Nyambura & 3 others v Independent Electoral and Boundaries Commission & 5 others; Kimando (Interested Party) (Constitutional Petition E021 of 2025) [2025] KEHC 17989 (KLR) (2 December 2025) (Ruling)

Neutral citation: [2025] KEHC 17989 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CONSTITUTIONAL PETITION E021 OF 2025

RN NYAKUNDI, J

DECEMBER 2, 2025

BETWEEN

JOYCELENE LEAH NYAMBURA ..... 1ST PETITIONER

FRANCIS PAUL ..... 2ND PETITIONER

ANDREW MUDIBO ..... 3RD PETITIONER

KENYA TABLE TENNIS ASSOCIATION ..... 4TH PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1ST RESPONDENT

MUTHEE GAJURU ..... 2ND RESPONDENT

SALONIK OLE KOYIET ..... 3RD RESPONDENT

NDERITU GIKARIA ..... 4TH RESPONDENT

NATIONAL OLYMPIC COMMITTEE - KENYA (NOCK-K) .. 5TH RESPONDENT

SPORTS REGISTRAR ..... 6TH RESPONDENT

AND

DANIEL MUNGAI KIMANDO ..... INTERESTED PARTY

RULING

1. What is pending before this court for determination is an amended Notice of Motion expressed under the provisions of section 1A, 1B, 3A, 63(c) & (e) of the *Civil Procedure Act*, Order 45 Rule 1 and Order 51 Rules 1 of the Civil Procedure Rules. The applicant seeks orders as follows:

1. Spent.

2. That this Honorable court be pleased to order a stay of execution ex-parte of the Ruling of this Honorable Court delivered on 18th July, 2025 and all consequential orders thereto pending the inter-partes hearing of this application.

3. That this Honorable Court be pleased to order a stay of execution of the Ruling of this Honorable Court delivered on 18th July, 2025 and all consequential orders thereto pending the hearing and determination of this application.

4.

   a. That this Honorable Court be pleased to review, discharge, vary, and/or set aside the Ruling delivered by this Honorable Court on 18th July, 2025.

4.

   b. That this Honorable Court be pleased to declare null and void the election conducted on the 21st day of July, 2025, and do hereby order and direct that fresh elections be held within twenty-one (21) days from the date of this order, wherein only candidates duly nominated by their respective federations shall be eligible to contest and only persons duly nominated to vote by their respective federations shall be entitled to participate as voters in the said fresh elections.

5. That such other orders and directions as may appear to this Honorable Court just and convenient to grant under the circumstances.

6. That the costs of this application be provided.

2. The application is anchored on grounds that:

   a. The court's decision failed to consider the evidence adduced by the 3rd and 4th Respondents in their Replying affidavit dated 9th July, 2025, despite the same being filed and served.

   b. There is a clear mistake and error apparent on the face of this Honorable Court's record warranting the decision to be revisited.

   c. The 3rd and 4th Respondents' case contained crucial evidence including Federations minutes clearly showing that nominations are by the Federation, which directly addressed the core constitutional mandate relevant to the petition.

   d. The Honorable Court failed to subject the evidence adduced by the 3d and 4th Respondents to the evidentiary test and standard required by law.

   e. The subject of matter of the Federation's Constitutional mandate to conduct nominations as evidenced in the minutes filed by the 3rd and 4th Respondents was not considered by the Honorable Court.

   f. The 3rd and 4th Respondents herein as parties to the said judicial proceeding had a Constitutional right to have their evidence considered.

   g. The ruling delivered on 18th July, 2025 relied upon incomplete consideration of evidence, which is in disregard of the Constitutional provisions regarding fair hearing.

h. The failure to consider the evidence of the 3rd and 4th Respondents violates the principles of natural justice and fair hearing as enshrined in *the Constitution*.

i. The admission and consideration of all relevant evidence is fundamental to the proper administration of justice and the Rule of law.

j. The ruling delivered on 18th July, 2025 was based on incomplete evidence thereby occasioning a miscarriage of justice.

k. No evidence was led to show that the evidence contained in the replying affidavit dated 9th July, 2025 was irrelevant or inadmissible.

l. The evidence presented by the 3rd and 4th Respondents including the Federation's minutes were of probative value and directly relevant to the issues for determination.

m. The failure to consider relevant evidence constitutes an error apparent on the face of the record that warrants review.

n. There shall be no prejudice occasioned to any party if this application is allowed.

o. It is in the interest of justice that the 3rd and 4th Respondents be afforded ample opportunity to have their evidence considered before the final determination.

3. The application was equally supported by an affidavit sworn by Nderitu Gikaria, which I have reproduced hereunder for context purposes:

a. That I am the Secretary General of Kenya Handball Federation, an Affiliated member of NOC-K, conversant with the facts of this matter and the 4th Respondent herein, hence competent to make this Affidavit.

b. That I am well acquainted with the contents of the Application filed herewith and make this affidavit in support thereof.

c. That I am aware that a ruling was delivered by this Honorable Court on 18th July, 2025 in favor of the Applicants who had been denied the right to participate in the election.

d. That I am further aware that the reasons for the Court's decision were based on the Court's findings regarding the denial of the right to participate in the election.

e. That I am advised by my Advocate on record which advice I embrace that there is a clear mistake and error apparent on the face of this Honorable Court's record warranting the decision to be revisited.

f. That our evidence as presented before the Honorable Court did not receive proper consideration despite filing substantive evidence in response to the matter.

g. That I am advised by my Advocate on record which advice I embrace that the Honorable Court failed to consider the evidence adduced by we, the 3rd and 4th Respondents through the replying affidavit filed on 9th July, 2025.

h. That the replying affidavit we filed dated 9th July, 2025 contained crucial evidence including minutes by the Federation which clearly demonstrates that nominations are conducted by the Federation.

i. That the subject matter of the said evidence is explicitly related to the core issue in the proceedings regarding the right to participate in the election and the proper procedure for nominations.

j. That it is apparently manifest that the court, in its ruling failed to highlight the evidence by the 3rd and 4th Respondent yet it went on to consider evidence that was filed by other parties.

k. That I am advised by my Advocate on record which advice I embrace that as parties to the said judicial proceeding, we, the 3rd and 4th Respondents had a Constitutional right to have our evidence properly considered by the Honorable Court.

l. That I am further advised by my Advocate on record which advice I verily believe to be true that the failure to consider the evidence we filed was an error apparent on the face of the record constituting a material omission in the judicial process.

m. That I am advised by my Advocate on record which advice I verily believe to be true that there was clear evidence before the Court establishing the Federation's authority over nominations which was not considered in arriving at the final decision.

n. That the evidence contained in the replying affidavit dated 9th July, 2025 is clearly relevant to the determination of the matter, particularly regarding the proper procedure for nominations and the rights of the parties.

o. That the Court failed to interpret articles 13.1 and 17.12 of the NOC-K Constitution and rules on who between the President and the Secretary General should exercise the voting right, which are of utmost importance in determining the dispute at hand.

13.The General Assembly – Composition and Voting Members

13.1 The General Assembly shall be the highest governing body, and the Legislative Organ of the Committee and in composition shall comprise all affiliated (voting and nonvoting) members of the Committee mentioned under Article 5 of *the Constitution*.

Each Federation shall be represented in the meeting by two (2) delegates who will be duly nominated by their respective federations, one of whom must either be the President or the Secretary General and one of whom shall be entitled to exercise a voting right (on behalf of the federation) in the meetings of the General Assembly (when the federation is a voting member under this constitution)

17. 12 Every Federation/Association eligible to vote shall be represented by two delegates one of whom must be either the President or the Secretary general one of whom shall have voting rights as mentioned in Article 13.2 of this Constitution.

p. That I am further advised by my Advocate on record which advice I verily believe to be true that the Court's failure to address our evidence regarding the Federation's role in nominations was material to the outcome of the case.

q. That I am advised by my Advocate on record which advice I verily believe to be true that the Court's decision would have been different had it properly considered our evidence.

r. That no evidence was presented to contradict the minutes by the Federation which clearly established the proper procedure for nominations.

s. That I am advised by my Advocate on record which advice I verily believe to be true that the Court's failure to consider the evidence filed by us may have rendered the decision incomplete and erroneous.

t. That I am advised by my Advocate on record which advice I verily believe to be true that the Court's ruling has condemned us without proper consideration of our evidence and defence.

u. That I am advised by my Advocate on record which advice I verily believe to be true that there are sufficient grounds for this Honorable Court to review and set aside its Judgment of 18th July, 2025.

v.

b. That I am advised by my learned Advocates, which advice I verily believe to be true and correct, that this Honorable Court in its Judgment delved extensively and pronouncedly into matters of discrimination which were neither pleaded nor raised as issues by any of the parties herein, and that in so doing, the Court acted beyond its judicial mandate and assumed the role of a litigant rather than that of an impartial adjudicator.

w. That I am aware that no Appeal has been preferred from the impugned decision of this Honorable Court delivered on 18th July, 2025.

x. That this Application has been brought without unreasonable delay.

y. That I make this Affidavit in support of the Notice of Motion Application filed herewith seeking a review of the Ruling delivered by this Honorable Court on 18th July, 2025.

4. In opposition to the application, the 1st and 2nd Petitioners filed a Notice of Preliminary Objection dated 2nd September, 2025 and grounds of opposition dated 12th August, 2025. The 1st and 2nd Petitioners advanced the following grounds of opposition:

a. The applicants have not made out a case for review of the Ruling of the Honorable Court per section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.

b. In the application at hand, the main ground for review by the applicants is that; "the court's decision failed to consider the evidence adduced by the 3rd and 4th Respondents despite the same being filed and served." This ground is unmerited as it cannot be categorized as an error apparent on the record of the court. This is a substantive ground that ought to be raised on appeal.

c. 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 detailed examination.

d. The court is being invited to re-open the case; re-evaluate, re-assess and re-analyze the evidence and then determine whether the conclusions it reached should stand or not. This is a function of the first appellate court as held in the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 where the Court of Appeal stated that: "On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

e. Having rendered its ruling which disposed of the matter, the Honorable Court was rendered functus officio and it cannot sit on appeal on its own decision.

f. An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the case afresh. The applicants have not demonstrated that re-consideration of their evidence would affect the final finding of the court. The overwhelming evidence presented by the Petitioners and the Sports Registrar regarding the right of the 1st and 2nd Petitioners to carry the vote as presidents of their respective federations overshadows the allegations by the 3rd and 4th Respondents. This aspect was already considered by the Court and a reconsideration of the same will not affect the Court's Ruling rendered on 18th July, 2025.

g. The 3rd and 4th Respondents hold positions of Secretaries General in their respective federations. The said federations were not aggrieved by the Ruling of the Court as it enabled their due representation in the NOC-K elections. The federations have not lodged any compliant nor shown dissatisfaction with the decision of the court.

h. Paragraph 4B of the annexed application prays that the results of the NOC-K elections held on 21st July, 2025 be nullified. This prayer cannot issue because it contravenes the principles of natural justice, rule of law and access to justice. There are other parties and candidates who participated in the NOC-K elections and were lawfully elected into office. A blanket nullification of the election would be condemning them unheard.

i. The applicants were not nominated by their respective federations to participate as candidates for any position in the NOC-K elections. They have demonstrated any direct prejudice that they shall suffer if the election results are not nullified. On the contrary, NOC-K and the sports fraternity will suffer monumental prejudice. This is because the elected official of NOC-K already assumed office and nullification of the election results will create an undesired vacuum in the NOC-K leadership.

j. The procedure for challenging elections of a sports body is clearly provided under Regulation 20(7) of the Sports Registrar Regulations (2016) which reads: 'A person who is dissatisfied with the results of an election may appeal to the sports disputes tribunal within thirty days of the election.' The applicants therefore cannot challenge the elections through an application for review application to this Honorable court.

1st and 2nd Petitioners written submissions

5. Learned Counsel for the petitioners started by giving a background of the matter and identified the following issues for determination:

a. Whether the amended notice of motion and supporting affidavit are fatally defective and liable to be struck out with costs.

b. Whether the applicants have made out a case for review of the ruling of the honorable court per section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.

c. Whether the court having rendered its ruling which disposed of the matter, can re-open the case, re-evaluate, re-assess and re-analyze its decision to determine whether the conclusion is reached should stand or not.

d. Whether the NOC-K elections held on 21st July be nullified as prayed by the 3rd and 4th Respondents.

6. Starting with the first issue, it is submitted for the 1st and 2nd petitioners that the amended Notice of motion dated 30th July, 2025 is fatally defective and bad in law as it is not supported by a valid supporting affidavit. That the applicants filed an amended supporting affidavit to support an amended notice of motion dated 30th July, 2025. Counsel submitted that it is trite law that an affidavit is evidence and therefore, Order 8 of the Civil Procedure Rules 2010 which provides directions on amendments of pleadings becomes inapplicable to affidavit evidence. On this counsel relied on the case of James Peter Maina Muriuki vs Moses Maina Ngugi & Another (2008) eKLR.

7. Learned Counsel further submitted that an affidavit is an oath and not a pleading that can be amended. That any alteration to an affidavit offends the oath upon which the affidavit is grounded. The 1st and 2nd petitioners cited the case of Omar & 161 others v. National Land Commission & 4 others KEELC 4618 (KLR) where the 3rd Respondent filed the preliminary objection raising one ground that depositions in an affidavit are statements under oath, and they cannot therefore be subject to amendment. That this preliminary objection was supported with brief submissions in which the counsel argued that the further further amended petition is supported by an affidavit cannot be amended, and the amended affidavit must be struck out, with costs.

8. Further, the 1st and 2nd petitioners submitted that the defects in the amended Notice of Motion and supporting affidavit filed by the applicants are not mere technicalities curable under Art. 159(2)(d) of *the Constitution* of Kenya, 2010, these defects go to the root of the validity and competence of the application.

9. On the second issue regarding review, it is submitted for the 1st and 2nd petitioner that despite the applicants' allegation that their evidence was not considered by the court before the decision. The applicants did not highlight the specific evidence not considered. It is further submitted that review by no means an appeal in disguise whereby a purportedly erroneous decision is reheard and corrected. That the applicant's case is an appeal in disguise.

10. Moving to the third issue, it is submitted for the 1st and 2nd petitioners that the court has been invited to re-open the case, re-evaluate, re-assess and re-analyze the evidence and then determine whether the conclusions it reached stand or not. That this is impermissible and it is a function of the first appellate court as held in the case of Kenya Ports Authority versus Kuston (Kenya) limited (2009) 2EA 212.

11. In sum, it was submitted for the 1st and 2nd petitioners that the applicants have not demonstrated the strength of their grounds of review and therefore their application ought to be dismissed.

Analysis and determination

12. Having carefully considered the application, the supporting affidavit and replying affidavit in support, the grounds of opposition, and the written submissions by the parties, this court is called upon to determine a singular but fundamentally important question: whether the applicants have established sufficient grounds to warrant this court's exercise of its review jurisdiction over the ruling delivered on 18th July, 2025. This determination requires this court to examine the legal principles governing review applications and their application to the facts as presented.

13. The power of review is a creature of statute, expressly provided for under section 80 of the *Civil Procedure Act* and circumscribed by the procedural framework set out in Order 45 of the Civil Procedure Rules. Section 80 of the *Civil Procedure Act* provides as follows:

> " Any person who considers himself aggrieved—

a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

14. While section 80 confers the substantive power of review, Order 45 Rule 1 of the Civil Procedure Rules on the other hand delineates the jurisdictional boundaries within which this power may be exercised. Order 45 Rule 1(1) provides:

> " 1.
>
> (1) Any person considering himself aggrieved—
>
> a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

15. From these provisions, it is manifest that the jurisdiction to review is not at large but is confined to three principal grounds:

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

b. On account of some mistake or error apparent on the face of the record; or

c. For any other sufficient reason. (See Daniel Macharia Karangacha v Nonicah Waitithi Mwangi, civil appeal number 159 of 2000, Evans Bwire v Andrew Ngida, Kisumu High court civil Appeal number 103 of 2000, Joshua Otineno Buyu v Petro Ochieng Wasabwa (2003) KLR 377, Francis Origo and another v Jacob Kumali Mungala, civil appeal number 149 of 2001 (2005) 2 KLR)

16. Therefore the review of a ruling or a judgement we rely to this court in a more contextual and textual of the Civil Procedure Rules under Order 45 rule 1 within the following parameters as cited above.

a. Discovery of new and important matter or evidence: Since review of the judgement is neither an appeal nor a second inning to the party who has lost the case because of his negligence or indifference, the party seeking review on this ground must show that there was no remission

on his part in adducing all possible evidence at the trail. In addition to this the evidence upon which the review is sought must be relevant and of such a character that if it would have ben brought into the notice of the court, it might have possibly altered the judgment

b. Error apparent on record: Since the word Error apparent on the face of record has not been defined anywhere under the code or *the constitution*, it has to be determined sparingly and with great caution by the judiciary. However, it is to be mentioned that no error could be said to be an error apparent on the face of record where one has to travel beyond the record to see the correctness of the judgment. Therefore, the error must be self-evident and should not require an examination or argument to establish it.

c. Other Sufficient reason: Since the other sufficient reason has to be decided by the court, the apex court in order to prevent the misuse of this clause and relying on the judgement of Privy Council and Federal Court has held that.....a reason sufficient on grounds should be at least analogous to those specified in the rule above.

17. It is settled law that under review jurisdiction no party will be allowed to move the court merely for fresh hearings or arguments or correction of an erroneous view taken by the court in an earlier decision. It is only applicable to be exercised for correction of a patterned error or mistake of law or fact which stares in the face of the record which does not require any elaborate arguments or reasoning to establish it. When it comes to discovery of new evidence or material by itself is not sufficient to entitle an aggrieved party a right for review of a judgement or ruling. The court can only be convinced and persuaded by this ground if the party establishes that due diligence was exercised and despite that the evidence or material in question which has been introduced and produced at the stage of review was not capable of being produced before the impugned or judgement was passed.

18. From the comparative jurisprudence perspective the court in case of Tungabhadra Industries (Pvt) V. Governent of Andhara Pradesh AIR 1964 SC1372 the court observed that:" A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a suitable point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of record would be made out"

19. A critical distinction must be drawn between appellate grounds and review grounds. This principle was clarified in National Bank of Kenya Ltd vs Ndungu Njau {1996} KLR 469 (CAK), where the Court of Appeal observed that: -

> " In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose."

20. Given that the applicants' case fundamentally rests on the assertion that there exists an error apparent on the face of the record, it becomes imperative to examine what this phrase means in law. The

jurisprudence on this point is extensive and consistent. In the case of Nyamogo & Nyamogo v Kogo 2001} EA 170.

> " An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long-drawn process of reasoning 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."

21. The gravamen of the applicants' case, as articulated in their amended Notice of Motion and supporting affidavit, is that this court failed to consider the evidence adduced by the 3rd and 4th Respondents in their replying affidavit dated 9th July, 2025. The applicants contend that this replying affidavit contained crucial evidence including Federation's minutes clearly showing that nominations are by the Federation and that the failure to consider this evidence constitutes an error apparent on the face of the record.

22. The aggrieved party has heavily relied on the non-consideration of the pleaded evidence in the affidavit which he considers an infringement of Article 50 of *the constitution*. I have given much thought on that affidavit in question and evaluated it in the whole with the impugned judgement of this court. Without looking that I am siting on appeal in my own judgement it was basically decided on the flame of *the constitution* which is in my review interpretation of the Articles of *the constitution* and whether the various instruments governing the various sports associations of Kenya including the National Olympic Committee Kenya decision to bare the petitioner from being part of the impending elections was in violation of *the constitution*. The evidence this court is being asked to look at so that the Applicant can have a second bite at the cherry is not maintainable as the material error being referred to as being manifest on the face of the judgement does not undermine the soundness or results in the miscarriage of justice. The predominant question was whether the petitioner should be excluded from being one of the contestants in the scheduled election. That decision was also taken baring in mind the Principles of governance and values in Article 10 of *the constitution*. Whether a decision taken by the Respondents would in violation of equity, social justice, inclusiveness, equality, Human Rights, Non-discrimination, and participation of the eligible officials or candidates as premised by the 1st Petitioner in her petition. It is also trite that review jurisdiction under Section 80 of the *civil Procedure Act* and Order 45 rule 1 of the Civil Procedure Rules is by no means an appeal in disguise whereby an erroneous decision is to be reheard and corrected by the same session judge. Let us assume for a moment the evidence so referred to was of significance most likely and on emphasis the interpretation of *the constitution* would still remain to be guided by Article 259 of *the constitution*. This affidavit as the author of the Judgement was conceived save that the details of it which I consider a minor mistake of inconsequential import cannot find its place for the invocation of review jurisdiction under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the CPR. The appreciation of the evidence I am being asked to revisit is fully within the domain of an appellate court. It cannot be permitted to be advanced in the review petition.

23. A review in our jurisdiction is not a routine procedure. Here the court is being asked to look at that affidavit and go the greater length to change the substratum of the judgement that the Applicant is

a grieved and hurt without being hurt. On my part I have considered anxiously and carefully that contention and agitation by the Applicant but I cannot review the earlier orders in the impugned judgement or ruling, for I am satisfied that a material error that manifest on the face of the order undermines its soundness or did result in prejudice or miscourage of justice

24. I dare say that a review of a judgement is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality. The Petition in question involved substantial question of law underpinned within the ambit of *the constitution*. Looking at the application as premised by the Applicant and on application to the facts of this particular petition, a question arises when does an error cease to be an a mere error and becomes an error apparent on the face of the record? In the submission before court, learned counsel hinged his arguments on the parameters of *the constitution* but was unable to suggest any clear cut violation of the tools of interpretation of *the constitution* by which he could conclusively demonstrate which boundary within the two classes of errors or mistakes would be demarcated to necessitate review under Order 45 Rule of the Civil Procedure Rules.

25. In a review petition under the contours of the *Civil Procedure Act* and the rules ordained by the Chief Justice commonly referred to as the Mutunga Rules does not open the litigation landscape for this court to re-appreciate the evidence and reach a different conclusion. Even if that is possible as argued by the learned counsel for the Applicant seeking at best to persuade this court that the affidavits exchanged between the parties did not support the conclusion reached by this court I am afraid such a submission cannot be permitted to be advanced in a review petition. In my considered view such nature of appreciation of evidence on record is fully within the domain of an appellate court. It must be remembered that in procedural law this court cannot apply the legal lens focusing substantially on the so called affidavit and ignores to juxtapose upon the other affidavits so as to review the impugned ruling or judgement. If on appreciation of the evidence produced by the Applicant this court records a finding of facts and reaches a conclusion that conclusion cannot be assailed in a review jurisdiction unless it is shown there is an error or mistake apparent on the face of the record or for some reason akin to it. This court cannot convert his review of the petition into an appeal in disguise. What this court is being asked to do in the review proceedings is to re-hear the original case which can never be a subject permissible and justiciable by this very same court.

26. With respect, this contention betrays a fundamental misapprehension of what constitutes an error apparent on the face of the record. The allegation that a court failed to consider certain evidence presented to it, or failed to give sufficient weight to such evidence, is quintessentially an appellate ground, not a ground for review. This distinction has been repeatedly emphasized in our jurisprudence.

27. As a matter of emphasis Let me state that the determination of whether evidence adduced by a party has been properly considered, and what weight should be accorded to such evidence, falls squarely within the evaluative function of the trial court. These are matters of judicial appreciation and weighing of evidence functions that guide the decision making process. Where a party contends that a court has erred in its evaluation of evidence or has failed to give proper consideration to crucial evidence, the appropriate remedy is an appeal.

28. In Kabansora Millers Ltd v Nyangena (Civil Appeal E665 of 2022) [2025] KEHC 4754, the court emphasized:

> " The law is well settled that a review is not intended to serve as an avenue for re-litigating matters that were, or ought to have been, addressed during the original hearing or on appeal. As affirmed in National Bank of Kenya Limited v Ndungu Njau and Stephen Gathua

Kimani v Nancy Wanjira Waruingi (supra), an application for review must be founded on compelling circumstances such as the discovery of new evidence or an error apparent on the face of the record and not on mere dissatisfaction with the outcome of the decision."

29. From the foregoing, it is evident that a review cannot be used as a mechanism for re-arguing a case on its merits or for obtaining a second judicial opinion on matters that have already been determined. The applicants' contention that the court's decision would have been different had it properly considered their evidence is, in effect, an invitation to this court to re-hear the matter and reconsider the conclusions it reached a function that review jurisdiction simply cannot accommodate. What the applicants seek is not the correction of an obvious error that leaps from the face of the record, but rather a reconsideration of a decision with which they disagree.

30. At a more fundamental level, to accede to the applicants' request would be to allow this court to sit in appeal over its own decision, which is a manifest impossibility and a practice that has been consistently discouraged in our jurisprudence. This court having rendered its ruling on 18th July, 2025, this court became functus officio. The doctrine of functus officio does not bar any engagement by a court with a case it has already decided, but what it expressly prohibits is merit-based decisional re-engagement with the case once a final decision has been entered. To grant the relief sought would require this court to engage in precisely such prohibited re-examination, to re-weigh evidence, reconsider submissions, and reach alternative conclusions on the merits.

31. In the final analysis, the applicants have not demonstrated the existence of an error apparent on the face of the record in the sense required by law. Their true complaint is not that there was a patent, glaring error visible on the face of the judgment, but rather that they are dissatisfied with the outcome. The grounds advanced do not fall within the circumscribed jurisdiction of review as delineated in section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. It bears emphasizing that this dismissal does not foreclose the applicants' rights. Should they consider themselves aggrieved by the ruling of 18th July, 2025, their remedy lies in an appeal to the Court of Appeal, where the first appellate court will have full jurisdiction to re-evaluate the evidence, reassess the legal conclusions, and reach its own determination. That is the proper forum for the grievances they have raised.

32. In the light of the above discussion, one must remember that the predominant dispute in the original petition was on elections. The relief prayed in the writ of the petition filed before this court on 18.6.2025 was for the following declarations.

    a. A declaration be and is hereby granted that the decision of the 1st 2nd and 5thRespondents to bar the Petitioners from participating in the NOC-Executive committee elections dated 19th June 2025 is unconstitutional)

    b. A declaration be and is hereby granted that the 1st, 2nd and 3rd Petitioners are duly nominated voting delegates of the Kenya Triathlon Federation, The Kenya Handball Federation and the Kenya Table Tennis Association respectively.

    c. A declaration that the 3rd Petitioner was duly nominated as a Candidate to vie for the Position of Secretary General.

    d. A declaration be and is hereby made that the 4th Petitioner is a duly affiliated member of NOC-Kenya.

    e. Any other orders this Honourable Court deems fit.

33. Looking at this declarations alone, it is settled law that such a jurisdiction as submitted by the applicant cannot be exercised for re-appreciating the evidence so as to arrive on findings of fact unless there is

a grievance that this court when it passed the impugned ruling /judgement with the corresponding declarations it did not have the jurisdiction to render the findings or it acted in excess of jurisdiction of the findings so complained of were patently perverse.

34. On the other hand the issues the Applicant proposes this court to deal with raises the question whether the application is res judicata under the import of Section 7 of the *Civil Procedure Act*. This is a fundamental doctrine of all courts that there must be an end to litigation. This is a doctrine envisaged by the parliament on adjudicatory processes which proceed to the merits and issues arising from that same cause of action are fully litigated under Article 50 of *the constitution* of the fair trail rights and finality of it is dealt with between the parties. The learned authors who put together Halsbury's Laws of England, 4th edition Vo. 16 paragraph 1528. The passage reads in part who reads as follows: " In order for the defence of res judicata to succeed it is necessary to show not only that the cause of action was the same but also that the plaintiff has had an opportunity of recovery and but for his own fault might have recovered in the first action that which he seeks to recover in the second action. It is not enough that the matter alleged to be concluded might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it was actually put in issue or claimed."

35. This issue in the instant application a form of estoppel arises in this same cause of action. The main objective of the Applicant is to re-open the proceedings dealing with the elections as between the 1st petitioner and the Respondents. A very illuminating explanation of the doctrine can be found in the decision by Lord Diplock in Thoday v Thoday (1964) P 181, 198 in the following terms: The second species, which I will call 'issue estoppel', is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

36. In this new application the case stated to this court is very clear from the petition with the corresponding notice of motion which sought conservatory orders to stop the impending elections by the 1st Respondent until the petition is heard and determined on the merits. The spirit and the letter of the application is to have this court review the original judgement have it accompanied with new declarations which will go to the root of the elections which is already fait accompli. This is properly explained in the case of Hoystead v Commissioner of Taxation (1925) AC 155 in which Lord Shaw as he then was stated as follows: "In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle— namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the

plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs."

37. The landmark case of Henderson v Henderson (1843) 3 Hare 100. 114-115 Sir James Wigram remarked as follows:

> "In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

38. As the domestic legal arena been left behind in affirming the doctrine of re-judicata in the development of jurisprudence within the policy framework of litigation and finality of decisions of courts save for the right of appeal to the superior court. The answer is in the negative as can be seen shortly from the illuminating decisions from the various superior courts.

39. This was followed up by the Judgment of Sir Charles Newbold in the same case:" The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

    (53) Instead, and contrary to the Appellants submissions, the plea of res judicata was raised through both grounds of opposition and replying affidavits in response to the Appellants application. It is also evident that through the Replying Affidavits of the 3rd and 4th Respondents, evidence by way of the Judgment of JR No. 130 of 2011 was introduced through an affidavit to bolster the plea of res judicata.

    (54) It is further evident that the Appellants were not condemned unheard or shut out from the proceedings. The proceedings demonstrate that the Court accorded the Appellants the two justiciable elements of fair hearing:

        (i) an opportunity hearing must be given; and

        (ii) that opportunity must be reasonable.

    (55) This ground of appeal must therefore fail. Is this doctrine of res judicata applicable to constitutional litigation and interpretation, just as in other criminal and civil litigation?

(56) The doctrine of "res judicata" is provided for under Section 7 of the *Civil Procedure Act* in that: -

> "No court shall, try, 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 issue in which such issue has been subsequently raised, and has been heard and finally decided by such court."

(57) The *Civil Procedure Act* has also provided explanations with respect to the application of the res judicata rule. Explanation 1-6 are in the following terms:

> Explanation (1) —The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it Explanation (2) —For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court. Explanation (3) —The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other. Explanation (4) — Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. Explanation (5) — Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused. Explanation (6) — Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

(58) This Court in the case of Kenya Commercial Bank Limited v. Muiri Coffee Estate Limited & another Motion No. 42 of 2014 [2016] eKLR (Muiri Coffee case) held as follows regarding the doctrine of res judicata:

> "(52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of Hon. Norbert Mao v. Attorney-General, Constitutional Petition No. 9 of 2002; [2003]UGCC3, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under Article 137 of the Uganda Constitution, and for redress under Article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under Article 50, seeking similar relief; and Judgment had been given in Hon. Ronald Reagan Okumu v. Attorney-General, Misc. Application No.0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The Constitutional Court dismissed the petition, on a plea of resjudicata, declining the petitioner's pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment.

(53) In Silas Make Otuke v. Attorney-General & 3 Others, [2014]eKLR, the High Court of Kenya agreed with the Privy Council decision in Thomas v. The AG of Trinidad and Tobago (1991) LRC (Const.) 1001, in which the Board was "satisfied that the existence of a constitutional remedy as that upon which the appellant relies does not affect the application of the principle of res judicata".

(54) The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

40. From the above principles no man ought to be put trouble if it appears to the court that it is for one and the same cause (nemo debet bis vexari eadem causa")

41. I have considered the application in its entirety and the substantive part of the impugned decision in rem and the issues which came directly for determination between the parties and there is no doubt that for all purposes and intents there was final and conclusive expression of the subject matter which this court had jurisdiction to rule on the merits. Therefore, the doctrine of res-judicata and estoppel operates in favor of dismissal of the application for review as structured under Section 80 of the *Civil Procedure Act* as read with Order 45 Rule 1 of the Civil Procedure Rules. I make no orders as to costs.

DATED SIGNED AND DELIVERED VIA CTS ON THIS 2ND DAY OF DECEMBER, 2025

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R. NYAKUNDI

JUDGE