



REPUBLIC OF KENYA



**Wambua & 2 others (Suing for themselves and on behalf of the other Residents of Muumoni village, Utithini Sub-Location, Masii Location, whose names appearing on the Schedule Attached Herein) v The County Government of Machakos & 3 others (Environment and Land Constitutional Petition E004 of 2022) [2024] KEELC 7022 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7022 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E004 OF 2022**

**A NYUKURI, J**

**OCTOBER 23, 2024**

**IN THE MATTER OF ARTICLES 10, 19, 20, 21(1), 22, 23(1) & 3, 27(1), (2), (4) & (5), 42, 43(1), 47(1) & (2), 50(1), 69(2), 70(1), 162(1), 165 (3) (B), 186(1), 259 (1) AND 260 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF RULES 4, 11, 13 AND 23(1) OF THE PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 10, 19, 20, 21(1), 22, 23(1) & (3), 27(1), (2), (4) & (5), 42, 43(1), 47(1) & (2), 50(1), 69(2), 70(1), 162(1), 165(3)(B), 186(1), 259(1) AND 260 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTION 42 OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT NO. 8 OF 1999**

**AND**

**IN THE MATTER OF CONTRAVENTION OF SECTION 29 OF THE PHYSICAL PLANNING ACT (CAP. 286) LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE CONTRAVENTION OF SECTION 6 OF THE LAND CONTROL ACT (CAP. 302) LAWS OF KENYA**



**BETWEEN**

**MARTHA MUTHEU WAMBUA ..... 1<sup>ST</sup> PETITIONER**

**SOLOMON KILONZO KIMUYU ..... 2<sup>ND</sup> PETITIONER**

**FREDRICK MUSYOKA MULE ..... 3<sup>RD</sup> PETITIONER**

**SUING FOR THEMSELVES AND ON BEHALF OF THE OTHER RESIDENTS  
OF MUUMONI VILLAGE, UTITHINI SUB-LOCATION, MASHI LOCATION,  
WHOSE NAMES APPEARING ON THE SCHEDULE ATTACHED HEREIN**

**AND**

**THE COUNTY GOVERNMENT OF MACHAKOS ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2<sup>ND</sup>  
RESPONDENT**

**JOSEPHAT MUTUVA KING'OO ..... 3<sup>RD</sup> RESPONDENT**

**JOSAN FUNERAL SERVICES LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

**Introduction**

1. Before court is the notice of motion amended on 15<sup>th</sup> December 2023 filed by the petitioners seeking for orders that the firm of Kalinga and Company Advocates be granted leave to represent the petitioners in this matter; also for orders that the court reviews its orders made on 8<sup>th</sup> February 2023 and that the petition as against the 3<sup>rd</sup> and 4<sup>th</sup> respondents be reinstated.
2. The application is anchored on the supporting affidavit of the 1<sup>st</sup> petitioner. The applicants' case is that the petition contains alleged violations against the 3<sup>rd</sup> and 4<sup>th</sup> respondents which are unrelated to the license issued by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and that therefore the court was wrong in dismissing the petition on the basis of the preliminary objection filed by the 1<sup>st</sup> and the 2<sup>nd</sup> respondents.
3. The applicants stated that before the 3<sup>rd</sup> respondent obtained licenses, he wrote him a letter protesting building a mortuary next to his land which the latter denied stating that he was only building a perimeter wall, which proves the petitioners' claim preceded the issuance licenses.
4. The application was opposed. The replying affiant filed by the 3<sup>rd</sup> respondent before amendment of the application herein was admitted and deemed as properly filed in response to the amended application. The 3<sup>rd</sup> respondent stated that this court was functus officio in respect of the order of 8<sup>th</sup> February 2023 and that the applicant was inviting the court to sit on appeal of its decision.
5. He stated that he just constructed a perimeter wall around his property and only constructed a mortuary after following the due process and complying with the relevant statutory requirements. He stated that he conducted public participation and an EIA report was done before the mortuary was constructed on his land.



6. Parties filed written submissions in support of their arguments. On record are submissions filed by the applicant on 31<sup>st</sup> October 2023 and submissions filed by the respondents, all of which this court has duly considered.

### **Analysis and determination**

7. The court has carefully considered the application; the response thereto as well as parties' submissions. Two issues arise for determination namely;
  - a. Whether leave should be granted to the petitioner to change his advocates.
  - b. Whether the application has met the threshold for review.
8. Order 9 rule 9 of the Civil Procedure Rules requires that a party who wishes to change their advocate or act in person having previously been represented by an advocate in a matter where judgment has been entered, must obtain leave of court first before changing their advocates or acting in person. Legal representation is a Constitutional right anchored on the right to a fair trial and therefore every party has a right to be represented by legal counsel of their choice and when they need to change an advocate, they have a right to be allowed to do so. In this case, the petitioners want to relieve their former advocates from representation herein and appoint the firm of Kalinga and Company Advocates. There is nothing raised by the respondents barring the change of advocates by the petitioners and therefore I find and hold that they are entitled to leave to allow the firm of Kalinga and Company Advocates to file notice of change and come on record for them.
9. On review, Section 80 of the *Civil Procedure Act* grants the court jurisdiction to grant orders of review while Order 45 Rule 1 of the Civil Procedure Rules provides for grounds for review and states as follows;
  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.
10. Therefore, for an applicant to obtain review orders, they must demonstrate that they have discovered new and important evidence that could not be produced at the time of the order sought to be reviewed, even upon exercise of due diligence; or that there is an error apparent on the face of the record or for any sufficient reason. In addition, an application for review must be made timeously without undue delay.
11. In the instant case, the applicant's reason for seeking for review is that this court was wrong in striking out the petition on the basis of the preliminary objection to the extent that the petitioner had alleged violations against the 3<sup>rd</sup> and 4<sup>th</sup> respondents when the dismissal was based on the preliminary objection raised by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
12. I have considered the application and the applicant has not stated that there is new evidence or that there is an error on the face of the record. Essentially, the applicant faults this court's decision. That



being the case, it is the position of this court that the reason for review presented by the applicants can only be a basis of appeal and not review. If this court were to determine whether it was right or wrong in its decision of 8<sup>th</sup> February 2023, it would indeed be sitting on appeal on its decision which will be contrary to the doctrine of *functus officio*, as the court holds the view that having struck out the petition against all the respondents for want of jurisdiction on 8<sup>th</sup> February 2023, the court conclusively discharged its mandate in regard to the dispute herein and there is nothing left for the court to adjudicate upon.

13. It is the view of this court that allowing the petitioners' application for review would amount to granting them a second bite at the cherry, which is frowned upon in our jurisdiction. The applicants' argument as framed in the application herein is good for appeal and cannot be the basis for review. In fact, the record shows that the 1<sup>st</sup> applicant filed a notice of appeal dated 13<sup>th</sup> February 2023 on even date. Therefore it is only proper and lawful that the petitioners proceed to the Court for Appeal in view of the nature of their challenge on this court's decision on 8<sup>th</sup> February 2023.
14. The upshot is that this court grants leave to the firm of Kalinga and Company Advocates to come on record for the petitioners, but the prayer for review is declined. Costs of the application are awarded to the respondents.
15. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 23<sup>RD</sup> DAY OF OCTOBER 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of;

Mr. Muia for 3<sup>rd</sup> and 4<sup>th</sup> respondents

No appearance for the plaintiff

Abdisalam – Court Assistant

