



REPUBLIC OF KENYA



Bironga (Suing on his own Behalf and on Behalf of Evelyne Mogere, Johnson Moriasi Nyandika, Rebecca Nyakundi Okari, Nicodemus Morara Nyamweya and Patrick Ndubi Mamboleo) v County Government of Nyamira; Omwenga, The County Executive Committee Member for Finance, County Government of Nyamira & 2 others (Contemnor) (Judicial Review E015 of 2023) [2025] KEHC 5282 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5282 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
JUDICIAL REVIEW E015 OF 2023**

WA OKWANY, J

APRIL 30, 2025

BETWEEN

**TONNY OIRA BIRONGA DECREE HOLDER
SUING ON HIS OWN BEHALF AND ON BEHALF OF EVELYNE MOGERE,
JOHNSON MORIASI NYANDIKA, REBECCA NYAKUNDI OKARI,
NICODEMUS MORARA NYAMWEYA AND PATRICK NDUBI MAMBOLEO**

AND

THE COUNTY GOVERNMENT OF NYAMIRA RESPONDENT

AND

**JONES OMWENGA, THE COUNTY EXECUTIVE COMMITTEE MEMBER FOR
FINANCE, COUNTY GOVERNMENT OF NYAMIRA CONTEMNOR
ASENATH MAOBE, THE CHIEF OFFICER FINANCE IN THE COUNTY
GOVERNMENT OF NYAMIRA CONTEMNOR
JACK MAGARA, THE COUNTY SECRETARY OF THE COUNTY
GOVERNMENT OF NYAMIRA CONTEMNOR**

RULING

1. The Applicant/Decree Holder herein filed the Judicial Review Application dated 18th October 2023 seeking the following orders: -
 1. That this Honourable Court be pleased to grant an Order of Mandamus directing the Respondents to pay the Decretal Sum of Kenya Shillings Twenty-Four Million, Five Hundred



and Ninety-Two Thousand, Three Hundred and Seventy Two (24,592,372.00) together with interest thereon at court rates;

2. That this Honourable Court be pleased to grant an Order of Mandamus directing the Respondents to pay the Certificate of Stated Costs of Kenya Shillings Eight Hundred and Ten Thousand, Nine Hundred and Twenty-Five (810,925.00) together with interests thereon at court rates;
 3. That such further and other Orders that the Honourable Court may deem just and expedient to grant.
 4. That cost of this Application be provided for.
2. The Respondents opposed the said application and in a ruling delivered on 4th July 2024, the court allowed the Applicant's application in the following terms: -
- a. An Order of Mandamus is hereby issued directing the Respondents to pay the Applicants the decretal sum of Kshs. 24,592,372/= together with interests thereon at court rates till payment in full.
 - b. An Order of Mandamus is hereby issued directing the Respondents to pay the Applicants the taxed costs of Kshs. 810,925/= together with interests thereon at court rates till payment in full.
 - c. The Respondents shall pay to the Applicant the costs of this Application.
3. The Applicant subsequently filed an application dated 17th September 2024 seeking the following orders: -
1. THAT Notice to Show Cause do issue to the County Secretary of the County Government of Nyamira, the County Executive Committee Member for Finance for Nyamira County Government (Contemnors) AND the Chief Officer Finance in the County Government of Nyamira to show cause why they should not be committed to Civil Jail for disobedience of the Courts Judgment and Orders issued by Honourable Lady Justice W. A. Okwany on the 4th of July 2024 at the Nyamira High Court;
 2. That the County Secretary of the County Government of Nyamira, the County Executive Committee Member for Finance for Nyamira County Government (Contemnors) AND the Chief Officer Finance in the County Government of Nyamira be cited for Contempt for disobedience of the Court Judgment and Orders issued by Honourable Lady Justice W. A. Okwany on the 4th of July 2024 at the Nyamira High Court;
 3. That the County Secretary of the County Government of Nyamira, The County Executive Committee Member for Finance for Nyamira County (Contemnors) AND the Chief Officer Finance in the County Government of Nyamira be committed to Civil Jail and detained for Six (6) months or such a period as the Honourable Court deems fit for contempt of the Honourable Courts Orders;
 4. That the costs of the Application be provided for.
4. On 31st October 2024 parties recorded a consent in respect to the application dated 17th September 2024 in the following terms: -
- By Consent;



- a. The decretal sum of Kshs. 39,985,950.00 to be settled in 2 instalments staggered over 2 financial years in the following terms: -
 - i. That part-payment of Kshs. 10 million being the 1st instalment be paid on or before 15/12/2024 and Kshs. 9,992,975.00 be paid on or before the 31st March 2025 (31/3/2025).
 - ii. The 2nd instalment, being Kshs. 19,992, 975.00 inclusive costs therein be paid on or before 31/10/2025.
 - b. That failure to pay any such instalment as particularized hereinabove, execution shall issue pursuant to the application dated 27/9/2024.
 - c. This case is hereby marked as settled on the above-stated terms.
5. The consent orders of 31st October 2024 were however not complied with and the 1st, 2nd, and 3rd Contemnors filed an application dated 16th January 2025 wherein they sought the following orders: -
- i. That this application be certified as urgent and be heard ex parte, service thereof being dispensed with in the first instance.
 - ii. That this Honourable Court grants leave to the firm of Samuel N. Mainga and Co. Advocates to properly come on record for the 1st, 2nd and 3rd Contemnors/Applicants.
 - iii. That pending inter parties hearing of this application, this Honourable Court be pleased to stay of execution of the warrants of arrest dated 3rd of January 2025 against the Chief Officer, Finance and or any of the contemnors herein.
 - iv. That the Honourable Court be pleased to discharge, set aside and suspend the warrant of arrest dated the 3rd of January 2025 against the Chief Officer, Finance and the other two contemnors herein.
 - v. The Honourable Court be pleased to review and or vary the terms of the Consent order dated the 31st of October 2024 particularly on the timelines set out therein on the settling of the Decretal amount and substitute thereof with an order extending the period of settling the said Decretal amount in instalments.
 - vi. Costs of this application be provided for.
6. In a ruling rendered on 27th February 2025, this court found, inter alia, that it lacked the jurisdiction to entertain the application thereby setting the stage for the filing of the application dated 3rd March 2025 that is the subject of this ruling.

Application

7. Through the application dated 3rd March 2025, the Applicant/Decree Holder seeks, inter alia, orders to stay the execution orders issued on 27th February 2025 and further, orders to set aside, vary and/or review the ruling of 27th February 2025.
8. The application is supported by the Applicant's affidavit and is premised on the grounds that: -
 - i. That this Honourable Court delivered a Ruling on the 27th of February 2025 stating that it had no jurisdiction to hear and determine matters regarding employment matters and specifically,



the instant decree arising from Employment and Labour Relations Court in Kericho ELRC E002 of 2021 Tonny Oira Bironga and Others vs County Government of Nyamira;

- ii. That in doing so, the Honourable Court issued orders that the file be transferred to the Employment and Labour Relations Court in Kericho and the matter be mentioned before Court on the 5th of March 2025;
 - iii. That the High Court in Nyamira, just like the ELRC court, has jurisdiction to hear and determine Judicial Review proceedings. The proceedings before the Honourable Court do not relate to an Employer-Employee Relationship. The proceedings before the court were in relation to execution of the said Decree which begins with Judicial Review. The Honourable Court therefore has competent and requisite jurisdiction to determine the matter;
 - iv. That neither party in the current dispute prayed to have the matter transferred to the Employment and Labour Relations Court at Kericho because they believed in the jurisdictional competence of the Honourable Court;
 - v. That none of the parties raised any issue with regards to jurisdiction. The issues raised were with regards to payment and the consent judgment entered into between the parties on the 31st of October 2024;
 - vi. That the consent judgment entered into between the parties on the 31st of October 2024 continues to be in force. The said Judgment was recorded before this Honourable Court and is effectively within the purview of this Honourable Court and not the Employment and Labour Relations Court in Kericho;
 - vii. That the matter had been heard, determined and/or compromised and was at the tail end therefore starting the proceedings afresh at the Kericho will highly prejudice the Decree Holders;
 - viii. That the Respondents will not be prejudiced if the orders sought are granted;
9. The 1st, 2nd and 3rd Contemnors opposed the application through the 1st Contemnor's replying affidavit sworn on 4th March 2025 wherein they avers that the application does not meet the threshold set for the granting of the orders for review under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*.
 10. The 1st Contemnor averred that since the application challenges this court's decision on jurisdiction, the proper action that the Applicant ought to take is to file an appeal against the said decision.
 11. The application was canvassed by way of written submissions which I have considered.
 12. I find that the main issue for determination is whether the Applicant has made out a case for the granting of orders for review.
 13. Section 80 of the *Civil Procedure Rules* stipulates as follows: -
 80. Delivery of property in occupancy of judgment-debtor [Order 22, rule 80]
Where the immovable property sold is in the occupancy of the judgment-debtor, or of some person on his behalf, or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property, and a certificate in respect thereof has been granted under rule 79, the court shall, on the application of the purchaser, order delivery to be made by putting such purchaser, or any person whom he may appoint to receive delivery on



his behalf, in possession of the property, and, if need be, by removing any person who refuses to vacate the same.

14. Order 45 Rule 1 of the *Civil Procedure Rules* stipulates as follows: -

1. Application for review of decree or order [Order 45, rule 1]

(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.

15. Section 80 of the *Civil Procedure Act* grants this court an unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. This discretion should however be exercised judiciously and not capriciously.

16. Courts have severally dealt with the issue of review. In Application No 8 of 2017, *Parliamentary Service Commission vs. Martin Nyaga Wambora & others* [2018] eKLR the Supreme Court quoted, with approval, the findings of the *East Africa Court of Appeal in Mbogo and another vs. Shah* [1968] EA, upon establishing the following principles: -

“(31) Consequently, drawing from the case law above, particularly Mbogo and Another v Shah, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:

- i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.
- ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
- iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
- iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
- v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
- vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and: a. as a result, a wrong decision was arrived at; or. it is manifest from the decision



as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”

17. In *National Bank of Kenya vs. Ndungu Njau* Civil Appeal No 2111 of 1996, the Court of Appeal observed as follows in respect of reviews applications: -

“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 sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceeds on an incorrect expansion of the law.”

18. The import of Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* was discussed in *Republic vs. Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR where by the High Court considered comparative jurisprudence and crystallized the principles for consideration in reviewing its own decisions as follows: -

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- iii. 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.
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of 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.
- vii. 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.
- viii. 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. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
- ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words



occurring in Section 80 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 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

- x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC.”

19. In *Pancras T. Swai vs. Kenya Breweries Limited* [2014] eKLR the Court of Appeal held:-

“Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limbs therein stated or “for any sufficient reason.”... As repeatedly pointed out in various decisions of this Court, the words, “for any sufficient reason” must be viewed in the context firstly of Section 80 of the *Civil Procedure Act*, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order.”

20. In *Shanzu Investments Limited vs. Commissioner for Lands* (Civil Appeal No. 100 of 1993) the Court of appeal upheld its earlier decision in *Wangechi Kimata & Another vs. Charan Singh* (C.A. No. 80 of 1985) (unreported) where it was held:-

“Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the *Civil Procedure Act*; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”

21. Taking a cue from the principles governing the granting of orders for review and particularly, the fact that the court has unfettered discretion to order for review for any other sufficient reason not necessarily analogous to the grounds set out in Order 45 Rule 1, I find that the Applicant has made out a case for the granting of an order for review. My finding is bolstered by the fact that, as can be seen in the chronology of events leading to the impugned orders that are the subject of this application, this case had already been determined, conclusively, way back on 31st October 2024. It is not disputed that the parties herein had already entered into a consent on the settlement of the decretal sum in a staggered manner spread over 2 financial years, and the matter thereafter marked as closed.

22. In the circumstances of this case and considering the fact that the case was only reopened for the purposes of dealing with the default or failure by the Respondents/Contemnors to comply with the terms of their consent, I find that it was not necessary or in the interest of justice to determine the issue of jurisdiction on a matter that was for all intents and purposes resolved.

23. For the above reasons, I find that the instant application is merited and I therefore allow it and set aside the ruling and orders made on February 27, 2025 and in its place, and in order to fast-track the finalisation of this matter, allow the contemnors Application dated January 16, 2025 in terms of prayer nos. (i), (ii), (iii) and (v) thereof but with a rider that the contemnors shall make a reasonable proposal regarding the adjusted timelines within which they undertake to settle the decretal sum.

24. It is so ordered.



**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT
TEAMS THIS 30TH DAY OF APRIL 2025.**

W. A. OKWANY

JUDGE

