Case ID: [2026] KEHC 150 (KLR) Copy

Title: Wafula & 8 others v OCPD-Kwanza & 6 others [2026] KEHC 150 (KLR) Copy

Court: High Court

Judges: RK Limo

Date: 19 January 2026

Parties: Wafula & 8 others v OCPD-Kwanza & 6 others [2026] KEHC 150 (KLR) Copy

---- JUDGMENT TEXT ----

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CONSTITUTIONAL PETITION NO. 9(E001) OF 2020

ANTHONY WALELA WAFULA & 8 OTHERS.....PETITIONERS

VERSUS

THE OCPD-KWANZA & 6 OTHERS.....RESPONDENTS

RULING

The applicants herein have vide a Notice of Motion dated 3/4/2024 moved this court for the following reliefs namely;

Spent

That the judgment made by this court on 8/2/2024 dismissing the petition herein be reviewed or set aside.

Any other orders the court may deem fit to grant.

Cost be in the cause.

The applicants have cited the following grounds;

That judgment in this matter was delivered on 8/2/24 where the petition was dismissed.

The applicants take the view that the dismissal was on the ground that parties ought to have given oral evidence.

That the court had earlier on 22/11/2022 given directions that the matter was to be heard by way of viva voce evidence and subsequently on 4/5/23 directed that the matter was to proceed by way of written submissions.

That the petitioners filed their statements, list of witnesses and documents on 1/12/22 pursuant to the directions.

That at the time of giving subsequent directions, the petitioners acted on the mistaken impression that the court had varied the earlier order.

That at time of delivery of the judgment, the court inadvertently failed to note that it had made the

said directions that the case proceeds by way of written submissions.

The applicants contend that there is an error apparent/mistake or an important reason to warrant review of the judgment.

The applicants have supported their grounds through an affidavit sworn on 8/4/24 by Anthony Walela Wafula, the 1st petitioner herein.

He avers that the honourable court in the judgment regretted that the petition ought to have proceeded by way of oral evidence and not summarily by way of written submissions.

That prior to taking directions, they had prepared trial bundle and had filed them.

That at the time of delivering the judgment, it may have escaped the attention of the court that two contrasting directions had been given.

That the dismissal of the suit has left them without a remedy.

That this court should rise to a higher calling and re-open the case so that they can access justice.

That the applicants are from humble background and have no means of survival.

In the written submissions dated 1/10/25 done through learned counsel M/s Walter Wanyonyi & Co Advocates, the applicants submit that Kimaru J (as he then was) had given directions earlier that the matter was to proceed by way of oral evidence and that when Mrima J took over the matter, he seemingly was not aware of the directions and dismissed the petition on the basis that the same ought to have proceeded by way of viva voce evidence.

They submit that the dismissal ignored the earlier direction which to them had not been set aside and left them without a remedy after being shot by police officers and even lost their relatives in the fracas.

They submit that the review is intended to address proceedings which have caused them injustice. They rely on the case of Charles Barnabas –vs- Republic (Cr.App No.13 of 2006) (unreported) and National Bank of Kenya –vs- Ndung'u Njau (Civil Appeal No.211 of 1996).

The respondents have opposed this application through written submissions dated 1st September 2025 and grounds of opposition dated 16/5/25.

The respondents are opposed to the application for review on grounds that the application is meant to give the applicants a second bite of the cherry. The respondents take a view that directions were given on how the petition was to be heard and that the applicants did not protest.

They submit that the applicants did not establish the cause of death and the petition was dismissed on merit.

They submit the provisions of Order 45 Civil Procedure Rules and Section 80 of Civil Procedure Act limits review applications to cases where there is a discovery of new evidence, a mistake or error apparent on the face of record or for any other sufficient reason. They take the position that the applicants' main contention that their petition was dismissed for want of viva voce evidence and that, that ground does not warrant a review. They rely on the case of Paul Mwaniki –vs- National Hospital Insurance Fund Board of Management where the court found that an order or judgment cannot be reviewed merely because it is erroneous in law or on grounds that a different view could have been taken.

They submit that review is only limited to an error made by a judge or magistrate while writing a judgment that may be a simple arithmetic error requiring no elaborate argument.

They take the view that directions issued on how the trial was to be conducted cannot be termed as an error on the face of record to be reviewed. They submit that the process adopted by the court is recognized by the Mutunga Rules and parties are at liberty to proceed by way of affidavits or viva voce evidence.

They submit that if there was any error in proceeding through affidavits and submissions, the error arose from applicants own neglect and failure to prosecute the matter properly. It is their case that such an error cannot be cured by review. They contend that the applicants were present when directions were taken and took the directions to proceed by way of written submissions.

They further point out that the applicants were required to lay out all the evidence they intended to rely on in their petition to give them a fair chance to respond as per the rules of natural justice. That in a petition parties are required to lay out all the evidence they will adduce at the hearing and lay out factual background unlike a plaint where general statements without facts are acceptable.

They submit that the petitioners seems to believe that if the matter is retried they will have a better chance of getting a favourable judgment or proving their case. They submit that the applicants had the burden of proving their case and after failing to do so cannot come back for a second bite of the cherry. In their view the petition was dismissed because the applicants failed to prove it and that in their view was not an error on the face of the record.

They contend that trials must come to an end and parties should not be given a window of coming back to court to correct their own mistakes. They submit that the court’s decision to accept affidavit evidence was not an error but a consensual proposal by parties.

This court has set out a summary of the applicants’ application and the opposition by the respondents. This is an application for review and setting aside of the judgment of this court delivered on 8/2/2024.

The applicants have invoked various Articles of the Constitution to wit Article 22(4), 47(1), 48, 50(1), 159(1) and 165. Apart from Article 48 which provides for right to justice, the applicants have not demonstrated a link between the prayers sought and the cited provisions of the Constitution. It suffices to state that the main relief sought that is review is provided under Order 45 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act. Those provisions of the Civil Procedure gives this court discretionary power to review an order, decree or judgment but only on the following conditions;

A discovery of a new matter or evidence which after exercise of due diligence was not within the knowledge of the applicant and could not be produced at the time the order/decree was made.

A mistake or error apparent on record.

Any other sufficient cause.

An application for review must demonstrate or disclose any of the above grounds and besides that move the court without unreasonable delay.

The applicants herein have hinged their substantive prayer on the grounds of apparent error on the face of judgment of Justice Mrima delivered on 8/2/24. The error cited by the applicant’s relates to the directions taken in court on 4/5/2023. On that date, both counsels representing the petitioners and respondents were in attendance and agreed by consent to vary the directions earlier given that the petition was to be canvassed through viva voce evidence. Instead counsel for the applicants informed

the court that they had agreed to proceed via written submissions and affidavits instead of viva voce evidence. The court obliged and varied the directions it had earlier given on 11/10/2022. The applicants contend that Justice Kimaru gave directions for viva voce evidence but the record clearly shows that Justice Mrima gave those directions on 11/10/22 after hearing both counsels.

This court finds that the request for change of the directions on how the petition was to be canvassed was made by both counsels on record. They requested the court to review the directions to the extent of canvassing the petition through written submission and highlights. That request was acceded to by court. The respondents are therefore right in their contention that directions to proceed by way of written submissions and affidavits was consensual and the court made no mistake in allowing it or giving the directions as sought by the parties through counsels on record.

This court has perused through the judgment of hon Justice Mrima dated 8/2/24 and finds that in paragraph 49, the hon judge has captured that fact well. He stated that parties varied directions earlier given (for viva voce evidence) and instead settled for affidavit evidence.

The directions given to proceed by way of written submissions and affidavits whether it was the right directions or wanting originated from the parties and not the court and if the applicants later faced difficulties or not owing to the same is something that cannot be directed to the court. The judge cannot be faulted on that account and say there was an error on his part which error can be corrected or addressed through review. This court takes the position in the case of Paul Mwaniki –vs- National Hospital Insurance Fund Board of Management where the court observed inter alia that an order, or a decision or a judgment cannot be reviewed merely because it is erroneous in law or that the ground that the court should have taken a different view.

A court may review an order or a decision if it considers that it is necessary to correct an apparent error or omission on the part of the court. That error or omission must be plain and simple. There should not be need elaborate arguments to establish it. As held in decision cited by the applicants in the case of National Bank of Kenya Ltd –vs- Ndung'u Njau (supra) a court cannot be asked to review an order/decision on grounds that the court proceeded on incorrect exposition of the law and reached an erroneous conclusion of law.

The impugned judgment in this application shows that the court considered the evidence placed before it and found them wanting for want of proof. The court found no evidence to support the petition and dismissed it. In my view the suggestions made by the judge that perhaps oral evidence could have aided the petitioners maybe advisory and lessons to be learnt and do not suggest that the court made errors on its part.

The applicants should not be blaming the court for their failure to prove their case. They were required to plead their case with specificity, lay the factual background and their case complete with documentary evidence to prove their allegations of infringements of their constitutional right. They failed to do that and that is what the judge found in his judgment. Asking this court to re-open the case is asking this court for a chance for a second bite on the cherry. That am afraid cannot be sustained in law.

This court further takes the view that directions on whether a matter proceeds by way of viva voce evidence or written submissions and affidavits does not change the principles of burden of proof or the standard applicable thereof. The burden of proof always remains on whoever alleges and that observation was clearly captured by Justice Mrima in paragraph 46 of the impugned judgment. The standard of proof in civil cases is on a balance of probability. That threshold was not met by the applicants and that is why the petition failed.

This court in the premises finds no merit in the application dated 3/4/24. The same is disallowed with costs to the respondents.

DELIVERED, DATED and SIGNED at KITALE this ……19th …. day of ……JANUARY……., 2026.

HON JUSTICE R.K. LIMO

KITALE HIGH COURT

Ruling delivered in open court

In the presence of;

Bikundo holding brief for Wanyonyi for petitioners

No appearance for the respondents

Duke/Chemosop – court assistants