REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CONSTITUTIONAL PETITION NO. 17 OF 2019

KINAIYA MOLONKET NKINYI.....4TH RESPONDENT /APPLICANT

VERSUS

LONGTON JAMIL HASHIM.....1ST PETITIONER/RESPONDENT

REGINA SYOKAU MUSYOKI.....2ND PETITIONER/RESPONDENT

THE COUNTY GOVERNMENT OF KAJIADO.....3RD RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT

ROSE WANJIKU KAMAU.....5TH RESPONDENT

ANTHONY MUNGAI WANJIKU.....6TH RESPONDENT

AND

KENYA NATIONAL COMMISSION ON

HUMAN RIGHTS (KNCHR).....INTERESTED PARTY

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RULING

1. By the judgment delivered herein on 2nd July, 2024, this court **(Mutuku J)** held the **County Government of Kajiado** (hereafter the 3rd Respondent), **Rose Wanjiku Kamau** (hereafter the 5th

Respondent), **Kinaiya Molonket Nkinyi** (hereafter the 4th Respondent/Applicant/the Applicant), and **Anthony Mungai Wanjiku** (hereafter 6th Respondent) sued in the Petition as the 1st, 3rd, 4th and 5th Respondents, respectively, liable for violating the fundamental rights and freedoms enumerated in the judgment, in respect of the Petitioners herein, namely **Longton Jamil Hashim** and **Regina Syokau Musyoki** (hereafter the 1st and 2nd Petitioner/ Respondents/ Petitioners). Consequently, the court awarded the sum of Kes. 2,500,000/- to each Petitioner as compensation. A decree was issued by the Court on 13th December 2024.

2. The 4th Respondent/Applicant thereafter lodged his motion dated 31.01.2025 invoking inter alia Articles 48, 50 and 159(2)(a), (d) and (e) of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act (CPA) and Order 45 Rules 1 and 5 of the Civil Procedure Rules (CPR). Seeking that the court be pleased to stay execution of the judgment and to review, vary and /or set aside the judgement of 2.07.2024 and resultant decree dated 13.12.2024 and to re-hear the petition.

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3. The motion is premised on the grounds on its face, as amplified in the supporting affidavit sworn by Applicant on the same date. To the effect that in the material period, he was employed by the 3rd Respondent in the position of Inspectorate Officer; that on 19.09.2019 he was on duty and in his office within Kitengela Township, while the 3rd Respondent's Inspectorate team was engaged in an operation to relocate traders from the bus terminus to a different location to facilitate construction of a new market; that he was summoned to Kitengela Police Station to record a statement concerning an incident that had occurred between the traders and the Inspectorate team in the course of the operation; and that he complied and having recorded his statement left to resume his duties.
4. He further deposes that he only became aware of the judgment herein upon being served by the advocate for the Petitioners; that from the said judgment he noted that a video-clip recorded and uploaded on You-tube had been produced at the trial as proof that he participated in harassing the 2nd Petitioner, but upon reviewing the clip did not see himself captured as present and engaged in the alleged act of harassment as purported; and hence the findings of the court are

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prejudicial in terms of his reputational standing and likely loss in the execution of the decree against him.

5. He asserts that he was never served with the petition herein to give him an opportunity to defend himself and that the findings of the court against him would have been different had he had such opportunity. Further contending that the compensation award was excessive in light of the injuries involved, he urged the court to review and/or set aside the judgment to enable him to defend himself
6. The 1st Petitioner opposed the motion via his replying affidavit dated 25th March 2025. Therein deposing that the motion is incompetent and bad in law for inter alia invoking the CPA and CPR in a constitutional matter, where The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (hereafter the **Mutunga Rules**) ought to apply. Moreover, despite invoking Order 45 Rules 1 and 2 of the CPR, the Applicant has not furnished evidence to bring the application within the requirements of the said provisions, or Rule 16 of the Mutunga Rules and that the grounds are more suited as grounds of appeal.

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7. The deponent further contends that the Applicant and his co-respondents in the Petition were duly served. As evidenced in the bundle of affidavits of service together with screen shots, indicating receipt of service via WhatsApp on his undisputed mobile phone no. +254720 xxx xxx exhibited as annexure **NEO 1.** And that upon being satisfied with the service, the court had proceeded to hear the petition. He contends that the Applicant deliberately failed to file his response to the petition and his motion is intended to delay and obstruct the course of justice, thereby denying him the fruits of his judgment, and that a denovo hearing as sought will occasion him prejudice in a case where the cause of action arose in 2019.
8. Finally, asserting that the Applicant has not demonstrated any triable issues, or sufficient cause to warrant the grant of orders sought, the 1st Petitioner urges that the instant motion, which he views as an afterthought be dismissed .
9. Through his supplementary affidavit sworn on 24.06.2025 the Applicant reiterated the contents of his earlier affidavit, adding that the relocation of traders earlier referred to had been preceded by a consent, a copy of which is exhibited in annexure **MKN-1,** between

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the Kitengela Business Owners Association and the 3rd Respondent and further disputed the finding of assault made against him in the impugned judgment of this court on the basis of the video footage in issue.

10. Citing Rule 3(8) of the Mutunga Rules and Article 159(2) (d) and (e) of the Constitution, the Applicant asserts that it was not fatal to invoke the inherent power of the court, and the Civil Procedure Rules including Order 45 of the CPR. In support of the proposition citing inter alia the decisions in **Karl Wehner Claasen v Commissioner of Lands and 4 Others (2019) eKLR; Abdisalam Hassan Ismail & 2 Others v Kenya Railways Corporation & 3 Others (2015)eKLR** and **Muindi Kimeu & 3285 Others v Kenya Pipeline & Another (2019) eKLR**

11. Disputing the propriety of the asserted service, he deposed that he had on several occasions advised counsel for the 1st Respondent to effect service upon his employer the 3rd Respondent, whose Attorney had committed to take up the defence, as evidenced in the WhatsApp conversation annexed to the affidavit of service dated 22nd April 2022 and marked **Exh 2(b).** Here stating that he subsequently believed

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that the County Attorney was handling the matter, until served with the judgment, and that the mistakes of his counsel should not be visited on his client. And restating that allowing the judgment to stand despite his denials of complicity in the material violations will be prejudicial and a travesty of justice, he deposed that his motion was brought in good faith and that no prejudice will be suffered by the 1st Respondent if it is granted. The other parties did not participate in the motion.

12. The motion was canvassed via written submissions. On his part, counsel for the Applicant confined his submissions to the prayer seeking review of the judgment pursuant to Order 45 Rules 1 and 2 of the CPR. Regarding the application of the Order to constitutional petitions, he relied on the holding by the Court of Appeal in **Karl Wehner Claasen** case(supra) to the effect that Rule 3(8) of the Mutunga Rules read together with Article 159 (2) (d) of the Constitution make provision for the court's inherent power to make orders necessary for the ends of justice . Adding here that the review provision in the Mutunga Rules was not elaborate enough hence the recourse to the procedure in Order 45 of the CPR, and relied on the

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case of **Abdisalam** (supra) and **Muindi Kimeu** (supra), inter alia where the High Court found that it was not erroneous to invoke the Order in a constitutional petition.

13. Regarding the substantive question whether an error on the face of the record had been demonstrated, counsel revisited the evidence tendered through the video clip, which he asserted resulted in an incorrect finding on his involvement in the alleged violation. He cited the case **of Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya (2019) eKLR** as to the definition of an error on the face of the record.

14. On the ground of sufficient reason, counsel reiterated the Applicant's affidavit material and emphasized his non-derogable right to be heard, and argued that allowing the impugned judgment to stand will amount to a violation of his right to a fair hearing, which he said constitutes sufficient reason in this case, to review and set aside the judgment for the interest of justice. Counsel further, attacking the award in the judgment as excessive, while citing several authorities. A submission which is outrightly misplaced as this court cannot sit on appeal on a judgment by a court of equal jurisdiction.

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15. In conclusion, the Applicant urged the court to review and set aside the judgment, relying on **Appeal No. 103 of 2000, Evan Bwire v Andrew Nginda (2000) LLR 8340,** as cited **in Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya.** Where, the court held that an application for review will only be allowed upon strong grounds, more so, if its effect will result in the re-opening case afresh. Counsel submitted that the interests of justice demand a fresh hearing to accord a hearing to the Applicant in the face of the manifest injustice occasioned by the judgment.

16. Counsel for the 1st Petitioner/Respondent commenced submissions by assailing the application as procedurally flawed and substantively unmerited. Counsel asserted that the motion has improperly invoked the Civil Procedure Rules—specifically Order 45—despite the matter being governed by the Mutunga Rules. Emphasizing that Rule 16 of the Mutunga Rules provides a procedure for setting aside ex parte judgments and that the Civil Procedure Rules are inapplicable unless expressly permitted. Moreover, pointing out that the Applicant failed to demonstrate the discovery of new and

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important evidence that was not available with reasonable diligence at the time of the hearing, as required by Order 45 of the CPR.

17. In addition, counsel stated that the motion does not meet the threshold of *"sufficient cause"* under Rule 16 above and contended that no legitimate explanation has been furnished for his failure to respond to the petition or to attend court. Instead, the motion is taken up with the court's findings, thereby raising issues more appropriate for an appeal. And citing the holding in **Shah v Mbogo & Another [1967] EA 116**, to the effect that *"the discretion to set aside default judgment should only be exercised to avoid injustice or hardship resulting from an accident, inadvertence, or excusable mistake."* Reiterating evidence that the Applicant had been duly served, dismissed the motion as a deliberate attempt to frustrate justice.

18. Counsel further argued that no triable constitutional issue or bona fide defence has been demonstrated by the Applicant as affidavit material tendered by the Applicant lacks substance, and does not address the specific constitutional violations alleged. As for the challenge in respect of the award of Ksh 5,000,000 in compensation,

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counsel contends that it is misplaced, because the award was grounded in constitutional principles rather than ordinary tort law.

19. Here citing **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR**, where the court held that *''compensation for constitutional violations is not pegged on strict liability principles or the quantification of special damages… (but as) a remedy for vindicating the Constitution."* And additionally, the case of **Wanjiru Gikonyo v Attorney General [2022] eKLR**, where the court observed that where *''bodily injuries are inflicted in violation of constitutional rights, the nature of compensation transcends medical categorization and encompasses constitutional considerations."* Other decisions were cited in defence of the award.

20. In conclusion, the 1st Petitioner contended that the motion is a camouflaged appeal rather than a legitimate review application as seen from the grounds raised, including alleged misapplication of the law and excessive damages, which are outside the criteria for setting aside a judgment under Rule 16 of the Mutunga Rules. Accordingly, the court was urged to dismiss the motion with costs.

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21. The court has considered the motion, rival affidavit material as well as submissions. Although the subject motion invoking Sections 1A, 1B and 3A of the Civil Procedure Act (CPA) and Order 45 Rules 1 and 5 of the Civil Procedure Rules (CPR) seeks to stay execution of the judgment and to review, vary and/or set aside the judgement of 2.07.2024, the submissions of the Applicant's counsel appeared to exclusively address the prayer seeking review.

22. It appears that the Applicant by his supplementary affidavit all but admitted service of the petition, which was the ground upon which the prayer for setting aside of the judgment herein had seemingly been premised. Thus, the live prayer before the court is essentially seeking review of the judgment herein, and premised on Order 45 Rules 1 and 2 of the CPR. The 1st Petitioner/Respondent has raised an objection to the invocation of the CPR in a constitutional matter such as before this court. Before dealing with the merits of the motion, it is apt to consider these legal objections.

23. No provision is made in the Mutunga Rules for the review of court orders or judgments. Rule 16 of the said Rules merely provides for the setting aside of ex parte orders or judgments. However Rule

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3(8) reserves *"the inherent power of the Court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the Court".* This wording echoes the provisions of **Section 3A** of the **CPA**, the latter which reserves the inherent power of the Court *"to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court".*

24. Regarding the latter provision, the Court of Appeal in **Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR,** observed that: -

> **"Also cited was Section 3A of the Civil Procedure Act which enshrines the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. In Equity Bank Ltd v West Link Mbo Limited [2013], eKLR, Musinga, JA stated *inter alia*, that, by "inherent power" it means that:**
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> ***"Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties***

but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion."

The Supreme Court went further in Board of Governors, Moi High School Kabarak & Anor v Malcolm Bell [2013] eKLR, to add the following: -

"Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion

from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just."

25. The appeal before the Court of Appeal in **Karl Wehner Claasen v Commissioner of Lands & 4 others [2019] KECA 766 (KLR),** arose from a decision dismissing application for substitution of a deceased petitioner in the Environment and Land Court. The court, having observed that the Mutunga Rules had no provisions for substitution of a deceased petitioner, nevertheless stated that there was nothing wrong in a party relying on the enabling provisions of the Civil Procedure Rules and the Civil Procedure Act... The appeal was however dismissed on a different ground.

26. Having considered the said different ground, the Court of Appeal proceeded to state that:

> **"There is no cross-appeal against the finding of the trial judge that in the absence of express provisions in the Practice Procedure Rules, an application for substitution may be based on the applicable Civil Procedure Rules. However, we add that Rule 3(8) of the Practice and Procedure Rules gives the court inherent power to make**

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such orders as may be necessary for the ends of justice and that Article 159(2) (d) and (e) respectively obliges a court to administer justice without undue regard to procedural technicalities and to protect and promote the purpose and principles of the Constitution".

27. In a different case discussing the procedure applicable in judicial review matters involving enforcement of constitutional rights, namely, **Aluochier v Independent Electoral and Boundaries Commission & 17 others [2022] KECA 952 (KLR),** the Court of Appeal observed that:

'"It is noteworthy that, whereas Article 47 of the Constitution and Sections 7(1) and 11(1) of the Fair Administrative Action Act affirm one's right to assert fair administrative action as enforceable by, inter alia, judicial review orders, subsection (2) of both sections empower courts and tribunals to review administrative actions or decisions, but do not provide the procedure independent of the Civil Procedure Rules for the

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institution of appropriate proceedings in the enforcement of one's right to fair administrative action".

23. It therefore goes without saying that, in the absence of specific rules tailored to suit applications for judicial review orders, Order 53 of the Civil Procedure Rules necessarily applies. In view of the fact that the prescriptive provisions of Order 53 Rule 1 are mandatory, failure to comply therewith renders a Motion for judicial review incompetent, fatally defective and deserving of nothing short of dismissal. Accordingly, we find nothing to fault the learned Judge for dismissing the appellant's application for failure to comply with the mandatory provisions of Order 53 Rule 1 of the Civil Procedure Rules."

See also **Gabriel Otiende & 4 others v County Commissioner – Siaya County & 2 others; John Nyapola Okuku & 3 others (Interested Parties) [2021] KEHC 8871 (KLR).**

28. Thus, guided by the above approach, this court is of the considered view that, in this instance where no specific provision in the Mutunga Rules provides for applications for review, it was permissible for the Applicant herein to invoke Order 45 of the CPR together with Rule 3(8) of the Mutunga Rules in approaching the court.

29. Section 80 of the Civil Procedure Act grants the court power to review its decisions on terms that are just. Order 45 rule (1) of the Civil Procedure Rules provides for grounds upon which a court may exercise the review jurisdiction. Order 45 Rules 1 and 2 of the CPR provide that;

> **"(1) Any person considering himself aggrieved—**
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> **(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
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> **(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**

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time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

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

30. As earlier observed, the key prayer in the motion before the court is for review of the judgment of this court delivered on 2.07.2024, on grounds of error on the face of the record and sufficient reason. In **Jason Ondabu t/a Ondabu & Company Advocates &**

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2 Others v Shop One Hundred Limited [2020] eKLR the Court of Appeal stated that: -

> **"<u>An application for review, therefore, involves exercise of judicial discretion</u>. The circumstances in which this Court, as an appellate court, can interfere with the exercise of judicial discretion are limited".**

31. There is a long line of authorities on the principles governing review applications brought under **Order 45 (1)** of the **CPR**. In the judgment of **Okwengu JA** in **Associated Insurance Brokers v Kenindia Assurance Co. Ltd [2018] eKLR** the Court of Appeal stated that:

> **"It is clear that Order 45 rule 1(1) of the Civil Procedure Rules provides that a mistake or error apparent on the face of the record is one of the grounds upon which an application for review of a decree or order can be granted. In National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR, this Court had this to say regarding a review arising from a mistake or error apparent on the face of the record:**

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"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. <u>The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."</u>

In Nyamogo and Nyamogo Advocates v. Kogo [2001]1 E.A. 173 this Court further explained an error apparent on the face of the record as follows:

"An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined

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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 or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

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32. Further, in **Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR** the Court of Appeal held that**:**

> **"It bears emphasizing that the phrase "mistake or error apparent" by its very connotation conveys the fact that the error envisaged is one which is evident *per se* from the record and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. It is prima-facie visible. It must relate to an error of inadvertence, one which strikes one on merely looking at record. An apparent error on the face of the record has been described in the most simplified manner by the Tanzania Court of Appeal adopting with approval commentaries by Mulla, Indian Civil Procedure Code, 14th Edition pg 2335-36 as follows:**
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> **"The courts in India have for many years had to consider what is constituted by "an error apparent on the face of the record" in the context of 0.47, r. 1 of the Code of Civil Procedure and we think their opinions are of immense**

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relevance. We treat for this purpose as synonymous the expressions "manifest" and "apparent". The various opinions are conveniently brought together in MULLA, 14th ed., pp. 2335-36 from which we desire to adopt the following. An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions [State of Gujarat v. Consumer Education & Research Centre (1981) AIR Guj. 223]… But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [Chhajju Ram v. Neki (1922) 3 Lah. 127]…"

33. The error apparent on the face of the record cited here is the finding by the court, based on video evidence presented at the trial, that the footage captures the Applicant present and participating in the acts of violations of the rights of the Petitioners. The Applicant asserting that contrary to that finding, the video footage does not

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show that he was present at the scene on 19.9.2019. Indeed, upon the hearing of his application before this court, the Applicant made an unsuccessful oral application to play the material video clip for the viewing of the court. From whatever angle this alleged error is viewed, it fails the tests in **Njau** and **Multichoice** (supra). It is no less than an invitation to this court to re-examine the evidence at the trial, and hence is more appropriate as a ground of appeal.

34. In support of the ground of sufficient cause, the Applicant cited his non-derogable right to a fair hearing under Article 50 (1) of the Constitution and prejudice that may result from the execution in respect of damages awarded against him and described as excessive**.**

35. In **Official Receiver and Liquidator V Freight Forwarders Kenya Limited [2000] KECA 19 (KLR),** the Court of Appeal considered the ground of sufficient reason as follows:

> **''On the authority Wangechi Kimita and Another v Mutahi Wakibiru, (1980-88) 1 KAR 977 the words "or any other sufficient reason" in Order XLIV rule 1(1) of the Civil Procedure Rules need not be analogous with the other two alternatives this order in view of Section 80 of the**

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Civil Procedure Act, Chapter 21 of the Laws of Kenya which confers an unfettered right to apply for a review. Indeed, these words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot, without at times running counter to the interests of justice , "be limited to the discovery of new and important matters or evidence, or the occurring of a mistake or error apparent on the face of the record."

36. Here, the Applicant all but admits that he was duly served with the petition but advised counsel for the petitioners that the County Attorney be similarly served, and hence proceeded on the belief that the said County Attorney was attending to the petition. These statements ignore the fact that the Applicant was sued in his own name alongside the 3rd Respondent, his employer. Thus, for whatever it was worth, the onus was upon the Applicant to respond to the petition and present the defence, now robustly articulated here, and not rest on assumptions. The Applicant was ultimately responsible for ensuring that his counsel attended to the case on his behalf. There

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is no evidence that the Applicant made any efforts to contact his counsel in order to give him instructions or to follow up on the case. His plea before this court that the mistakes of his counsel ought not to be visited on him cannot aid his case in these circumstances.

12. The Court of Appeal in the case of **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR** held that**:**

> **"While mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude (in Mwangi v Kariuki [1999] LLR 2632 (CAK)) Shah, JA. ruled that "mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude."). <u>The import of this is that while the mistake of counsel is excusable, if it is accompanied by a litigant's carelessness and inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned."</u>**

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37. Equally, a party who has been served with a court process and fails to respond cannot be heard to complain almost five years later, in a review application, that he was denied a hearing, and that the outcome in the case amounts to a violation of his right to be heard. Or that the decision is erroneous and amounts to a travesty of justice. To qualify as sufficient reason, the hardship or injustice envisaged in **Shah –vs- Mbogo and Another [1967] E.A 116** as cited in the Applicant's submissions must result from an accident, inadvertence, or excusable mistake.

38. An asserted wrong conclusion in such impugned decision cannot be sufficient reason to support a review application. As stated in **Njau's** case (supra), it is not a sufficient ground for review that another Judge could have taken a different view of the matter. It will also not be a ground for review, that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. In any event, if the Applicant were aggrieved with the merits of the judgment herein, an appeal rather than a review would have been the more appropriate course of action.

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39. Recently, the Court of Appeal in **Solacher v Romantic Hotels Limited & another [2022] KECA 771 (KLR)** cited with approval the decision of **Bennett J** (as he then was) in **Abasi Belinda v Frederick Kangwamu and Another [1963] EA p.557** to the effect that:

> **"A point which may be a good ground of appeal may not be a good ground for an application for review, and an erroneous view of evidence or of law is not a ground for review, though it may be a good ground for appeal."**

See also **Francis Origo & another v Jacob Kumali Mungala (C.A. Civil Appeal No.149 of 2001) [2005] KECA (314)** and **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR.**

40. In the latter case, the Court of Appeal restated the position that where a party bases his review application on the failure by the court to apply the law correctly, it faults the subject decision on a point of law which is a good ground for appeal, but not a ground for an application for review.

41. Applying the principles espoused in the above decisions to the motion herein, the court has arrived at the conclusion that the

Applicant has not demonstrated the asserted ground of error apparent on the face of the record, or sufficient reason. The motion dated 31.01.2025 is without merit must therefore fail. It is hereby dismissed with costs to the 1st Respondent/ Petitioner.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 11TH DAY OF DECEMBER 2025.

C. MEOLI

JUDGE

In the presence of:

Mr. Nairi for the 1st Petitioner/ Respondent

4th Respondent/ Applicant - N/A

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