



**Sang v Governor Kericho County & 2 others (Petition E001 of 2023)
[2024] KEELRC 163 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 163 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
PETITION E001 OF 2023
HS WASILWA, J
FEBRUARY 8, 2024**

BETWEEN

COLLINS KIPNGETICH SANG PETITIONER

AND

THE GOVERNOR KERICHO COUNTY 1ST RESPONDENT

THE COUNTY ASSEMBLY OF KERICHO 2ND RESPONDENT

KERICHO COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

RULING

1. Before me for determination is the Respondents’ Application notice of motion dated 22nd June, 2023, brought under certificate of urgency pursuant to Articles 50(1) and 159(2)(d) of the Constitution, Sections 1A,1B, 3A and 80 of the Civil Procedure Act, Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law, seeking for the following Orders; -
 1. Spent.
 2. That the Honourable Court be pleased to review, vary and or set aside the ruling and all consequential Orders of the Honourable Court made on the 23rd May, 2023.
 3. That the Honourable Court be pleased to issue an order maintaining the status quo prevailing prior to the delivery of the ruling on 23rd May, 2023, pending the hearing and determination of the substantive Petition.
 4. That costs of this application be provided for.
2. The Application is based on the grounds on the face of the application and the supporting affidavit of Dr. Wesley Kipkorir Bor, the County secretary and the Head of County Public Service Board.



3. The affiant stated that this Honourable Court delivered its Ruling in favour of the Petitioner against the Respondents and allowed an injunctive Order restraining the Respondents from proceeding with the vetting, appointing or issuing of letters of appointment to any candidate for the position of the County Attorney for Kericho County.
4. That the 1st and 3rd Respondents herein are aggrieved by the Orders of the Court on the basis that there is an error apparent on the face of the Ruling warranting the Courts discretion to review the said orders.
5. Further that there is discovery of new and important evidence which after the exercise of due diligence was not within the knowledge of the applicant and thus could not be produced at the time the ruling was passed.
6. In the affidavit, he stated that the Applicants herein have obtained the letter of appointment for for one Mr. Gideon Kipkoech Mutai dated 1.9.2014 appointing him to his substantive position as a County legal officer, however that the said letter eluded the grasp of the applicant at the time of prosecution of the Application dated 9.2.2023, therefore the same was not presented before this Court.
7. It is stated that this evidence can now be considered by this Court on strength of Order 44 of the Civil Procedure Rules. Accordingly, that Section 31(2) of the County Attorney Act provides that a person employed by the County Public Service Board to perform the functions of the County Attorney, County solicitor and Legal Counsel at the commencement of the Act shall continue to hold their respective positions only if they meet the qualifications specified in the County Attorney Act.
8. He stated that the process of transition does not in itself hinder the Governor from exercising its authority in the appointment of the County Attorney who hold full and substantive positions of legal responsibilities. Further that the appointment of a county attorney is indispensable for seamless functioning of the legal affairs of the County Government, without this vital position, a void is created that impedes the administration's ability to effectively handle legal matters.
9. It was stated further that it is necessary to restore the administrative continuity and preserve the public interest, preventing potential legal loopholes and ensure the Government protect the interest of its constituents.
10. The affiant stated that the County Function that include; financial matters, contracts and regulatory compliance are inherently intertwined and the absence of a county attorney hinders the execution of contractual obligations with adverse economic consequences arising from the lack of legal representation.
11. The affiant stated that there is an error apparent on record of the ruling at paragraph 65 and clarified that contrary to the position adopted by the Court, the incumbent Mr. Gideon Mutai transitioned to the position of County Attorney in line with the office of the Attorney General Legal Advisory, when his previous terms were on permanent and pensionable terms while the current job was on contract, a fact which he reiterated in his affidavit sworn on 20.2.2023.
12. On that basis, he stated that the said Gideon Mutai is now handling two jobs, one on permanent and pensionable terms and another on contrary to Article 75(1) of the Constitution. Therefore, that the error apparent on the face of the Ruling on the fact that the Court disregarded the affidavit sworn by Gideon Mutai which contained pertinent facts and crucial information that are central to the matter at hand and the failure to consider the said affidavit undermined the principles of justice and fairness.
13. The affiant stated further that prior to the nomination process of Mrs. Alice Bett, the incumbent proffered a written advisory letter dated 3.2.2023 addressed to the County Secretary regarding provisions of the County Attorney Act in relations to the transitional arrangement under the office



of the County Attorney Act. Moreover, that the said Gideon explicitly conveyed his complete lack of opposition towards the appointment of a substantive County Attorney.

14. Based on the foregoing, the affiant urged this Court to review its decision in the interest of justice as the said Gideon Mutai is an employee of the County on permanent and pensionable terms in the legal office.
15. The Application is opposed by the Respondent, Collins Kipngetich Sang, who filed a replying affidavit deposed upon on the 20th July, 2023. In his affidavit, the affiant listed the principles established for reviews as follows:-
 - a. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 of the *Civil Procedure Rules* and not otherwise.
 - b. The expression "any other sufficient reason" appearing in Order 45 Rule 1 of the *Civil Procedure Rules* has to be interpreted in the light of other specified grounds.
 - c. An error which is not self-evident, and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80 of the *Civil Procedure Act*.
 - d. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
 - e. A decision/order cannot be reviewed under Section 80 of the *Civil Procedure Code* on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
 - f. While considering an application for review, the court must confine its adjudication with reference to material which was available at the time of the initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
 - g. 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.
 - h. 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 detail examination.
 - i. Section 80 of the *Civil Procedure Act* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 of the *Civil Procedure Act* mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 of the *Civil Procedure Rules* must be taken into consideration. Section 80 of the *Civil Procedure Act* does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1 *Civil Procedure Rules*.
 - j. The power of a civil court to review its judgment/decision is traceable in Section 80 of the *Civil Procedure Act*. The grounds on which review can be sought are enumerated in Order 45 Rule 1 of the *Civil Procedure Rules*.
 - k. The expression 'any other sufficient reason' in Order 45 of the *Civil Procedure Rules* means a reason sufficiently analogous to those specified in the rule.



16. He also stated that there are three limbs which are discernible under the law for seeking review, which are; -
 - a. Discovery of new and important matter or evidence.
 - b. Mistake or error apparent on the face of the record.
 - c. Any other sufficient reason.
17. That the application herein does not pass the test of established principles for review and is not lawfully grounded on either of the foregoing listed discernible limbs for seeking review in Order 45(1)(b) of the *Civil Procedure Rules*.
18. Furthermore, that the application is irregularly in Court thus fatally defective since the Applicant has failed to annex a formally extracted order in respect of which the review orders are sought contrary to Order 45 Rule 1 of the *Civil Procedure Rules*. Therefore, that the application is untenable and incompetent and that the only recourse available for the Respondents is an Appeal and not as review.
19. Directions were taken for the application herein to be canvassed by written submission, with the Applicant filing on the 12th October, 2023 and the Respondent filed submissions on the 11th December, 2023.

Applicant's Submissions.

20. The Applicant submitted on only one issue; whether there are errors apparent on the face of the record to warrant orders for review. On that basis it was submitted that review may be granted whenever the court considers it necessary to correct an apparent error or omission on the part of the court record. The error or omission must be self-evident and should not require an elaborate argument to be established. He argued that there are requirement that must be met by an applicant requiring review and these condition are listed at Order 45, Rule 1(b) of the *Civil Procedure Rules* which provides that;-

“(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.

21. This position was reiterated by the Court in the case of *Nyamogo & Nyamogo v Kogo*, where the Court while discussing what constitutes an error on the face of the record, the court rendered itself as follows:

“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 not a ground for review though it may be one for appeal.”

22. Counsel, defined what amounts to mistake and stated that the term “mistake or error apparent” by its very connection signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act.
23. On the contrary that in this case there is an error apparent on the face of the record as evinced on paragraph 65 of the ruling where the honourable court noted that there was no explanation as to what happened to the incumbent and why a new appointee was nominated. He explained that Mr. Gideon Mutai in his affidavit dated 20/02/2023 and annexed to the affidavit dated 18/02/2023 categorically stated that he temporarily transitioned to the position of county attorney in line with the office of the Attorney General legal advisory. The terms of his employment however did not change from permanent and pensionable terms to contractual terms as evidenced by the copy of the affidavit dated 18/02/2023 marked as WKB-3. However, that this Court overlooked the significant affidavit presented by Gideon Mutai, which affidavit contains pertinent facts and crucial information that are central to the matter at hand. Hence the court’s failure to give due consideration to this material evidence undermined the principles of justice and fairness.
24. It was submitted that Mr. Gideon Mutai cannot be employed under permanent and pensionable terms while at the same time on contract for two jobs as this will result to a conflict of interest under Article 75(1) of the Constitution. Moreover, that the inherent incompatibility between permanent and pensionable terms of employment and contractual engagements further compounds the matter at hand. The permanence and stability associated with the former, juxtaposed against the transitory nature of the later, create an incongruity that undermines the principles of equitable and sustainable employment practices.
25. Furthermore, that the court regrettably failed to properly attend to the matter concerning the legal deficiency of the supporting affidavit, which was dated 9th February 2023 and attested to by an advocate who lacked the necessary qualifications. He argued that this critical oversight resulted in the court leaving this particular issue unresolved. Further that the affidavit submitted by the respondents, dated the 19th July 2023, was accompanied by an appended exhibit-WKB-5 specifically a letter dated the 4th April 2023, issued by the Law Society of Kenya indicating that advocate Hillary K. Rutto was not qualified to practise law at the relevant period as such the affidavit commissioned by the said advocate was invalid as per sections 24 and 30 of the Advocates Act.
26. The Applicant submitted that it seeks injunctive reliefs which are equitable remedies and since equity will not allow a remedy that is contrary to law, the Court should not allow the Respondents to benefit from such illegality. In this they cited the the decision of the Supreme Court of Uganda in the case of Prof. Syed Hug v Islamic University of Uganda C.A. No 47 of 1995 where the Court considered the effect of Commissioning Oaths without a practicing certificate and held that such actions were illegal as it was done while perpetrating an offence which cannot be considered by a court of law. He also cited a High Court of Kenya Decision in Election Petition No 21 of 2017 Omusotsi v The Returning Officer and another where the petition was struck out on the grounds that the affidavits were not commissioned by an advocate permitted to practice law.



27. Counsel clarified that the issue before this Court is commissioning of documents unlike what was dealt with by the Supreme Court which was on instrument or document of conveyance. A practising advocate can sign documents and instrument of conveyance as a witness which is different from administering oaths. This is because for an advocate to administer oaths he must be appointed as such by the Chief Justice and must be a practising advocate. In support of this view, he relied on the case of *Omusotsi v The Returning Officer Mumias East Constituency, Independent Electoral and Boundaries Commission and Benjamin Washiali Jomo*, Election Petition No 9 of 2017, where the High Court held that :-

“An affidavit can only be commissioned by a commissioner for oaths and officials of the court allowed to do so under the Act..... the petition as filed is not supported by the affidavit of the petitioner as required by rule 12 (1) (b), of the Elections Rules.” The petition does not comply with the mandatory provisions of the law. The petition filed without the said documents is not a competent petition. The petition is a still birth that should not be allowed to see the light of day. The petition is accordingly struck out with costs.”

28. Similarly, that in the Supreme Court of Uganda in Prof Syed Hug –V-Islamic University in Uganda C.A. No 47 of 1995, considered the effect of commissioning of oaths by a non-practising advocate under a provision similar to our Section 2 of *Oaths and Statutory Declarations Act*, held:-

“An advocate who practices after the period of grace without a valid practicing certificate commits an offence and is liable to prosecution under Section 14 (1) of the *Advocates Act*. Therefore, the documents he prepares, signs, and files are illegal as he does so in perpetration of an offence under Section 14 (1) of the *Advocates Act*. Accordingly, such documents are invalid and of no legal effect as no Court can sanction or condone an illegality which is brought to its notice.”

29. Further that sections 24 and 34 of *Advocates Act* makes it an offence for and Advocate to practice without a practising certificate, a position that has been reiterated time and again by the Court in the case of *Hosea Mundui Kiplagat v Sammy Komen Mwaita & 2 others* [2013]eKLR ,where the Court stated that an affidavit commissioned by unqualified advocate is as good as an affidavit not commissioned at all.

30. Also in the case of *Pius Njogu Kathuri v Joseph Kiragu Muthura & 3 others* [2018] eKLR it was held that; -

“Court to admit the affidavit it must be an affidavit. It must have been sworn. The affidavits cannot be said to have been sworn. it is commissioned by a person authorized to administer oaths. The defect it is sworn when is not on form nor is it a technicality.... It is clear that the affidavit of the petitioner and his witnesses were ‘commissioned’ by an advocate who was not authorized to practice law. He was operating illegally and in contravention of the provisions of the *Advocates’ Act* and *Oaths and Statutory Declarations Act*. The affidavits allegedly commissioned by Robinson N. Mugo are not affidavits but mere statements. There was no legal basis for the trial magistrate to hold that the application to strike out the petition had no merits.”

31. It was finally submitted that Section 80 of the *Civil Procedure Act*, grants this court unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. Accordingly, the Applicant urged this Court to exercise its discretion and allow the Application as prayed.



Respondent's Submissions.

32. The Respondent on the other hand submitted on two issues; whether there is an error apparent on the face of the record to warrant orders for review and whether the Applicant is entitled to the orders sought.
33. On the first issue, it was submitted that there is no error apparent on the face of the record to warrant orders for review. That it is clear from the grounds provided in the application that the 1st and 3rd Respondents are aggrieved by ruling of the Court, which can only be ventilated in appeal as this Honourable Court is not entitled to address its ruling as doing so would be sitting on appeal in its own decision.
34. It was submitted that contrary to the Applicants' submission, the Court did not overlook material evidence when coming up with the ruling as alleged, but that the Court considered the affidavit of Mr. Gideon Mutai and found that there was nothing substantial to affect its decision and that cannot in any way be imputed as undermining the principles of justice and fairness.
35. On the issue of commissioning of documents, the Respondent submitted that the commissioning of documents by the Petitioner was done in accordance with the law and that the commissioner of oath was a holder of a practicing certificate as at the time of commissioning of documents and the allegations that the commissioner of oaths lacked a practicing certificate are baseless and untenable.
36. On the second issue, it was submitted that the review sought is an abuse of the court process, aimed at defeating the process of justice. In any event that the application for review is fatally defective and contrary to Order 45 Rule1 of the Civil Procedure Rules 2010 in that the Applicant did not annex an extracted copy of the order sought to be reviewed. In this he relied on the case of Hosea Nyandika Mosagwe & 2 others v County Government of Nyamira [2022] eKLR where the Court held that:-

“ Finally, the application is irregularly in Court since an applicant in an application for Review ought to have annexed a formal extracted Decree or Order in respect of which the Review is sought.”
37. This Position was reiterated by the Court in the case of Suleiman Murunga v Nilestar Holdings Limited & another [2015] eKLR, where the Court held that:-

“ the plain reading of Order 45 Rule 1 is that an application for review ought to have annexed a formal extracted decree or order in respect of which the review is sought, in essence judgement or Ruling. Thus where an applicant fails to annex the order sought to be reviewed, an application is defective.”
38. It was submitted further that the Respondents' grounds for review are misleading and just meant to confuse and hoodwink the Court to their favour. That the reasons do not show an error or omission to qualify for a review of the ruling thus the Application does not meet the threshold for review and thus the Applicants' Application should be dismissed and the Court and uphold its former decision.
39. I have examined all the averments and submissions of the parties herein.
40. The applicant herein seeks orders of review of this court's order dated 23rd May, 2023.
41. The applicants aver that they seek these review orders on the ground that there is an error on the face of the record and further discovery of new and important evidence which after the exercise of due



diligence was not within the knowledge of the applicant and could not be produced at the time of the ruling.

42. This court has powers to review its judgment, ruling and orders under Rule 33 (1) of the ELRC Procedure Rules which provide as follows:-

“A person who is aggrieved by a decree or an order from which an appeal is allowed but from which an 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.”

43. The applicants have sought review on the ground that there is an error apparent on the face of the ruling. They also aver that there is discovery of new and important evidence which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time the ruling was passed. What is the error on record as pointed out by the applicant?

44. The applicants have pointed out that they have in their possession a copy of the letter dated 1/9/2014 marked as WKB 2 appointing the respondent Mr. Gideon Kipkoech Mutai in his substantive position as a County Legal Officer. This position is true and further there is a gazette notice dated 27th November, 2020 appointing Gideon Kipkoech Mutai to the position of County Attorney for the County Government of Kericho.

45. The applicants point out that by virtue of Section 31 (2) of the County Attorney Act the respondent could not be appointed to the position of County Attorney.

46. Section 31 (2) of the office of the County Attorney Act provides that;

“31. Transition (1) Upon the coming into effect of this Act, members of staff employed by the county executive to perform the functions of the Office under this Act shall—

- (a) be deemed to be members of staff of the Office in their respective capacities;
- (b) retain any rights accrued or accruing to them as such staff or contributors;
- (c) be at liberty to continue to contribute to any superannuation scheme to which they were contributors;
- (d) be entitled to receive any deferred or extended leave as if they have continued to be such staff of the Office during their service with the county executive;



- (e) be entitled to receive any payment, pension or gratuity as if they have continued to be such staff of the Office during their service with the county executive; and
 - (f) be deemed to be employees of the Office for the purposes of any law under which those rights accrued or were accruing, under which they continue to contribute or by which that entitlement is conferred.
- (2) Despite the provisions of subsection (1), a person employed by the county public service board to perform the functions of the County Attorney, County Solicitor or County Legal Counsel at the commencement of this Act shall continue to hold their respective positions in the Office after the coming into effect of this Act only if they meet the qualifications specified in this Act.
 - (3) The county public service board shall, where a person employed by the county executive to perform the functions of the County Attorney, County Solicitor or County Legal Counsel does not meet the qualifications specified in this Act, redeploy such person to the highest position that is vacant and to which such person qualifies for appointment.”

47. This section deals with transition of the staff of the County Attorney and the County Attorney to their position under this Act but only if they meet the qualifications specified in this Act.

Under section 5 of the act,

- “(1) The County Attorney shall be appointed by the governor upon the approval of the County Assembly.
- (2) A person qualifies for appointment as County Attorney if such person;
 - a. Is an advocate of the High Court of Kenya for at least 5 years.
 - b. Meets the requirement of Chapter 6 of the *Constitution*....”

48. The applicants have not submitted that the petitioner was not qualified for the office or the transition was flawed. They in fact do not point out the error on record in the appointment of the petitioner as the County Attorney.

49. The applicants have come before this court seeking orders for review but unfortunately the error they seek to rely upon has not been pointed out clearly and neither has it been shown how the appointment of the petition was made in error.

50. Other than this, the applicants indicated that they have new information that they would seek to rely on warranting a review. No new information has however been presented before me to enable me review my ruling and orders of 23rd May, 2023.

51. I return the verdict that the application for review has no merit. I dismiss it accordingly. Costs in the petition.

RULING DELIVERED VIRTUALLY THIS 8TH DAY OF FEBRUARY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-



Lorot holding brief for Kiplangat for 1st & 3rd Respondent/Applicant - present

Kiprono for Respondent - present

Court assistant – Fred

