Ungai v Speaker, County Assembly of Kakamega & 2 others; County Assembly of Kakamega (Interested Party) (Constitutional Petition E001 of 2024) [2025] KEHC 16463 (KLR) (13 November 2025) (Ruling)

Neutral citation: [2025] KEHC 16463 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CONSTITUTIONAL PETITION E001 OF 2024

AC BETT, J

NOVEMBER 13, 2025

BETWEEN

VICTORIA ZILLA UNGAI ..... PETITIONER

AND

THE SPEAKER, COUNTY ASSEMBLY OF KAKAMEGA ..... 1ST RESPONDENT

THE ACTING CLERK, COUNTY ASSEMBLY OF KAKAMEGA .... 2ND RESPONDENT

THE KAKAMEGA COUNTY ASSEMBLY COMMITTEE ON POWERS, PRIVILEGES AND IMMUNITIES COMMITTEE ..... 3RD RESPONDENT

AND

THE COUNTY ASSEMBLY OF KAKAMEGA ..... INTERESTED PARTY

RULING

1. The applicants herein moved this court vide a notice of motion application dated 31st December 2024, seeking the following orders;

    a. Spent

    b. Spent

    c. Spent

    d. Pending the hearing and determination of the application, the Honourable court be pleased to stay its finding contained in the judgment delivered on 1st November,2024 o the declaration of the illegality of the session and or sitting of the county Assembly of Kakamega on 27th September, 20233 and the subsequent order quashing the proceedings and business of the

session and or sitting of the county assembly of Kakamega convened by the speaker of the County Assembly of Kakamega o 27th September, 2023.

e. The Judgment of the court delivered on 1st November 2024, be reviewed and or varied, and the court be pleased to set aside the following findings as contained in the judgment: -

i. The session and or sitting of the County Assembly of Kakamega convened by the speaker of the County Assembly of Kakamega on 27th September 2023 was unlawful, illegal, and unconstitutional for having been convened contrary to the provisions of the county government of Kakamega standing orders; and

ii. An order of certiorari quashing the proceedings and business of the session and or sitting of the County Assembly of Kakamega convened by the speaker of the County Assembly of Kakamega on 27th September 2023.

f. The costs of the application will be provided for.

2. The application was supported by an affidavit sworn by Dr. Donald Keya Manyala, a Clerk to the Interested Party in which he averred that by the judgment delivered on 1st November 2023, this court in Paragraph 106 held that the sessions convened on 27th December 2023 were unprocedural and unlawful insofar as it convened in contravention of the assembly's standing orders and that the court arrived at the finding that it was a "special sitting" on the account that the respondents never submitted evidence, such as Hansard, Calendar or Gazette Notice of the special sitting to dislodge the petitioner's claim.

3. He averred that contrary to the finding by the court, the sitting of the 27th September 2023 was regular and not a special sitting. The sitting was within the sitting days of the Gazette Calendar, where the third part of the Calendar commenced on Tuesday, 19th September 2023, and as such, they annexed a copy of the Calendar of Events for the year 2023 to February 2024 together with the Gazette notice.

4. He admitted that they failed to annex the gazette notice or calendar of the county assembly in their earlier replying affidavit, which would have guided the court in arriving at a different finding. He asserted that there was an error apparent on record warranting this court to review its finding and stated that the error was;

a. The finding by the court that the sitting on 27th September,2023, was a special sitting. The sitting was, in fact, regular in line with the calendar.

b. Secondly, the finding by the court that the sitting session of the 27th September 2023 was illegal and or unconstitutional for failing to be gazetted and or in the absence of a calendar, contrary to the finding, the session was legal, having been gazetted as demonstrated above.

5. He further asserted that the Gazette notice and the calendar of the county Assembly, 2023, together with the attendant Gazette Notice, are new and important evidence that would warrant the court's consideration of its finding and review of its judgment.

6. According to the applicants, following the findings by this court, the operations of the County Government is in limbo as other businesses were also transacted on the exact date being 27th September 2023 and are susceptible to legal challenge including the Finance Act 2023.This would affect other third parties including the collection of revenue and other business which are at risk of being challenged through various petitions.

7. In opposition to the application, the respondent filed a replying affidavit dated 20th June 2025, where she deponed that she had already preferred an appeal at the Court of Appeal on the same ground, being that "12. The learned judge erred in fact and law at Paragraph 106 of the judgment by finding the 27th

September 2023 sitting unprocedural and unlawful for alleged contravening the Assembly standing orders, based on the assumption it was a "special sitting without the respondents providing evidence like the Hansard, Calendar, or gazetted notice to refute the petitioner's claim" and they annexed a copy of the Notice of Appeal and the Memorandum of Appeal.

8. The respondent made reference to order 45 Rule 1 (2) that provides that:-

> " 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."
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> She contends that the ground for review is common to the ground of appeal, and the applicants can present to the appellate court the case on which they are applying for review. Consequently, this court's jurisdiction for review is ousted, and it should drop its tool and strike out the application.

9. The application was canvassed by way of written submissions.

Applicant's Submissions

10. In their submissions dated 30th May 2025, the applicants submit that this court ought to exercise its jurisdiction in accordance with section 80 of the *akn ke act 1924 3 Civil Procedure Act*, stating that they had proved that there was discovery of important evidence, an error apparent on the face of the record, and any sufficient reason. On the first ground, they claim that the sitting conducted on 27th September 2023 was not a special sitting but a regular sitting, affirming that the finding that it was illegal and or unconstitutional, was in error as demonstrated by the Gazette Notice.

11. They aver that the error or mistake apparent on the face of the record is self-evident and does not require elaborate arguments. Quoting the case of Moses Kipkolum Kogo vs. Nyamogo & Nyamogo advocates [2000] eKLR to support their arguments, they contend that the review application is properly before the court, which has jurisdiction to determine it, stating they have not filed an appeal before the Court of Appeal but filed an application for review. They assert that they are not the party that filed the appeal, hence they are not precluded from filing a review application before this court.

12. They further submit that the right for review subsists notwithstanding an existing appeal by the other party, as there is no appeal within the meaning of Order 45 Rule 2 and cite the case of Multichoice (Kenya) Limited vs. Wananchi Group (Kenya) Limited & 2 others [2020] eKLR and Amani National Congress party & 2 others vs. Shimanga & another [2022] KECA 740 (KLR).

13. According to the applicant, since no record of appeal has been filed by the petitioner, the grounds in the appeal cannot be ascertained at this stage. They submit that the new evidence was not part of the record and cannot form a ground of appeal in the intended appeal before the Court of Appeal and pray that the court reviews the judgment delivered on 1st November 2024 and grant the orders prayed for in their application.

Respondent's Submissions

14. The respondent avers that the application seeking review is statutorily barred under order 45 Rule 1(2) as she had already lodged an appeal against the same judgment as evident by the notice and the draft memorandum of appeal. As such rule 1 (2) bars the respondent from seeking a review of a judgment on grounds common to the pending appeal. She contends that even in the absence of the appeal, the

review application still fails as the alleged Gazette Notice and Assembly calendar were never presented earlier. She contends that the alleged new and important evidence is both false and legally inadequate, as it was a public document known to the applicants. They should have produced it as part of due diligence as part of their evidence.

15. She asserts that the allegation that the sitting was a special sitting as opposed to a regular sitting was acknowledged by this court in paragraph 101 of the judgment and stated that an error must be self-evident and quoted the case of Moses Kipkolum Kogo vs. Nyamogo & Nyamogo advocates [2000] eKLR (supra).

16. She claims that the applicants seek relief on both the review and appeal, thus invoking double jurisdiction contrary to Order 45 Rule 1 (2), as she has already lodged an appeal and is awaiting the typed proceedings to file her record of appeal, and the delay in filing the proceedings was beyond her control.

17. She prays that the application be dismissed on logical consideration, holding that the Court of Appeal is a superior court and, as such, the High Court should cease entertaining parallel proceedings on the same subject matter as it would risk issuing a contrary decision on the same question of law and fact.

Analysis and Determination

18. I have considered the application, the supporting affidavit, the replying affidavit, and the rival submissions by the parties and find the following issues for determination;

    a. Whether this court has the jurisdiction to review its judgment delivered on 1st November, 2024, in light of the pending appeal.

    b. Whether the applicants have met the threshold for review under Section 80 of the *akn ke act 1924 3 Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules.

    c. Whether sufficient grounds exist for the grant of the orders sought.

19. Section 80 of the *akn ke act 1924 3 Civil Procedure Act* gives this court power to review its own decree or order, while Order 45 Rule 1(1) of the Civil Procedure Rules outlines the grounds for such review, as follows:-

    a. Discovery of new and important matter or evidence which, after due diligence, was not within the applicant's knowledge or could not be produced at the time the decree was passed;

    b. Some mistake or error apparent on the face of the record; or

    c. Any other sufficient reason.

20. However, Order 45 Rule 1(2) expressly limits the court's review power where an appeal is pending. It provides that:

> "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 the respondent, he can present to the appellate court the case on which he applies for the review."

21. The respondent in her submissions relied on the above rule, where she annexed a copy of her Notice of Appeal and draft Memorandum of Appeal dated 20th June 2025, both relating to paragraph 106 of the judgment on the ground that this Court erred in finding the 27th September 2023 sitting unprocedural

and unlawful for alleged contravention of Standing Orders, based on the assumption it was a "special sitting" without evidence of the Hansard, gazette notice or calendar.

22. In Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Ltd (supra) the Court of Appeal held that a court cannot entertain a review application where an appeal is pending on the same issue, as doing so would occasion the risk of two courts pronouncing themselves concurrently on the same subject.

23. Similarly, in Republic v Advocates Disciplinary Tribunal & Another ex parte Apollo Mboya [2019] KEHC 6379 (KLR), the court held that:-

> " 30. The principles which can be culled out from the above noted authorities are:-
>
> i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
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> ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
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> iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
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> iv. An erroneous order decision cannot be corrected in the guise of exercise of power of review.
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> v. A decision order cannot be reviewed under Section 80 on the basis of subsequent decision judgment of a coordinate or larger Bench of the tribunal or of a superior court.
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> vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order decision as vitiated by an error apparent.
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> vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court tribunal earlier.
>
> viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
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> ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for

the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1."

24. I note that one of the grounds in the draft Memorandum of Appeal is that, "The learned judge erred in fact and law at paragraph 106 by finding the 27th September 2023 sitting unprocedural and unlawful for alleged contravening the Assembly standing orders, based on the assumption it was a 'special sitting' without the respondents providing evidence like the Hansard, Calendar, or gazetted notice to refute the petitioner's claim."

25. The grounds for the review application is: "The Court erred in finding the sitting was a special sitting and unlawful for want of gazettment, whereas it was regular per the Calendar now produced."

26. The grounds raised by both parties are similar in substance. Both challenge the evidentiary basis for the finding in paragraph 106. The applicants' "new evidence" is deployed to dislodge the same finding that the respondent has appealed against. The applicants are not the appellants; they are the respondents in the appeal. They are not precluded from presenting their case (including the Calendar and the Gazette Notice) to the Court of Appeal by way of additional evidence under Rule 29(1)(j) of the Court of Appeal Rules, upon showing it was not available earlier.

27. Accordingly, I hold the opinion that this Court lacks jurisdiction to entertain the application for review. To do so would be to sit on appeal over its own judgment, a course prohibited by the court vide its decision in Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Ltd & 2(supra).

28. Consequently, I find that this court lacks jurisdiction to review the impugned judgment to the extent that the issues raised are already before the appellate court.

29. Without prejudice to the above finding on jurisdiction, and for completeness, I shall nonetheless address the issue as to whether the applicants have satisfied the statutory requirements for review.

30. The applicant's main grounds for review of the finding that the 27th September 2023 sitting was unprocedural and unlawful for alleged contravening the assembly's standing order are based on two grounds, being that;

    a. There exists an error apparent on the face of the record; and

    b. New and important evidence has been discovered which was not before the court at the time of judgment.

31. On the first ground that there was an error apparent on the face of the record, the applicants contend that this court erred in paragraph 106 of its judgment by finding that the sitting of 27th September 2023 was a special sitting rather than a regular sitting. They argue that this amounts to an error apparent on the face of the record.

32. The concept of an error apparent has been the subject of consistent judicial interpretation. In Nyamogo & Nyamogo Advocates v Kogo [2001] EA 173, the Court of Appeal held that:-

> "An error apparent on the face of the record cannot be defined precisely or exhaustively. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error has to be established by a long drawn process of reasoning or on points on which there may conceivably be two opinions, it cannot be said to be an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal."

33. Applying the foregoing principles, the court's determination on whether the sitting was special or regular was a factual finding arrived at after a full consideration of the evidence presented. Revisiting that issue would entail a fresh re-examination of the evidence, which falls outside the limited mandate of this court when exercising review jurisdiction. The alleged mistake is not self-evident on the face of the record; rather, it is a debatable issue of fact and law that properly belongs to the appellate court.

34. I therefore find that no error apparent on the face of the record has been demonstrated. Regarding the second claim that new and important evidence was presented, the applicants have now produced the County Assembly Calendar for 2023-2024 and a Gazette Notice dated June 23, 2023, ref Vol. CXXV-No.143, contending that the documents demonstrate that the sitting on 27th September 2023 was a regular sitting and not a special sitting as alluded to by the court's judgment delivered on 1st November 2024. They assert that this evidence was not available at the time of the hearing, and therefore, there is a need to review their decision.

35. On the other hand, the respondent opposes the application, stating that the applicants had an opportunity to produce the Gazette notice and the calendar during the trial since they are the custodians of the documents, which are public documents, and it was their duty to exercise due diligence and produce all the evidence that they sought to rely on.

36. It is this court's finding that the applicants should demonstrate that the new evidence was not within their knowledge and could not have been produced at the trial through the exercise of due diligence. This principle was reaffirmed in Republic v Advocates Disciplinary Tribunal ex parte Apollo Mboya (supra).

37. In the present case, the applicants candidly admit that they "failed to annex the Gazette Notice or Calendar" in their earlier replying affidavit. The Gazette Notice and Assembly Calendar are public documents that have been in existence and are accessible to the applicants with minimal effort. Failure to adduce them cannot be said to constitute discovery of new evidence; it amounts to an omission due to lack of diligence, not a discovery of a new matter.

38. In Rose Kaiza v. Angelo Mpanjuiza [2009] KECA 422 (KLR), the Court of Appeal while considering an application for review on the grounds of new evidence held that:-

> " An application for review under Order 44 r 1 must be clear and specific on the basis upon which it is made."

39. I therefore find that the applicants have failed to demonstrate discovery of any new and important evidence within the meaning of Order 45 Rule.

40. The applicants have also invoked the ground of "any other sufficient reason," holding that failure to review the judgment would paralyze the operations of the County Government and expose previous proceedings, including the Finance Act 2023 and other decisions discussed on 27th September 2023, to challenge.

41. The jurisprudence of our superior courts has consistently held that "any other sufficient reason" must be analogous to the other grounds stipulated under Order 45 Rule 1, namely, discovery of new evidence or error apparent. Administrative inconvenience or potential policy impact, without a demonstrated miscarriage of justice, does not qualify as a sufficient reason. In Republic v Advocates Disciplinary Tribunal & Another ex parte Apollo Mboya [2019] KEHC 6379 (KLR)(supra) the court held that:-

> 27. A court can review a judgment for any other sufficient reason. In the case of Sadar Mohamed vs Charan Signh and Another it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter. Mulla in the Code of Civil Procedure (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression 'any other sufficient reason'...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.

42. While the court appreciates the gravity of the applicants' concerns, such implications are best addressed through the appellate process rather than reopening a concluded judgment under the guise of review.

43. Having considered the totality of the pleadings, evidence, and applicable law, this court finds as follows:

    a. The grounds raised in the review application are substantially the same as those pending before the Court of Appeal, thereby ousting this court's jurisdiction under Order 45 Rule 1(2) of the Civil Procedure Rules.

    b. No error apparent on the face of the record has been demonstrated.

    c. The documents relied upon do not amount to newly discovered evidence within the meaning of Order 45 Rule 1.

    d. No sufficient reason has been established to warrant interference with the judgment of this court delivered on 1st November 2024.

    e. Accordingly, the Notice of Motion dated 31st December 2024 lacks merit and is hereby dismissed.

    f. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 13TH DAY OF NOVEMBER 2025.

A. C. BETT

JUDGE

In the presence of:

..... for the Petitioner

..... for the Respondents

..... for the Interested Party

Court Assistant: Polycap