 2nd November 2022.

113. I have in the past, both judicially and administratively, maintained that the orders or decree must agree with the judgment or ruling in the sense that the decree or order must be dated and issued on the date when the decision was made. That remains the legal position.

114. Examining the impugned order, it has a date, and is dated 1st November, 2022. However, the said order was extracted by the Deputy Registrar on 2nd November, 2022 hence the latter date. Whereas the subsequent date may appear to make the order defective in view of the requirement under Order 21 Rule 7 of the Civil procedure Rules, that defect does not go to the substance of the order. It is a technical error which does not in any way prejudice any party and is curable under section 99 of the *Civil Procedure Act* and Article 159 (2) (c) of *the Constitution*.

115. Furthermore, the signing, certifying and issuing by the Deputy Registrar merely certified the authenticity of the order as reflecting the court's ruling. It did not amount to the Deputy Registrar issuing the order afresh. In any case, the loose meaning of the term issuing is to supply or distribute (something) for use. What matters is that the contents of the order agree with the ruling or order made by the Judge.

116. This Court therefore finds that the difference between the date the order was pronounced by the judge on 1st November 2022 and the date it was signed and certified by the Deputy Registrar on 2nd November

2022 does not affect the validity or legality of the order. It is well established that a Deputy Registrar's role in signing or certifying an order is administrative in nature. The Deputy Registrar does not possess judicial authority to issue new or independent orders. The act of signing and issuing merely formalizes and authenticates the judge's decision for purposes of record-keeping and service on the parties.

117. Accordingly, the order extracted and signed on 2nd November 2022 is legally the same as the order written and rendered by the court in the ruling of 1st November 2022. The purported discrepancy in dates is therefore a non-issue and cannot render subsequent proceedings, irregular or invalid. If anything, tat discrepancy can be curable under section 99 of the *Civil procedure Act* and is a mere procedural technicality curable by application of Article 159(2) (d) of *the Constitution*.

Whether the court (Ndung'u J) made the order which is impugned and whether he acted within his powers and discretion in issuing the interim order of 1st November 2022 and whether that order is irregular

118. It is the applicant's /Mr. Omurwa's case that there is an error apparent on the face of the record and discovery of new and important evidence, that there are also additional sufficient reasons for review of the ruling and order of 23rd February 2023, including the need to correct the injustice that the ruling, which was based on an irregular/erroneous order, has visited upon him.

119. In response, the ex parte applicant argues that the contemnor's motion dated 11th March 2024 is a misuse of the court process, filed despite a pending Court of Appeal application (Civil Application No. E081 of 2024) seeking to stay his sentencing. It is argued that the motion improperly targets a non-existent order of 2nd November 2022, while the genuine orders of 1st November 2022 issued and reaffirmed by Justice A.K. Ndung'u remain valid and enforceable. The ex parte applicant insists that no unlawful order was extracted and that court orders are prepared by the Registrar's office, not by the parties, under post–Covid-19 procedures.

120. The ex parte applicant maintains that the contemnor has shown acquiescence to the valid orders and is estopped from denying them, yet continues to breach the same orders by facilitating the operations of Metro Trans E.A. Ltd along Tom Mboya Street, contrary to express court prohibitions. Further, that this ongoing defiance has disrupted the ex parte applicant's PSV operations, undermined the authority and dignity of the court, and brought its orders into public disrepute.

121. This court begins by confirming that upon carefully examining the hand written proceedings by Ndung'u J and the court order extracted by the ex parte applicant, I find no discrepancy between the order as written and pronounced by the court on 1st November 2022 and the order extracted and signed by the Deputy Registrar on 2nd November 2022.

122. Although the applicant purports to challenge the order extracted by the Deputy Registrar on 2nd November 2022, the effect of his application is to impugn the substance of the order granted by Justice Ndung'u on 1st November 2022. This is because the record reveals that the extracted order faithfully reflects the terms of the court's handwritten proceedings. Consequently, the challenge, though framed as a complaint against the Deputy Registrar's extraction, in substance invites this Court to revisit and overturn a judicial determination of a judge of concurrent jurisdiction, an exercise which this Court is not permitted to undertake under the guise of review.

123. Turning to the genesis of the impugned orders, the record shows that the ex parte applicant had sought leave under Order 53 of the Civil Procedure Rules to apply for an order of prohibition in the chamber summons dated 29th August 2022. He did not, however, expressly in writing, seek for an interim order of stay pending hearing and determination of the substantive motion.

124. Order 53 Rule 1(4) of the Civil Procedure Rules provides as follows:

> " The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise."

125. The question to be answered, from the arguments for and against the order of 1st November, 2022 is whether a party must specifically apply for stay before the court can direct that the grant of leave operates as a stay under Order 53 Rule 1(4) of the Civil Procedure Rules, particularly where the relief sought is an order of prohibition or certiorari.

126. The rule vests in the court a discretionary power to determine whether the grant of leave shall operate as a stay. The operative phrase is "if the judge so directs," which confers upon the court latitude to act as the interests of justice may demand. The provision does not, however, state that such a direction shall issue automatically upon grant of leave.

127. In Republic v Independent Electoral and Boundaries Commission " Republic v Independent Electoral and Boundaries Commission Wiper Democratic Movement (Kenya) Registrar of Political Parties, Kyalo Peter Kyuli Exparte Wavinya Ndeti (Miscellaneous Civil Application 301 of 2017), G.V. Odunga J (as he then was) had this to say concerning the discretionary orders of stay in judicial review proceedings, citing other judicial pronouncements:

> " 15. In making a determination whether or not to grant the stay, the Court must place the respective cases of the parties before it in a legal scale. It must balance the competing interests in order to arrive at a just decision. Where the Court has found that there are issues in the suit which deserve further investigations, the Court is enjoined to preserve the substratum of the suit so that at the conclusion of the case, its decision will not be merely an academic exercise. The Court therefore has a duty to ensure that its proceedings are geared towards the achievement of a meaningful determination otherwise litigants who come to Court to seek redress therefrom will lose faith in the judicial system if the Courts cannot, during the pendency of the dispute preserve the subject of litigation. In my view the Court must have the power to guard against actions by some of the parties to the suit which are geared towards the dissipation of the subject matter before it before a determination is made one way or the other with respect to the rivalling issues placed before it. In other words, the Court must be in a position to ensure that whatever decision it finally arrives at, the proceedings before it are not seen to have been a circus.
>
> 16. As held by the High Court in Kaduna in Econet Wireless Limited vs. Econet Wireless Nigeria Ltd and Another [FHC/KD/CS/39/208] this involves: "a consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order of stay is granted, destroy the subject matter or foist upon the Court...a situation of complete hopelessness or render nugatory any order of the...Court or paralyse in one way or the other, the exercise by the litigant of his constitutional right...or generally provide a situation in which whatever happens to the case, and in particular even if the applicant succeeds...there would be no return to the status quo."

17. Therefore this Court must guard against any action or inaction whose effect may remove pith of this litigation and leave only a shell as was appreciated by the Court of Appeal in Dr Alfred Mutua vs. Ethics & Anti-corruption Commission & Others Civil Application No. Nai. 31 of 2016 in which it cited the Nigerian Court of Appeal decision of Olusi & Another vs. Abanobi & Others [suit No. CA/B/309/2008] that: "It is an affront to the rule of law to... render nugatory an order of Court whether real or anticipatory. Furthermore... parties who have submitted themselves to the equitable jurisdiction of courts must act within the dictates of equity." 18. It is therefore my view that parties who have invited the Court to adjudicate on a matter which they are disputing over ought not to create a situation whereby the decision to be made by the Court would be of no use. In that event as held by the Nigerian Court of Appeal in United Cement Company of Nigeria versus Dangote Industries Ltd & Minister of Solid Mineral Development [CA/A/165/2005], the Court ought to ensure that: "appropriate orders are made to prevent acts which will destroy the subject matter of the proceedings or foist upon the court a situation of complete helplessness or render nugatory any judgement or order."

19. It is trite that in giving effect to the rights the courts must balance fundamental rights of individual against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions. See Bell vs. DPP [1988] 2 WLR 73.

20. Apart from that as the Supreme Court appreciated in Gitirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR, the Court must consider whether or not it is in the public interest that the order of stay be granted and that this condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through *the Constitution*.

21. It was contended to grant the orders sought herein would amount to granting the final orders at this stage. Dyson, LJ in R (H) vs. Ashworth Hospital Authority [2003] WLR 127 at 138 where the held that: "The purpose of a stay in a judicial review is clear. It is to suspend the "proceedings" that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. In Avon, Glidewell, LJ said that the phrase "stay of proceedings" must be given wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction. A narrow interpretation, such as that which appealed to the Privy Council in Vehicle and Supplies, would appear to deny jurisdiction even in case A. That would indeed be regrettable and, if correct, would expose a serious shortcoming in the armoury of powers available to the court when granting permission to apply for judicial review...Thus it is common ground that "proceedings" includes not only the process leading up to the making of the decision but the decision itself. The administrative court routinely grants a stay to prevent the implementation of a decision that has been made but not yet carried into effect, or fully carried into effect." [Underlining mine].

> 22. What I understand the Court to be saying is that stay may include stay of the decision itself where the circumstances permit. However, whereas this Court appreciates that in certain cases a stay may be granted even where its effect may be to temporarily reverse the decision, that remedy may only be resorted to in exceptional cases and the onus is upon the applicant to prove that such exceptional circumstances exist. It is in this light that this Court understands the decision of Gladwell LJ in Republic vs. Secretary of State for Education and Science, ex parte Avon County Council (No. 2) CA (1991) 1 All ER 282 where he said that: "An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has been finally determined is, in my view, correctly described as a stay.""

128. This provision of Order 53 Rule 1(4) of the Civil procedure Rules confers explicit discretion on the court to issue interim orders to preserve the subject matter or prevent injustice pending determination of the substantive application. The provision does not make it mandatory that for the interim order of stay to issue, then the applicant must have sought such stay in the first instance.

129. The purpose of a stay order was well articulated by D. K. Maraga, J (as he then was) in Taib A Taib V Minister For Local Government & 3 Others (2006) eKLR when he stated that:

> " That this court has jurisdiction to grant orders of stay has never been in issue given the provisions of Order 53 Rule 1(4). What is always in issue is whether, in the circumstances of any particular case, a stay order is efficacious. I also want to state that in judicial review applications like this one the court should always ensure that the Ex-parte applicant's application is not rendered nugatory by the acts of the respondent during the pendency of the application. Therefore, where the order of stay is efficacious the court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that stay orders are discretionary and their scope and purpose is limited."

130. Thus, on the whole, in issuing an order of stay, the Courts always balance the interests of the parties before the Court. The court is empowered to direct that the grant of leave operates as a stay even where the applicant has not expressly asked for it, if the circumstances so warrant. The guiding principle is the need to preserve the substratum of the dispute.

131. This reasoning is particularly compelling where the applicant seeks an order of prohibition, whose purpose is to restrain a public authority or inferior tribunal from continuing unlawful proceedings. In such cases, the necessity for stay is inherent in the nature of the relief sought because failure to stay the impugned proceedings would defeat the very object of prohibition and render the substantive application nugatory

132. The Courts also consider the impact of the stay orders on the wider public.

133. In the present case, Ndung'u J, after being satisfied that the delay in the hearing and determination of the application was by the respondents, as shown by their noncompliance with the previous directions of the court to file their responses, and being satisfied with the urgency of the matter and the losses allegedly being suffered daily by the ex parte applicant, he exercised this judicial discretion under Order 53 Rule 1(4) of the Civil Procedure Rules to issue the interim order of 1st November 2022. The order sought to maintain the status quo and protect the exparte applicant from irreparable harm while the substantive motion for prohibition and mandamus was pending.

134. Therefore, whereas the grant of stay upon leave being given is discretionary and not automatic, the court's discretion may be invoked by the applicant or exercised suo motu where justice so requires.

135. In the instant case, and having examined the proceedings of the Court as a whole, I find that the interim order of stay as granted was not an amendment of the pleadings or a usurpation of party rights by the Court, but a lawful exercise of the court's judicial discretion under Order 53 Rule 1(4) of the Civil Procedure Rules.

136. Furthermore, the learned Judge's reasoning balanced the scales of justice, addressing delays caused by the respondents and mitigating daily financial prejudice, thereby demonstrating a clear exercise of judicial discretion.

137. As such, the order made on 1/11/2022 granting an interim stay, since the exparte applicant had sought for prohibition as the substantive orders in prayer No. 3 of the chamber summons, cannot be impugned on the grounds that the order as extracted on 2nd November, 2022 was deliberately changed by omission of part of Prayer 3 of the chamber summons dated 29th August 2022 with the result that the meaning and effect of the order granted by the Court was altered to grant an undue benefit to the ex parte applicant.

138. This court will therefore not interfere with the learned judge's exercise of judicial discretion or substitute its own view. To do so would amount to sitting on appeal over a decision of a court of concurrent jurisdiction, which the law abhors.

139. This court cannot sit on appeal over the discretionary decisions of a court of concurrent jurisdiction in the name of review or expunging from the record an irregular order. Where a party believes that a judge has exercised discretion improperly, the correct recourse is by way of appeal, not review. Accordingly, upon discovering the alleged irregularity in the order, Mr. Omurwa ought to have filed an appeal against the decision rather than seek to have it set aside through a review application.

140. The court of appeal in the case of Joseph Ndirangu Waweru t/a Mooreland Mercantile Co. & another v City Council of Nairobi [2015] KECA 148 (KLR) held thus;

> " We reiterate this Court's findings in the Stephen Mwaura Njuguna case (supra) that a Judge has no jurisdiction to re-hear and interfere with a decision in a matter that was decided by a fellow Judge of concurrent jurisdiction. If the respondent was aggrieved by the ruling and preliminary decree, its recourse was in appealing against the same.

141. Similarly, in the case of C C D vs. E N B, P K N, V D & B [2018] KEHC 3123 (KLR)

> "
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> " 11. Further, this Court cannot purport to fault the decision of a Court of concurrent jurisdiction. Nay, this would be arrogating to myself jurisdiction that I do not possess. The redress of the Respondent/Applicant being aggrieved by the decision on Hon. Chepkwony, J. lay in an appeal to the Court of Appeal and not the setting aside by this Court. I am fortified by the decision of the holding in the case of Joseph Ndirangu Waweru t/a Mooreland Mercantile Co. & another v City Council of Nairobi [2015] eKLR where the Court of Appeal had occasion to consider issue of the setting aside an order of a Court of concurrent jurisdiction. The case of Stephen Mwaura Njuguna vs

Douglas Kamau Ngotho Civil Appeal No. 90 of 2005 consolidated with Civil Appeal No. 247 of 2007 was cited, where the Court held:

"the learned Judge had no jurisdiction to determine a matter that was decided by a fellow Judge of concurrent jurisdiction. He could not for instance set aside a judgment of Muga Apondi J, a Judge who has the same jurisdiction as himself. Such setting aside could only be by an appellate court but not by a Judge of the High Court as the appellant sought."

The Court of Appeal in the Joseph Ndirangu Waweru case (supra) had this to say:

"We reiterate (sic) this Court's findings in the Stephen Mwaura Njuguna case (supra) that a Judge has no jurisdiction to re-hear and interfere with a decision in a matter that was decided by a fellow Judge of concurrent jurisdiction. If the respondent was aggrieved by the ruling and preliminary decree, its recourse was in appealing against the same.... The learned Judge was in error in assuming jurisdiction where she had none and setting aside a proper, regular judgment of a judge of concurrent jurisdiction where such jurisdiction was non-existent"

142. In Stephen Mwallyo Mbondo v County Government of Kilifi [2021] KEELRC 42 (KLR) held thus;

> " 20. The general principles on when an appellate court may interfere with a discretionary power of a trial are now well settled. In the case of Mbogo & Another vs Shah, [1968] EA, these principles were set out as follows: -
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> "An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice."
>
> "The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice."
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> 21. In Patel v E.A. Cargo Handling Services Limited (1974) E.A. 75, this Court held as follows:
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> " There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself or fetter wide discretion given to it by the rules: the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any rule of procedure."
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> 22. In Shanzu Investments Ltd v Commissioner of Lands [1993] eKLR, the court observed as follows on the discretion to set aside ex-parte judicial decisions: -
>
> ''The jurisdiction to vary judgment being a judicial discretion should be exercised judicially; and, as is often said, whether judicial discretion should be exercised or withheld in a party's favour, depends, on a large measure, on the facts of each particular case. The tests for the exercise of this discretion are these: - First, was there a defense on the merits? Secondly, would there be any prejudice? Thirdly, what was the explanation for any delay?''

23. In Shabir Din v Ram Parkash Anand (1955) 22 EACA 48 Briggs JA said at 51: -

> " I consider that under Order IX rule 20, the discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case, it should be exercised. In particular, mistake or misunderstanding of the appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised."

128. Similarly, the Court of Appeal in Justus Ongera v Director of Public Prosecutions & another [2018] eKLR held as follows;

> 15. We have considered the appeal fully. As earlier observed the only issue to consider is whether the trial court exercised its discretion in a judicious manner, for if it did, then an appellate court would have no basis to interfere. The Court can only interfere if the appellant demonstrates that the court misdirected itself in some matter and as a result has arrived at a wrong decision, or it is manifest that the judge was clearly wrong as a result of which an injustice occurred. In the case of United India Insurance Co. Ltd & 2 Others vs East African Underwriters (Kenya) Ltd [1985] eKLR, Madan, JA, (as he then was) stated:-
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> "The Court of Appeal will not interfere with a discretionary decision of the judge appealed from. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account of, or fifthly, that his decision, albeit a discretionary one, is plainly wrong".

143. Having considered the parties' respective rival positions, the record, and the applicable law, this Court finds that the interim order of 1st November 2022 was properly and lawfully issued in the exercise of the court's judicial discretion under Order 53 Rule 1(4) of the Civil Procedure Rules, and that the order extracted by the Deputy Registrar on 2nd November 2025 was a reflection of what the court had ordered on 1st November 2022.

144. It is therefore this court's finding that Ndung'u J acted within his jurisdiction and powers in granting interim relief to preserve the subject matter of the proceedings pending determination of the substantive motion.

145. I further find that the impugned order was not irregular merely because it was not expressly sought in the pleadings, and it is also not true that the order issued on 2nd November 2022 was acquired with connivance and deceit. Rather, the court in making the order of 1st November 2022, which orders are contained in the extracted order issued on 2nd November 2022 was exercising its lawful discretion conferred by statute to prevent injustice and preserve the efficacy of judicial review proceedings. Once the judge exercised that discretion, whether the prayer was sought in writing or not, this court, being one of concurrent jurisdiction, cannot sit on appeal over that decision through a review motion. The proper recourse for an aggrieved party would have been to file an appeal, not a review.

146. The principle is well established in Joseph Ndirangu Waweru t/a Mooreland Mercantile Co. & another v City Council of Nairobi [2015] KECA 148 (KLR) and C C D v E N B & others [2018] KEHC 3123 (KLR).

147. Therefore, having carefully considered the court record, this Court finds that the order of 1st November 2022 was properly issued by Ndung'gu J in the exercise of judicial discretion under Order 53 Rule 1(4) of the Civil Procedure Rules, and that the order extracted on 2nd November 2022 faithfully reflected the court's decision, contrary to the aspersions cast by the contemnor/applicant. There is no basis for impugning that order as being irregular or unlawfully procured.

148. Consequently, there is no basis upon which the contempt orders made pursuant to the disobedience of the impugned order can be set aside. Neither can this court set aside the warrants of arrest issued against the contemnor noting that the matter of contempt proceedings is pending before the Court of Appeal.

149. I find and hold that the application for review amounts to an impermissible collateral attack on the decision of a court of concurrent jurisdiction, which can only be challenged through an appeal, not a review.

150. In the end, and for the foregoing reasons, the notice of motion dated 11th March 2024 filed by Rosana Oscar Omurwa is found to be devoid of merit and the same is hereby dismissed.

151. The interim order of 1st November 2022 issued by Ndung'u J remains valid and in force.

152. The contempt proceedings against Rosana Oscar Omurwa and the interested party remain valid and enforceable, including the associated warrants of arrest.

153. I order each party to bear costs of the application for review.

154. Mention on 12/11/2025 for mitigation and the contemnor to appear physically in open court with his counsel.

155. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF NOVEMBER, 2025

R.E. ABURILI

JUDGE