

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KIBERA
CONSTITUTIONAL PETITION NO E014 OF 2024

NOVERCLAIRE

ATIENO.....PETITIONER

VERSUS

THE DIRECTOR GENERAL, DIRECTORATE

OF CRIMINAL INVESTIGATIONS.....1ST

RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND

RESPONDENT

BENSON KASYOKI.....APPLICANT/3RD

RESPONDENT

ISAAC KARIUKI.....4TH

RESPONDENT

AND

JAPHETH CHANGE.....INTERESTED

PARTY

RULING.

1. Before the Court is the Notice of Motion dated 14th July 2025 brought by the Applicant/3rd Respondent, Benson Kasyoki, pursuant to Sections 1A, 1B, 3A, and 80 of the Civil Procedure Act, and Order 45 Rule 1 of the Civil Procedure Rules. The Applicant seeks the review, variation, or setting aside of the judgment delivered on 24 June 2025 in respect of the Petition dated 6 November 2024, insofar as it relates to him.
2. The application is supported by the Applicant's affidavit sworn on 14 July 2025, wherein he deposes that the Petition challenged the institution of criminal charges arising from a complaint lodged by

one Ralph Edward Nguma concerning alleged financial misrepresentation in tax matters. Investigations into that complaint were initiated on 19th August 2024 by the Deputy Regional Criminal Investigations Officer, Mr. Justus Imaana. The Applicant avers that he was only posted to the Nairobi Region on 23rd September 2024, more than a month after investigations had commenced, and therefore had no involvement in their initiation or conduct.

3. He contends that the pleadings wrongly alleged that he directed or acted through the 4th Respondent, yet no evidence was placed before the Court to support that assertion. He further states that the investigation records, correspondence forwarding the file to the Office of the Director of Public Prosecutions, and the ODPP's recommendation letter identify the 4th Respondent as the investigating officer and Mr. Imaana as the supervisory officer, with no reference to him. His official deployment record and copies of the relevant correspondence are annexed in support of this position.
4. The Applicant also avers that he was never served with the Petition or related documents and only became aware of the proceedings after delivery of the judgment. He contends that the Affidavit of Service indicates service upon the 1st Respondent only, and that he was thereby denied an opportunity to be heard. It is his case that the adverse findings made against him were therefore based on a factual error regarding his presence and participation in the investigations.
5. He asserts that the newly produced deployment records and official correspondence constitute new and important evidence which was not within his knowledge or possession at the time of

the proceedings and which materially affects the basis of the judgment. The Applicant maintains that the failure to hear him before adverse findings were made violated his right to a fair hearing under Article 50 of the Constitution. He contends that unless the judgment is reviewed as against him, he stands to suffer serious prejudice, including reputational harm and possible professional consequences for actions he did not undertake.

6. Lastly, he states that the application has been brought promptly upon discovery of the new evidence and in good faith, for the sole purpose of preventing injustice and ensuring that no party is condemned unheard.
7. The Petitioner filed a Replying Affidavit dated 9th May 2025, opposing the 3rd Respondent/Applicant's position in this matter. Further, the Interested Party filed Grounds of Opposition dated 6 May 2025, seeking to have the Applicant's Notice of Motion dismissed with costs on several grounds, including lack of jurisdiction, abuse of court process, and non-compliance with the provisions of Order 45 Rule 1 of the Civil Procedure Rules.
8. In particular, it was contended that the Applicant's purported "new evidence," namely deployment records indicating that he was not stationed at Nairobi Area Police Station during the investigation period, is neither new nor material. Such records were at all times within the Applicant's custody, control, or that of his superiors, and could have been obtained and produced with reasonable diligence during the pendency of the proceedings. The records are administrative in nature and cannot outweigh sworn evidence being the 4th Respondent's affidavit dated 9th May 2025, which unequivocally states that the 4th Respondent acted under the instructions of the Applicant. The 4th Respondent referred to

the Applicant as his “boss,” and no evidence contradicts this account.

9. It is further contended that the Applicant was aware of the Petition, which was duly served on his authorised representative, the 1st Respondent. Constructive service was effected in accordance with Article 50 of the Constitution, and any internal administrative arrangement between the 1st and 3rd Respondents does not vitiate the proceedings. The reliance on deployment records appears contrived to remove the Applicant from the proceedings under the guise of “new evidence,” and to supplement the evidentiary record after judgment, which is impermissible under the law of review.
10. The application also seeks to re-open proceedings that have long been concluded, contrary to the principle of finality in litigation, and thereby constitutes an abuse of court process and vexatious litigation. The Court is functus officio with respect to the matters already determined, including service, and has no jurisdiction to entertain claims already conclusively decided. The Applicant’s claims of prejudice are therefore baseless, and the application is calculated to delay and frustrate the expeditious administration of justice, while undermining the Petitioner’s constitutional rights to equality before the law, a fair hearing, and freedom from discrimination under Articles 27, 50, and 258 of the Constitution of Kenya. It was contended that the application is frivolous, vexatious, and without merit.
11. In a further affidavit dated 10th November 2025, the 3rd Respondent/Applicant averred that the deployment records relied upon in this application were not in his personal custody and

could not have been obtained earlier through the exercise of reasonable diligence.

12. As a police officer, he has no unilateral access to official deployment records, which are securely held at the Directorate of Personnel, Human Resource and Administration under the Inspector-General of Police. The transfer letter confirming his posting to Nairobi on 23rd September 2024 was only made available to him following a formal written request on 29th June 2025, after he discovered that the judgment had erroneously presumed his presence in Nairobi during the impugned investigations. These records constitute new and important evidence within the meaning of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules.
13. The Applicant further asserts that the Petitioner's reliance on alleged eyewitness testimony that he issued instructions to the 4th Respondent is uncorroborated. Documentary evidence, including letters dated 19th August 2024, 10th January 2025, and 27th February 2025, confirms that Mr. Justus Imaana, then Deputy Regional Criminal Investigations Officer, supervised the investigations, and no communication or instruction was addressed to the Applicant.
14. Additionally, the Applicant was never personally served with the Petition or its supporting documents. Service upon the 1st Respondent did not constitute notice to him, and the Replying Affidavit dated 9th May 2025 was filed without his knowledge or input, depriving him of a meaningful opportunity to be heard, contrary to Articles 47 and 50 of the Constitution. The assertion that the Court is functus officio is misconceived, as a court may revisit its decision where a judgment is founded on an error

apparent on the face of the record or new evidence that could have produced a different result.

15. The application was filed promptly on 14 July 2025, three weeks after the judgment of 24 June 2025, in good faith. The existence of an appeal by another party does not oust this Court's jurisdiction to review the judgment as it relates exclusively to the 3rd Respondent/Applicant. The adverse declarations against him have caused significant reputational, professional, and psychological harm, justifying the Court's consideration of this review.
16. All submissions, including those filed by the Applicant dated 4th December 2025, the Petitioner dated 16th January 2026, and the Interested Party dated 24 September 2025, have been duly considered.
17. Under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, this Court is vested with jurisdiction to review its decision inter alia on account of a mistake or error apparent on the face of the record, or for any other sufficient reason. This court therefore has the jurisdiction to handle the application.
18. The sole issue for determination is whether the 3rd Respondent/Applicant has demonstrated a mistake or error apparent on the face of the record, or any sufficient reason to justify the review of the judgment delivered on 24 June 2025. The Supreme Court of India in **Aribam Tuleshwar Sharma v Aribam Pishak Sharma (1979) 45 CC 389, 1979(11) UJ 300 SC** held:

“The power of review may be exercised on the discovery of new and important matter or evidence which, after exercise of due diligence, was not within the knowledge of the person

seeking the review or could not be produced by him at the time when the order was made. It may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court.”

19. Similarly, in **Ajit Kumar Rath vs State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608,** it was held:

“The power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier... The expression ‘any other sufficient reason’... means a reason sufficiently analogous to those specified in the rule.”

20. In **Paul Mwaniki v National Hospital Insurance Fund Board of Management [2020] eKLR,** the Court further clarified the principles guiding review applications:

“A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise... Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show

that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier... 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."

21. In the present case, the Applicant contends that he was never served with the Petition dated 6th November 2023 or its supporting documents and that the adverse findings were made against him without his knowledge. However, the record indicates otherwise. From the record, a Replying Affidavit dated 9th May 2025, sworn by IP Isaac Karimi Kariuki, a DCI Officer, was filed on behalf of the 1st to 4th Respondents, including the Applicant herein. By this process, the Applicant was constructively represented, and therefore, he cannot now assert a lack of service. The Applicant has failed to produce any documentary evidence to substantiate his claim of failure of service or to show that he was not adequately represented.
22. Further, the Applicant claims to have discovered new evidence, specifically, official deployment records indicating his posting to Nairobi Area Police Station on 23rd September 2024. This is an administrative issue within the police. The Court finds that the Applicant has not established that such evidence was unavailable to him, or that it could not have been obtained through reasonable diligence prior to the judgment.
23. The requirement under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, that the new evidence must be both material and previously inaccessible, is not satisfied.

24. The Applicant has also failed to demonstrate any error apparent on the face of the record. As held in **Paul Mwaniki v National Hospital Insurance Fund Board of Management (supra)**, an error must be prima-facie visible and self-evident. No such error has been shown here, and the grounds advanced are speculative, unsubstantiated, and legally untenable.

25. Moreover, no other sufficient reason for review, within the meaning of Section 80 and Order 45 Rule 1, has been established.

26. Accordingly, the Court finds that the application is without merit, constitutes an abuse of the review process, and cannot be sustained. The application is hereby dismissed with costs.

Orders accordingly

**Ruling dated and delivered virtually this 25th day of
February 2026**

**D. KAVEDZA
JUDGE**

In the presence:

Mr. Ndung'u h/b for Mr. Wandubi for the Applicant

Ms. Maina for the 2nd Respondent

Isaac Odhiambo for the Interested Party

Karimi Court Assistant.