

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT NAIROBI

ELRC PETITION NO. E017 OF 2025

(Before Hon. Lady Justice Hellen Wasilwa, J)

FAITH VILOKO.....PETITIONER

VS

**GRAND CAFÉ INDIAN CUISINE.....1ST
RESPONDENT**

**GHAG SANJAY BABAN.....2ND
RESPONDENT**

RULING

1 The Petitioner/Applicant filed a Notice of Motion dated 29th September 2025 seeking orders that: -

1. *spent*
2. *there be a stay of execution of the judgment and decree delivered on 2nd October 2025 in ELRC Petition No. E017 of 2025 - Faith Viloko v Grand Café Indian Cuisine & Ghag Sanjay Baban pending hearing and determination of this application.*
3. *this Honourable Court be pleased to review, vary and/or set aside its judgment and decree delivered on 2nd October 2025 on grounds of procedural irregularity, violation of the right to fair hearing, and error apparent on the face of the record.*
4. *costs of this application be in the cause.*

Respondents/Applicants' Case

- 2 The Applicants aver that on 2nd October 2025, this Court delivered judgment in favour of the Respondent, awarding her a sum of Kshs. 1,150,000 together with costs and interest. However, the circumstances under which the judgment was entered occasioned grave prejudice and resulted in a miscarriage of justice.
- 3 The Applicants aver that the judgment was entered without the Respondent/Petitioner being subjected to examination in chief or cross-examination, and without them being afforded an opportunity to test her evidence or credibility. The Petition was thus determined on the basis of untested affidavit evidence despite the existence of contested factual issues.
- 4 The Applicants aver that the procedure adopted by the Court was contrary to the rules of natural justice, Article 50(1) of the Constitution, and Rule 21 of the Employment and Labour Relations Court (Procedure) Rules, which mandate the taking of oral evidence where facts are disputed. They contend that they were condemned unheard.
- 5 The Applicants aver that the failure to receive oral evidence constitutes a fundamental procedural irregularity and an error apparent on the face of the record, thereby

properly invoking this Honourable Court's jurisdiction to review its judgment.

- 6 It is the Applicants' case that the Respondent has since commenced execution proceedings to enforce the decree, and unless a stay of execution is granted, the Applicants will suffer substantial loss and the application for review will be rendered nugatory.
- 7 The Applicants aver that they have demonstrated a strong and arguable case for review and that it is in the interests of justice that the matter be re-opened and re-heard so that each party may properly present evidence and test the other's case through cross-examination.
- 8 The Applicants aver that the present application was brought promptly, in good faith, and without any intention to delay the course of justice. Therefore, the application ought to be allowed, stay of execution granted, and the matter re-heard so as to uphold the right to a fair hearing and the dictates of substantive justice.

Petitioner/Respondent's Case

- 9 In opposition, the Respondent filed a replying affidavit dated 9th December 2025.
- 10 The Respondent avers that the Applicants' assertion that the conduct of the hearing violated the tenets of the Constitution, particularly Article 50(1), is false and

contradicted by both the record of this Court and the applicable law. The proceedings were conducted strictly in accordance with the prescribed legal framework.

- 11 The Respondent avers that Rule 10 of Employment and Labour Relations Court (Procedure) Rules provides that constitutional petitions shall be handled in accordance with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules. The Petition herein was filed and heard as a constitutional petition and was therefore properly proceeded under the said Practice and Procedure Rules, commonly referred to as the Mutunga Rules.
- 12 The Respondent avers that Rule 20(1) of the Mutunga Rules provides that the hearing of a constitutional petition shall, unless the Court otherwise directs, be by way of affidavits, written submissions, or oral evidence.
- 13 It is the Respondent's case that affidavit evidence and written submissions are therefore lawful, valid, and the default modes of hearing constitutional petitions before this Court.
- 14 The Respondent avers that in directing the parties to proceed by way of affidavits and written submissions, this Court followed the correct and prescribed procedure. It is the Respondent's case that adherence to Rule 20(1) does

not amount to an unfair hearing and was in no way contrary to Article 50(1) of the Constitution. Once the Court invoked Rule 20(1), it was under no obligation to take *viva voce* evidence.

- 15 The Respondent avers that Rule 20(3) of the Mutunga Rules grants parties the right to apply for oral evidence, either on application or on the Court's own motion. The Applicants thus had a clear procedural right to request *viva voce* evidence or cross-examination but elected not to exercise it. At no point did the Applicants make any application under Rule 20(3) seeking leave to call oral evidence or to cross-examine the Respondent.
- 16 The Respondent avers that the court record shows that the Applicants were present during the pre-trial conference where directions were issued for the matter to proceed by way of affidavits and written submissions.
- 17 It is the Respondent's case that pre-trial is the appropriate forum for raising procedural issues, including the need for oral testimony, and that despite having full knowledge of the allegations in the Petition, the Applicants neither objected to the mode of hearing nor sought leave to call witnesses.
- 18 The Respondent avers that the Applicants' silence amounted to an unequivocal acceptance of the procedural framework set by the Court. Having expressly submitted

to that structure, the Applicants cannot, after an adverse judgment, disown it and allege procedural unfairness.

- 19 The Respondent avers that the Applicants fully participated in the proceedings and were represented by competent counsel. They filed a detailed Replying Affidavit and extensive written submissions, all of which are reflected in the judgment. Therefore, the Applicants cannot claim to have been condemned unheard, having actively filed pleadings, evidence, and submissions and enjoyed legal representation throughout the proceedings.
- 20 The Respondent avers that Rule 33 of the ELRC (Procedure) Rules strictly limits the grounds for review to discovery of new and important evidence, mistake or error apparent on the face of the record, clarification, or any other sufficient reason.
- 21 It is the Respondent's case that the Applicants have not demonstrated the existence of new evidence, any error apparent on the face of the record, or the need for clarification. No sufficient reason has been shown, as the Applicants' complaint arises solely from their own failure to apply for oral evidence during the hearing.
- 22 The Respondent avers that the application is not a genuine application for review but an improper attempt to reopen the case after the Applicants lost on the merits.

- 23 It is the Respondent's case that once judgment is delivered, a successful litigant acquires a lawful right to execute, and that execution does not amount to prejudice but is the natural consequence of a valid judgment.
- 24 It was submitted that the Applicants were fully heard, that the Petition was determined in the manner expressly provided for by law, and that no ground for review has been established. Therefore, the application is frivolous, misguided, legally untenable, and intended to delay execution, and it ought therefore to be dismissed with costs.

Respondents/Applicants' Submissions

- 25 The Applicant submitted on five issues: whether this Honourable Court has jurisdiction to review its judgment under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules; whether the failure to subject the Petitioner to examination-in-chief and cross-examination violated Article 50(1) of the Constitution and the rules of natural justice; whether such omission amounts to an error apparent on the face of the record and/or sufficient cause for review; whether the threshold for stay of execution has been met; and whether the interests of justice warrant setting aside the judgment and ordering a rehearing de novo before a different Judge.

- 26 On the first issue, the Applicants submitted that this Court is properly seized of jurisdiction to review its judgment. Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016, empowers the Court to review its judgments on grounds including discovery of new and important matter, mistake or error apparent on the face of the record, breach of written law, or any other sufficient reason. Further, Sections 80 and 3A of the Civil Procedure Act grant the Court statutory and inherent power to review its orders where necessary to meet the ends of justice. They cited ***Raila Odinga & Others v IEBC & Others [2013] eKLR*** which affirmed that courts possess inherent power to correct their own proceedings where fundamental procedural errors occur.
- 27 It was the Applicants' submission that the present application falls squarely within Rule 33(1)(b) and (d), being an error apparent on the face of the record and other sufficient cause.
- 28 On violation of the right to a fair hearing, the Applicants submitted that Article 50(1) of the Constitution guarantees every person the right to a fair and public hearing, which includes the right to adduce evidence, challenge adverse evidence, and test credibility through cross-examination. The Applicants placed reliance on the Court of Appeal decision ***Kenya Ports Authority v Modern Holdings [EA] Limited [2017] eKLR*** wherein it was held that the right to be heard is not a cosmetic formality but a

fundamental principle that goes to the root of the adjudicative process.

- 29 The Applicants submitted that the Petition was determined without the Petitioner being subjected to examination-in-chief or cross-examination and without affording the Applicants an opportunity to test her evidence. Rule 21 of the ELRC (Procedure) Rules, which provides that where facts are disputed, the Court shall take oral evidence. They cited ***CMC Aviation Limited v Mohammed Noor [2015] eKLR***, the Court of Appeal held that cross-examination is a vital tool in testing the truthfulness and reliability of evidence and its denial amounts to a miscarriage of justice.
- 30 On the third issue, the Applicants submitted that the omission to conduct examination-in-chief and cross-examination is evident from the record and goes to the jurisdictional competence of the process itself, thus constitutes an error apparent on the face of the record. They relied on ***National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR***, the Court of Appeal stated that a review may be granted where there is a clear error or omission that undermines the correctness of the decision.
- 31 The Applicants further submitted that in ***Benjoh Amalgamated Ltd & Another v Kenya Commercial Bank Ltd [2014] eKLR***, the Court held that sufficient

reason includes circumstances where it would be unconscionable to allow a judgment to stand.

- 32 On stay of execution pending review, the Applicants submitted that the governing principles are well settled and include demonstration of substantial loss, promptness, and the risk of the application being rendered nugatory if stay is not granted. They relied on ***Butt v Rent Restriction Tribunal [1982] KLR 417***, the Court held that the purpose of stay is to preserve the subject matter of the dispute.
- 33 It was submitted that the Respondent has commenced execution for Kshs. 1,150,000 plus costs and interest, and that execution prior to determination of the review would occasion substantial loss and render the application academic. The application was brought promptly and in good faith.
- 34 The Applicants submitted that where proceedings are vitiated by a fundamental procedural irregularity, the appropriate remedy is to set aside the judgment and order a rehearing. They cited ***Munyao v Attorney General [2010] eKLR***, the Court held that where a party has been denied a fair hearing, the only way to cure the defect is to rehear the matter afresh.
- 35 The Applicants submitted that given the gravity of the breach and in order to safeguard public confidence in the

administration of justice, the matter ought to be reheard *de novo* before a different Judge.

Petitioner/Respondent's Case

- 36 The Respondent submitted on three issues: whether the Court adopted an unlawful or irregular mode of hearing by proceeding by way of affidavit evidence and written submissions and not Viva Voce; whether the Respondent's Right to a fair Hearing as provided for under Article 50 of the Constitution was violated by the court proceeding by way of affidavit evidence and written submission; and whether the Applicants have satisfied the legal threshold for review under Rule 33 of the ELRC (Procedure) Rules, 2016.
- 37 On the first issue, the Respondent submitted that the instant suit was a constitutional petition properly filed before the Employment and Labour Relations Court and was therefore governed by Rule 10 of the Employment and Labour Relations Court (Procedure) Rules.
- 38 It was submitted that Rule 10 expressly provides that constitutional petitions shall be instituted, litigated, heard, and determined in accordance with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, commonly referred to as the Mutunga Rules.

- 39 The Respondent submitted that Rule 20(1) of the Mutunga Rules clearly provides that the hearing of a petition shall, unless the Court otherwise directs, be by way of affidavits, written submissions, or oral evidence. The Rule does not create a hierarchy among these modes of hearing and affidavit evidence and written submissions are neither inferior nor exceptional, but are expressly recognized as lawful and sufficient modes of determining constitutional petitions.
- 40 It was the Respondent's submission that by proceeding by way of affidavits and written submissions, the Court acted strictly in accordance with the law and precedent, and such procedure does not amount to procedural irregularity or injustice. Reliance was placed on ***Mobile Pay Limited v Governor Central Bank of Kenya & another [2024] KEHC 8940 (KLR)***, where the Court held that constitutional petitions are generally determined on affidavit evidence and written submissions unless a compelling need for oral evidence is demonstrated.
- 41 On the second issue, the Respondent submitted that the Applicants' contention that their right to a fair hearing under Article 50(1) of the Constitution was violated is misconceived. The Constitution guarantees a fair hearing, not necessarily an oral hearing, and that the essence of a

fair hearing lies in meaningful participation rather than the form the hearing takes.

- 42 The Respondent relied on the Court of Appeal decision in ***Kibos Distillers Limited & 4 others v Benson Ambuti Adegga & 3 others [2020] KECA 875 (KLR)***, where it was held that the right to be heard is not exclusively or primarily a right to adduce oral evidence, and that procedural fairness does not require an oral hearing in all cases. The Respondent further cited comparative authority relied upon by the Court of Appeal to the effect that meaningful participation can occur through affidavits and written submissions.
- 43 It was the Respondent's submission that the record demonstrates that the Applicants participated fully in the proceedings. They were represented by counsel, filed a detailed replying affidavit, and filed extensive written submissions, all of which were duly considered by the Court. Therefore, the Applicants cannot credibly claim to have been condemned unheard.
- 44 The Respondent further submitted that Rule 20(3) of the Mutunga Rules expressly allows a party to apply for a petition to proceed by way of oral evidence. *Viva voce* evidence is not automatic and that the obligation lies on the party desiring such evidence to apply for it. The Applicants never objected to the directions given at pre-

trial, never invoked Rule 20(3), and never sought leave to cross-examine or adduce oral evidence. Having acquiesced in the procedure adopted, they cannot now, after judgment, challenge it.

- 45 On the third issue, the Respondent submitted that the power of review is purely statutory and strictly circumscribed by Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016. Review is only available on the grounds of discovery of new and important evidence, mistake or error apparent on the face of the record, need for clarification, or any other sufficient reason.
- 46 It is the Respondent's submission that the Applicants have not alleged discovery of new evidence, do not seek clarification, and have not demonstrated any error apparent on the face of the record. The lawfully exercised its discretion under Rule 20 of the Mutunga Rules and dissatisfaction with the mode of hearing does not amount to an error apparent or sufficient reason within the meaning of Rule 33.
- 47 The Respondent submitted that Rule 33 does not permit the Court to sit on appeal over its own judgment or to reopen proceedings merely because a party, after losing, prefers a different procedural route. The Applicants have

failed to bring themselves within the strict confines of Rule 33 and that the application is devoid of merit.

- 48 It is the Respondent's submission that the Petition was lawfully heard and determined in accordance with the applicable rules and settled precedent, that no violation of Article 50(1) was demonstrated, and that the Applicants failed to meet the strict legal threshold for review. She urged the Court to find that the application is frivolous, an abuse of the Court process, and to dismiss it with costs.
- 49 I have examined all averments and submissions of the parties herein. The applicants seek review of this court's judgment on the ground of error apparent on the record contesting that the court denied them a right to call evidence and cross-examine witnesses.
- 50 It is this court's position that the application for review of this courts orders, rulings and judgments will fall under rule 33 of the employment and labour relations rules, procedure rules which provide for grounds of review as follows:

33. (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—

(a) if there is discovery of new and important matter or evidence which, after the

- exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; (b) on account of some mistake or error apparent on the face of the record;
- (c) if the judgment or ruling requires clarification; or (d) for any other sufficient reason.
- (2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.
 - (3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed.
 - (4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.
 - (5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.
 - (6) An order made for a review of a decree or order shall not be subject to further review.

51 The error the applicant seek to cite relates to not cross examining a witness. The issue of not cross examining a

witness in a constitutional petition like this one falls under rule 20 of the **Mutungu** rules and which allow constitutional petitions to proceed by way of affidavit service and written submissions unless the parties apply or the court directs that oral evidence should be applied.

- 52 The applicants never sought to call a witness or cross examine the petitioner. Their reference to an error on this account is therefore misconceived. That as it may be, assuming that this is an error, it can only be corrected on appeal and not as a review.
- 53 The application to set aside this courts judgment in the circumstances is not merited and is declined.
- 54 It therefore follows that there is reason to warrant stay of execution and the entire application therefore fails and is dismissed with costs.

Dated, Signed and Delivered Virtually at Nairobi this 26th Day of February, 2026.

**HELLEN WASILWA
JUDGE**