



**Oyatsi v Peony Management Company Limited & 3 others (Environment & Land
Petition E033 of 2023) [2025] KEELC 53 (KLR) (16 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 53 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E033 OF 2023**

**MD MWANGI, J
JANUARY 16, 2025**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR
FUNDAMENTAL FREEDOMS UNDER ARTICLE 60 (1)(B), 64, 66(1), 40(3) AND
27(1), (2) OF ~~THE CONSTITUTION~~ THE CONSTITUTION}}**

BETWEEN

DESTERIO OYATSI PETITIONER

AND

PEONY MANAGEMENT COMPANY LIMITED 1ST RESPONDENT

GAO YU INTERNATIONAL LIMITED 2ND RESPONDENT

STANLEY GIBSON KADIRI 3RD RESPONDENT

FURAHA MARWA 4TH RESPONDENT

*(In respect to the 4th Respondent's application dated 16th
October 2024 seeking review of the court's ruling of 11th April 2024)*

RULING

Background.

1. The application under consideration is the Notice of Motion dated 16th October 2024 by the 4th Respondent herein. The main prayer by the Applicant is seeking that this court be pleased to set aside, review and or vacate the ruling dated 11th April 2024.
2. The application is premised on the grounds on the face of it and on the affidavit of FURAHA MARWA sworn at Nairobi on 16th October 2024. The Applicant avers that the court misinterpreted his application dated 8th December 2023 that sought his striking out and all the 1st Respondent's former



directors from the ensuing proceedings as non-suited parties. Consequently, the court arrived at a decision that was adverse to the 4th Respondent and all the 1st Respondent's former directors.

3. The Applicant terms the alleged misinterpretation of his application as an error apparent on the face of the impugned ruling dated 11th April 2024. He affirms that this court is clothed with the requisite jurisdiction and discretion to review the impugned ruling and vacate its orders thereto.
4. The Applicant pleads that unless the review is done, there will be gross miscarriage of justice that shall lead the 4th Respondent and all the former directors of the 1st Respondent to suffer immense prejudice.
5. In his supporting affidavit, the Applicant discloses that he is the former chairman of the 1st Respondent company. It is his case that the court dismissed his application dated 8th December 2023, on a wrong ground which he had not sought. He has attached as an annexure the chamber summons application dated 8th December 2023, as well as the ruling of this court of 11th April 2024.

Response by the Petitioner.

6. The Petitioner responded to the 4th Respondent's application by way of a replying affidavit sworn at Nairobi on 18th October 2024. The Petitioner termed the application as a non-starter, unconstitutional, null and void and an abuse of the process of court.
7. The Petitioner affirmed that he filed the present petition in exercise of his constitutional rights under Article 22 of *the Constitution* in order to enforce and or protect his rights and fundamental freedoms to property. The law applicable in respect to the petition therefore is *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The Applicant has however, according to the Petitioner deviated from the said law and has brought his application based on the provisions of the *Civil Procedure Act* and Rules which is inapplicable in these kinds of proceedings.
8. The Petitioner opines that the application by the 4th Respondent is but a delaying tactic and seeks to circumvent this court's directions on the hearing of the petition. He prays for its dismissal with costs.

Court's Directions

9. The court directed that the 4th Respondent's application be heard and determined before the hearing of the main petition and be canvassed by way of written submissions. The 4th Respondent filed his submissions on 7/11/2024 whereas the Petitioner filed his submissions on 8/11/2024. The 1st and 3rd Respondents did not file any submissions but indicated through their Advocate that they were in support of the application by the 4th Respondent.
10. On 8th November 2024, the Petitioner brought it to the attention of the court that the Applicant had not filed his submissions within the time directed by the court. He neither made an application to have them admitted out of time; he merely apologized for late filing and left it at that. The Petitioner was of the view that the same ought to be disregarded for the non-compliance.

Issues for determination.

11. Having considered the application by the 4th Respondent, the response by the Petitioner and the submissions filed herein, the two issues for determination are whether the *Civil Procedure Act* and Rules apply to constitutional petitions and whether the application is merited.



12. For the sake of doing justice to all parties, the court will consider the submissions filed by the 4th Respondent in spite of them having been filed outside the time limits set by the court. I am of the view that no prejudice will be suffered by the Petitioner for that.

Analysis and Determination

Whether the Civil Procedure Act and Rules apply to Constitutional Petitions.

13. The Petitioner has strongly argued that the 4th Respondent's application is defective having been brought under the provisions of the Civil Procedure Act and rules which are not applicable in a constitutional petition.
14. The application by the 4th Respondent as already pointed out earlier on seeks to review the ruling of this court delivered on 11th April 2024. It is grounded on the provisions of Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.
15. What is before the court is a Constitutional Petition. As correctly observed by the Petitioner, the law governing proceedings made under Articles 22 of the Constitution as the current proceedings is the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
16. The provisions of the Civil Procedure Act and Rules are not applicable in these proceedings. I agree with the observation by Musyoka – J, in the case of Francis Angueyah Ominde and ano –vs- Vihiga County Executive Committee Member Finance Economic Planning and 3 others (2021) eKLR, where he tacitly stated that,
- “...it should pointed out that the constitutional Petitions are governed and regulated by the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, so far as procedures and processes are concerned. They are not subject to the Civil Procedure Rules, which govern processes that are brought under the Civil Procedure Act, Cap 21, Laws of Kenya. So far as the procedure is concerned, the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, captures the spirit of Article 159 (2)(d) of the Constitution.”
17. On that basis alone, I would strike out the 4th Respondent's application with costs to the Petitioner.
18. I will go further to the second issue and state that even if the provisions on review were applicable in Constitutional Petitions, I am not persuaded that the 4th Respondent's application meets the threshold for review.
19. In the case of National Bank of Kenya Limited – vs- Ndungu Njau (1997) eKLR, the Court of Appeal pronounced itself on the subject of review under Section 80 of the Civil Procedure Rules as follows;
- “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. 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 of review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for review.”



20. In his application under consideration, the 4th Respondent accuses the court of misapprehending and misinterpreting its application of 8th December 2023, thereby arriving at a wrong decision. The alleged misinterpretation of the application by the court cannot be a ground for review but rather one for an appeal.
21. It is important to distinguish between grounds of appeal and grounds for review. A matter cannot be reviewed on allegations of misapprehension of the law or facts or on the basis that the court exercised its discretion wrongly in the case.
22. Finally, there is a requirement under Order 45 rule 1 of the *Civil Procedure Rules* that the application for review be brought without unreasonable delay. The ruling that the 4th Respondent seeks to review was delivered on 11th April 2024. This application was brought over six (6) months after the delivery of the impugned ruling. The delay is not only excessive but also unreasonable and has not been explained.
23. The 4th Respondent did not bother to offer any explanation whatsoever for the inordinate delay.
24. The court is inclined to agree with the Petitioner that the application was calculated at sabotaging the hearing of the petition.
25. For the foregoing reasons, the 4th Respondent's application dated October 16, 2024 is hereby dismissed with costs to the Petitioner.
26. Directions had already been issued on the mode of hearing of the petition. Since this court is on transfer, I direct that this file be placed before my successor at the Land Division of the Milimani Environment and Land Court for purposes of issuance of a hearing date of the main petition.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 16TH DAY OF JANUARY 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Oguko h/b for Mr. Muma for the 1st and 3rd Respondents

N/A for the Petitioner and the 2nd and 4th Respondents

Court Assistant: Mpoye

