Republic v Ouko & 11 others; Mutuia & 2 others (Exparte Applicants) (Judicial Review Application E176 of 2023) [2025] KEHC 7446 (KLR) (Judicial Review) (28 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7446 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E176 OF 2023

RE ABURILI, J

MAY 28, 2025

IN THE MATTER OF: AN APPLICATION TO PROTECT THE IMPALA CLUB CONSTITUTION AND INTEREST OF MENBERS OF A SOCIENTY

AND

IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF THE PROVISIONS OF ARTICLES 10,23,47,259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 8(2) AND 9 (1) (B) OF THE LAW REFORM ACT, SECTIONS 4,5,6,7 & 8 OF THE FAIR ADMINIATRATIVBE ACTION ACT, 2015 AND ORDER 53 RULE 1(2) OF THE CIVIL PROCEDURE RULES

BETWEEN

REPUBLIC ..... APPLICANT

AND

SAM OUKO & 11 OTHERS & 11 OTHERS & 11 OTHERS ..... RESPONDENT

AND

PETER MUTUIA ..... EXPARTE APPLICANT

CHRISTINE LUKALO ..... EXPARTE APPLICANT

KENNETH MIRITU ..... EXPARTE APPLICANT

RULING

1. By his judgment dated 16th January 2025 delivered by Ngaah J, the learned judge dismissed the exparte applicant's Notice of motion dated 7th November, 2023 which sought for judicial review orders of certiorari, prohibition and mandamus as stated in the said Notice of motion.

2. At paragraphs *34* to *40* are the main reasons for dismissing the notice of motion.

3. The first ground for dismissing the notice of motion was that the application as presented by the exparte applicant did not plead with precision the grounds upon which the judicial review orders were sought and that it was therefore rather difficult to tell the grounds upon which the judicial review application was based. That what were presented as grounds were largely depositions in the verifying affidavit verifying the facts relied upon. Further, that it was not for the court to speculate the grounds upon which relief is sought. That the burden was on the applicant to set out grounds for judicial review with clarity and not to throw everything at the court. The learned judge concluded that the applicant had not discharged that burden to the court's satisfaction.

4. The second ground upon which the learned Judge dismissed the notice of motion can be found at paragraphs 35 to 40 of the judgment sought to be reviewed. In the said paragraphs, the judge found that although the applicant had claimed in his application that there was noncompliance with *the Constitution*, he had not exhibited a copy of the said Constitution of the Club on any of the affidavits filed and that in the absence of *the constitution*, the court could not verify the allegations of provisions allegedly violated such as extending the term of the caretaker committee and whether there exists any internal dispute resolution mechanisms in *the constitution* of the Club and whether those mechanisms had been resorted to resolve the impasse at the Club that culminate din this suit.

5. Aggrieved by the above decision, the exparte applicant is before this court vide a notice of motion dated 17th February 2025 seeking for review, setting aside or varying the judgment rendered by Judge Ngaah on 16th January 2025 on the grounds that the same had errors apparent on the face of the record as *the constitution* of the Club was annexed yet the judgment says that it was not and secondly, that the grounds for review were also disclosed especially at paragraph *10* as shown by the annexed typed proceedings in the brief oral highlights given to the court.He now argues that there exists an error apparent on the face of the record, warranting review under Order 45 Rule 1 of the Civil Procedure Rules.

6. The respondents and interested parties oppose the application and contend that the application for review is seeking this court to sit on appeal of the judgment delivered on 16th January 2025. Secondly, that there are no errors apparent on the face of the record and that the applicant wants this court to reinterpret the judgment of the learned judge.

7. Both parties filed written submissions to canvass their respective positions and cited case law and statutory provisions on the threshold for review. I need not rehash them here.

8. I have considered the application and the opposing affidavits and submissions by all the parties for and against the prayers for review of the judgment delivered on 16th January 2025. The issue for determination is whether the prayers sough are available to the exparte applicant.

9. On whether legal threshold for review has been met, the applicant invokes Order 45 Rule 1 of the Civil Procedure Rules, which permits review where:

(a) There is discovery of new and important evidence;

(b) There is an error apparent on the face of the record; or

(c) There exists any other sufficient reason.

10. The Court of Appeal in Otieno Ragot & Co Advocates v National Bank of Kenya Ltd [2020] eKLR made it clear that:

> " An error apparent on the face of the record must be such that it can be seen by one who runs and reads, and not one that calls for a long and elaborate argument."

11. On the prayer for review on the ground of the exparte applicant's failure to state grounds for judicial review reliefs as sought, the Court dismissed the judicial review application because, according to the learned judge, the applicant failed to clearly articulate the grounds upon which judicial review orders were sought, contrary to the provisions of Order 53 Rule 1(2) of the Civil Procedure Rules. This Rule requires an application for judicial review to be supported by a statement setting out the relief sought and the grounds relied upon. The learned judge observed that Order 53 Rule 2 of the Civil procedure Rules mandates that the application for judicial review must state the grounds upon which the reliefs sought are predicated which are illegality, irrationality and procedural impropriety and he relied on the case of Council of Civil Service Unions versus Minister for the Civil Service [1985] AC 374, 410, a holding by Lord Diplock which he cited.

12. It is not in doubt that the learned judge pronounced himself on the law requiring that there must be clear grounds upon which the relief for judicial review can be sought and those grounds must be spelt out precisely, not generally. The applicant claims that the grounds were in paragraph *10* being, the respondents acting illegally or contrary to the Club's Constitution.

13. The Court of Appeal in Wamalwa v Law Society of Kenya & Another [2023] KEHC 19649 (KLR) citing many other decisions reiterated that Judicial review is not a general forum for complaint, the specific public law wrong must be set out plainly, and with legal precision.

14. The Applicant now argues that during oral submissions, he referred the Court to "paragraph *10*," which allegedly disclosed illegality.

15. The relevant paragraph states:

> " The Respondents held an AGM which was illegal and irregular, contrary to Article 48.7.5 of the club's constitution."

16. This paragraph, however, is a factual allegation. It does not spell out how this action constituted illegality in the public law sense, or gave rise to a ground for judicial review.

17. In judicial review, the court must be told what kind of illegality is alleged: ultra vires conduct? Breach of which statute? Abuse of discretion? A bare assertion that something was "illegal" is not enough.

18. As the Court of Appeal has consistently held, including in Mwangi v African Wildlife Foundation [2023] KEELRC 3358 (KLR), errors of evaluation or legal reasoning must be addressed through appeal, not review.

19. The Court of Appeal in Attorney General v Okiya Omtatah Okoiti & Another [2020] eKLR observed:

> "Judicial review proceedings are determined on the basis of clearly framed grounds. It is not for the Court to infer or reconstruct a case from unstructured factual allegations."

20. It follows that grounds of judicial review cannot be deduced from submissions but from actual pleadings. In Republic v Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati [2008] eKLR, the Court held:

> "Submissions, however persuasive, cannot substitute for proper pleadings. The applicant must set out the grounds in the statutory statement with clarity."

21. In the circumstances, this Court finds that the claim of "illegality" at paragraph *10* does not provide a foundational ground for judicial review reliefs and does not constitute an error apparent on the face of the record. The decision by the learned judge was a reasoned one and only an appeal can upset it not review.

22. Thus, Counsel and litigants are guided to approach judicial review with discipline, precision and adherence to legal principles, failing which their applications may be declared fatally defective.

23. In other words, the court does not find that there was an apparent error on the face of the record, capable of correction by this court.

24. As was stated by Okwengu JA in Associated Insurance Brokers v Kenindia Assurance Co. Ltd [2018] eKLR, the Court of Appeal pronounced itself as follows: "It is clear that Order 45 rule 1(1) of the Civil Procedure Rules provides that a mistake or error apparent on the face of the record is one of the grounds upon which an application for review of a decree or order can be granted.

25. In National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR, this Court had this to say regarding a review arising from a mistake or error apparent on the face of the record:

> "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 for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review." (Emphasis added).

26. In Nyamogo and Nyamogo Advocates v Kogo [2001]1 EA 173 the Court further explained an error apparent on the face of the record as follows:

> "An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to 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 or 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 also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

27. Further, in Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR the Court of Appeal held that:-

> " It bears emphasizing that the phrase "mistake or error apparent" by its very connotation conveys the fact that the error envisaged is one which is evident per se from the record and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. It is prima-facie visible. It must relate to an error of inadvertence, one which strikes one on merely looking at record. An apparent error on the face of the record has been described in the most simplified manner by the Tanzania Court of Appeal adopting with approval commentaries by Mulla, Indian Civil Procedure Code, 14th Edition pg 2335-36 as follows:
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> "The courts in India have for many years had to consider what is constituted by "an error apparent on the face of the record" in the context of 0.47, r. 1 of the Code of Civil Procedure and we think their opinions are of immense relevance. We treat for this purpose as synonymous the expressions "manifest" and "apparent". The various opinions are conveniently brought together in Mulla, 14th ed., pp. 2335-36 from which we desire to adopt the following. An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions [State of Gujarat v Consumer Education & Research Centre [1981] AIR Guj. 223]... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law Chhajju Ram v Neki [1922] 3 Lah. 127]..."

28. The issue raised by the Aapplicant concerning failure to state precisely the grounds relied on for judicial review in my view, appear to belong to an appeal rather than a review motion. The Court of Appeal in Solacher v Romantic Hotels Limited & another (Civil Appeal 167 of 2019) [2022] KECA 771 (KLR) cited with approval the decision of Bennett J in Abasi Belinda v Frederick Kangwamu and Another [1963] EA p.557 to the effect that:

> " A point which may be a good ground of appeal may not be a good ground for an application for review, and an erroneous view of evidence or of law is not a ground for review, though it may be a good ground for appeal."

29. In the end, I find that the Applicant ought to have pursued an appeal, not a review.

30. On alleged Failure to Consider the Club Constitutionn which was on record, the Applicant also claims that the Court overlooked the club's constitution, which he says was annexed to the affidavit. I have perused the file and indeed, the Club's Constitution was annexed as an exhibit KM1, annexed to the affidavit of Kenneth Miriti sworn on 6th November, 2023.

31. Nonetheless, even as true and correct as it is that the applicant's Club's constitution was annexed but that the learned judge did not refer to it and instead found that it was not exhibited, this does not negate the fundamental procedural defect in the application, namely, the failure to precisely plead grounds for judicial review reliefs.

32. Judicial review proceedings are determined on the basis of the pleadings and the supporting documents. Even if the document was overlooked, that not being the only ground upon which review is sought in the present application, the application would still have failed for not disclosing a proper cause as required under Order 53 rule (2) of the Civil Procedure Rules cited by the learned Judge.

33. Thus, the alleged oversight regarding the club's constitution, cannot override the fact that the application failed at the jurisdictional threshold due to lack of clear grounds. I find that the test for review is therefore not satisfied.

34. Accordingly, I find the application dated 17th February, 2025 for review of the judgment delivered on 16th January 2025 to be devoid of merit.

35. Having so found, I shall not delve into whether the application is overtaken by events or not. Needless to say, that the interested parties having assumed office for now over one year.

36. The application for review is hereby dismissed.

37. I however order that each party shall bear their own costs of the application as dismissed.

38. Before I pen off, I wish to urge counsel preparing pleadings for judicial review that these are the simplest of all pleadings and when they do so, let them consult the statutes under which they are filing the applications on the requirements before embarking on a long winding verbose journey.

39. This case illustrates a recurring procedural deficiency in judicial review litigation where applicants file lengthy affidavits or factual narratives without identifying with clarity the legal grounds upon which relief is sought.

40. Judicial review is a specialized public law remedy, not a forum for general complaints. The applicant must clearly identify and plead grounds such as illegality, irrationality, or procedural impropriety, among other known grounds under the *Fair Administrative Action Act*. The grounds must be brief, specific and distinctly numbered. They must be ssupported by legal authority or constitutional/ statutory provisions and be linked to the decision-making process, not merely the outcome.

41. As highlighted in Republic v Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati [2008] eKLR, submissions and facts cannot be substitutes for properly framed grounds. The failure to do so risks the summary dismissal of the application.

42. Counsel and litigants are therefore urged to approach judicial review with discipline, precision, and adherence to public law principles, failing which their applications may be declared fatally defective.

43. Judicial review is a constitutional remedy and just like in constitutional petitions, pleading with precision is key.

44. Having dismissed the application with no orders as to costs, this file is closed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF MAY, 2025

R.E. ABURILI

JUDGE