



**Noor & 4 others v Premier Bank Limited & another (Civil Case E527 of 2023)
[2024] KEHC 10236 (KLR) (Commercial and Tax) (15 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10236 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E527 OF 2023
PM MULWA, J
AUGUST 15, 2024**

BETWEEN

**MAHAT MOHAMUD NOOR 1ST PLAINTIFF
YUSUF ADEN MOHAMED 2ND PLAINTIFF
WAKO GALGALO ODHA 3RD PLAINTIFF
RICHARD MATERE LUSWETI 4TH PLAINTIFF
GVR INFRA PROJECTS LIMITED 5TH PLAINTIFF**

AND

**PREMIER BANK LIMITED 1ST DEFENDANT
NEXTGEN AUCTIONEERS LIMITED 2ND DEFENDANT**

RULING

1. The plaintiffs filed a Notice of Motion dated 26th March 2024 asking the court to extend the injunction and/or interim order issued on 22nd February 2024 as order (i) without any limitation, restraining the defendants either by themselves, their agents, servants, employees and/or anyone acting under their instructions from advertising for sale, offering for sale or in any manner interfering with properties known as Land Reference Number 209/22172 (IR 204301), Land Reference Number 209/21799, Apartment B1 on Land Reference Number 2/668 and Apartment Number 103, 1st Floor erected on Land Reference Number 2/714 pending the hearing and determination of this application, and that the ruling of Hon. Mr. Justice P. Mulwa made on 22nd February 2024 being order (ii) thereof be reviewed, varied and/or set aside. And that the costs of the application be provided for.



2. The application was supported by the affidavit indicated to be sworn by one Ondieki A. Anyegah but executed by one Mahat Mohamud Noor, the 1st plaintiff herein. It was stated that order (ii) made by the court on 22nd February 2024 contradicted order (i) thereof and that it was evident there was an error apparent on the face of the record in issuing order (ii) since the plaintiffs were challenging the entire exercise of the statutory power of sale by the bank and not just the notice by the auctioneer.
3. And further that there is sufficient grounds and reasons to warrant a review of the orders of the court as the plaintiffs did not seek the orders issued as order (ii) in their pleadings.
4. In response to the application the 3rd plaintiff filed grounds of opposition dated 9th April 2024 and contended that the supporting affidavit ought to be struck off or dismissed for being fatally defective. And further that the plaintiffs' motion was an attempt to appeal the decision of the court under the guise of review. That there was no error apparent in respect of the ruling of the court which had essentially granted a conditional injunction.
5. The application was argued orally on 7th May 2024, by Mr. Ondieki and Mr. Njoroge, learned counsel for the plaintiffs and the defendants respectively.
6. Having considered the application, grounds of opposition and the arguments by learned counsel, only one issue comes out for determination, that is; whether there was an error apparent on the face of the record to warrant a review of the order by the court.

Analysis and Determination

7. On 22nd February 2024 this court issued a Ruling on the plaintiffs' Notice of Motion dated 31st October 2023 and issued the following orders;
 - “(i) Pending the hearing and determination of this suit, a temporary injunction is issued restraining the defendants whether by themselves, their servants, agents or any person claiming through or under them from entering, selling, taking over, advertising for sale, offering for sale or in any manner whatsoever interfering with those properties known as Land Reference Number 209/22172 (IR 204301), Land Reference Number 209/21799, Apartment B1 on Land Reference Number 2/668 and Apartment Number 103, 1st Floor erected on Land Reference Number 2/714;
 - (ii) The order for temporary injunction is limited to the time the defendants shall comply with the provisions of Rule 15 of the Auctioneer Rules 1997; and
 - (iii) Each party to bear its own costs.
8. The instant application seeks to partially review the above orders of this court issued on 22nd February 2023 with the objective of having order (ii) thereof varied and/or set aside. Under section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, the court may review its decision, inter alia: - on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.
9. It was the applicant's contention that the process adopted by the bank after the court ruling was improper and was vitiated, that the process can only be commenced afresh and not midway, that the process ought to have been initiated for 90 days and not 45 days. On the issue of the supporting affidavit being defective, counsel for the plaintiff admitted that there was an error but the same did not diminish



the clear intent of the contents of the affidavit. It was prayed that the application be found to be merited and the orders sought allowed.

10. In opposition, the defendants insisted that the supporting affidavit was defective as it had been sworn by two different people. The defendants contended that in its ruling the court had found that only one notice had not been given, to allow the plaintiffs to exercise their right of redemption, hence the granting of order (ii). That there existed no error apparent on the face of the record and the plaintiffs ought to have appealed the ruling of the court if they thought otherwise.
11. I will disregard the mix-up in respect of who the deponent is in the supporting affidavit as the intent of the contents therein is clear.
12. In *Muyodi v Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record as follows:

“In *Nyamogo & Nyamogo -vs- Kogo* (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or 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 real distinction between a mere erroneous decision and an error apparent on the face of 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 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 or wrong view and is certainly no ground for a review although it may be for an appeal.”
13. Does the instant application meet the threshold for review? Section 80 of the [Civil Procedure Act](#) grants the court jurisdiction for review by providing that “a person who considers himself aggrieved by a decree or order from which an appeal lies but no appeal has been preferred, or by a decree or order from which no appeal lies, may apply for a review of the judgment to the court which passed the decree or made the order, and the court may make such order as it thinks fit.”
14. In *Chandrakant Joshibhai Patel -v- R* [2004] TLR, 218 it was held that an error stated to be 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 reading on points on which may conceivably be two opinions.”
15. It is notable that the plaintiffs herein, have through their application sought to explain to the court that order (ii) of the impugned ruling was wrong for contradicting order (i) where the plaintiffs are given an injunction pending the hearing and determination of the suit, restraining the defendants from advertising or selling the suit properties.
16. In the said ruling, the court clearly stated how it arrived at its decision by explaining that the 1st defendant had demonstrated that, before exercising its statutory power of sale, it had served upon the plaintiffs the requisite statutory notices as required under section 90 and 96 of the [Land Act](#). However, the court noted, the 1st defendant had failed to demonstrate service of the 45 days redemption notice to the plaintiffs as required by rule 15 of the Auctioneers Rules, 1997. In essence therefore, the grant of order (i) was conditional to order (ii) thereof.



17. From the foregoing analysis and guided by the above cited decisions, the court confirms that this is not an issue of an error being apparent on the face of the record, the applicant is essentially asking the court to arrive at a different conclusion from the one arrived at in the ruling dated 22nd February 2024.
18. The application herein does not meet the legal threshold for review as the plaintiffs have failed to demonstrate to the court that there was an error apparent on the face of the record.
19. Consequently, the instant application dated 26th March 2024 is hereby dismissed with costs to the defendants.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF AUGUST 2024.

.....

P.M. MULWA

JUDGE

In the presence of:

N/A for plaintiffs

Mr. Mumu h/b for Mr.Njoroge for 1st& 2nd defendants

Court Assistant: Lilian

