



Mutiso v Ndambuki (Civil Suit 4 of 2021) [2023] KEHC 21183 (KLR) (31 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21183 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CIVIL SUIT 4 OF 2021

MW MUIGAI, J

JULY 31, 2023

BETWEEN

SUSAN KAMENE MUTISO PLAINTIFF

AND

LEONARD MTUA NDAMBUKI DEFENDANT

RULING

1. Vide an order dated 28th July,2021, this Court issued orders in favor of the Plaintiff that: pending the hearing and determination of the application dated 23/6/2021, the Defendant/ Respondent or his servants, agents, employees, or any person acting under his authority be restrained from entering, trespassing, accessing, threatening to evict and evicting the plaintiff or in any way interfering with the Plaintiff's peaceful occupation of their matrimonial home erected on Machakos/ Kiandani/ 355 in Manza area, Machakos county; pending the hearing and determination of the application dated 23/6/2021 and/or hearing of the suit.
2. An order barring the Defendant from leaving jurisdiction of this court as well as leaving this country pending the hearing and determination of the application dated 28/7/2021 be and is hereby issued until 30/7/2021; application dated 28/7/2021 be served upon the Defendant.

Application Of 22/9/2022

3. Vide application dated 22nd September,2022, the Defendant/ Applicant sought the following orders:
That
 - a. This application be certified as urgent and service of the same be dispensed with in the first instance
 - b. This Court be pleased to vacate its Orders issued on 28th July,2021 and hereby allow the Defendant/ Applicant, his agents, servants, relatives and or any other persons to access and enter the premises of the subject house erected on Machakos/ Kiandani/ 355 in Manza area,



Machakos county for the purposes of installing and/ or providing security to the said house pending the hearing and determination of this application interpartes and pending the hearing and determination of the substantive suit.

- c. The Plaintiff/ Respondent be held responsible for the vandalism on the subject house and further be ordered to compensate, repay and/ or damages occasioned upon any of the fixtures and fittings in and within the subject house.
 - d. Costs of this Application be provided for.
4. The application was supported by an affidavit sworn by Leonard Mutua Ndambuki, the Defendant/ Applicant herein. According to him, he is the legitimate and rightful owner of the subject matter of the suit herein which is the house built Machakos/ Kiandani/ 355 in Manza area, Machakos county: deposing that following the Plaintiff/ Respondent's application dated 23rd June, 2021, this Honorable Court issued orders dated 28th July, 2021 in which he was restrained from accessing, trespassing and/ or entering the said house built on Machakos/ Kiandani/ 355 in Manza area, Machakos county pending the hearing and determination of the substantive suit filed herein (copy of the order annexed);
 5. The Applicant deposed that the Defendant/ Applicant vacated the said house and no longer stays there and did not hire or authorize any person to check on the security of the subject house, its fixtures and fittings thereby leaving it exposed to all manner of vandalism and theft; it was the assertion of the Defendant/ Applicant.
 6. He recently received reports and photographic evidence of vandalism and destruction of the subject house, its fixtures and fittings despite the Plaintiff/ Respondent being granted the occupation of the house as per the court order of 28/7/2021 and that he spent a lot of money in building the subject house and therefore it is /was very painful and hurting to see the house being exposed to such kind of destruction which will cost a lot of money to repair.
 7. He deposed that the Plaintiff/ Respondent ought to have made arrangements to ensure that the subject house, its fixtures and fittings remained secure and safe despite her willful desire to vacate the house; that when this Honorable Court allowed the Plaintiff/ Respondent to peacefully and quietly occupy the subject house and to his exclusion, the security of the house and all that concerns it were also vested upon her and she should be held responsible for the loss and damage occasioned by the aforementioned vandalism;
 8. It was deposed that this application has been necessitated by his desire to secure and preserve the subject house against the ongoing vandalism so as to ensure that the outcome of the substantive suit is not rendered nugatory and that unless this application is allowed, the subject house will be vandalized and thus his right to property will be violated and will also suffer massive financial loss.

Replying Affidavit

9. Vide the replying affidavit dated 7th October, 2022 sworn by Susan Kamene Mutiso the Plaintiff/ Applicant herein deposed that the aforementioned application dated 22/9/2022 and filed in court on even date is frivolous, vexatious, is an abuse of the court process, lacks merit and the same ought to be dismissed on the very outset.
10. The facts stated in the supporting affidavit do not warrant the grant of the sought orders on the application; deposing that the Defendant/ Applicant is not the rightful owner of the house erected on Machakos/ Kiandani/ 355 in Manza area, Machakos county and that the same is their matrimonial home and hence jointly owned by herself and the Defendant/ Applicant.



11. It was her position that on 27/7/2022 the Defendant/ Applicant who resides in the United States of America flew into the country and together with armed goons stormed their matrimonial home around 7am, jumped over the fence, broke doors, gained access, vandalized the household goods extensively and violently evicted her from the house (annexed marked bundle of photos showing the extent of the damage occasioned by the Defendant / Applicant);
12. She lamented that being aggrieved, she reported the matter at Machakos police station vide OB 23/27/7/2021 (annexed and marked extract of the police Occurrence Book); deposing that at the time of the illegal actions of the Defendant/ Applicant there were orders in force issued by the Court on 9/7/2021 restraining the Defendant/ Applicant from entering, trespassing, threatening to evict and evicting her or in any way interfering with peaceful occupation of the matrimonial home (annexed and marked copy of the court order);
13. It was her assertion that she filed an application dated 28/7/2021 seeking contempt orders as against the Defendant/ Applicant for disobeying court orders issued on 9/7/2021 and that Ruling was delivered on 18/8/2021 by Hon. Justice G.V. Odunga who found the Defendant / Applicant guilty of disobeying court orders issued on 9/7/2021; and that after mitigation the Defendant/ Applicant was ordered to pay a fine of Kshs 50,000/= and 250,000/= for her mental anguish.
14. It was deposed that after the Defendant/ Applicant complied, the court ordered that he give her the keys to the matrimonial home before he left the jurisdiction of the court (annexed and marked copy of the court order); according to her it is the Defendant / Applicant either by himself and/ or his agents, servants and employees who were engaged in vandalizing their matrimonial home and that the Defendant/ Applicant only gave one set of keys and kept the other keys for reasons unknown to her.
15. She deposed further that after the Defendant/ Applicant left the country, she went back to their matrimonial home only to find that the Defendant/ Applicant's agent servant and/or employee armed with machetes was already living there and she could not stay there due to fear for her life (annexed and marked photos in proof of the same); deposing that the reasons she vacated the house is because of the fear of her life and if guaranteed safety by this court and the Defendant/ Applicant she is ready and willing to go back to her matrimonial home and that she has been squatting in her friends' houses from the time she left their matrimonial home, being unable to raise rent for a decent house for herself and her daughter;
16. She lamented that she has never vandalized anything in their matrimonial home and she has no reason whatsoever to vandalize anything as she is the one who purchased said goods and that contrary to the allegations that she has been vandalizing their matrimonial home, she has been keen in maintaining and improving the said home overtime; further that the photos presented to this Court by the defendant / applicant to prove alleged vandalism have been taken inside the house which confirms that the Defendant/ Applicant by himself and/ or his agents /servants/ employees have entered and/ or accessed their matrimonial home in blatant breach of the orders issued by this Honorable Court on 28/7/2021;
17. It was her assertion that the Prayer by the Defendant/ Applicant to be granted access to the Matrimonial Home for the purposes of installing and/ or providing security is a fishing expedition only intended to hoodwink this honorable court into issuing access orders to the property; deposing that if the access orders sought are granted to him there is an eminent risk that he shall evict her completely and/ or make alterations to lock her out of their matrimonial property; she urged the court to dismiss the Defendant/ Applicant's application dated 22/9/2022 with costs to them.



Further Affidavit

18. Pursuant to the Further affidavit dated 18th November,2022, the defendant/ Applicant opposed the replying affidavit deposing that he is the rightful owner of the subject house and the Respondent is misleading this Honorable Court by insinuating otherwise and that the subject house is constructed on his family land and more specifically on the portion allocated to him by his late grand grandmother (annexed and marked confirmation of the distribution and allocation to himself) hence the Respondent has no ownership right towards the subject house nor the piece of land that it is built on.
19. Further that he had employed the Respondent as a caretaker who was fully compensated for her services; he lamented that he has never been married to the Respondent at any point in his life and that it is misleading for the Respondent to refer to the subject house as ‘our matrimonial home’;
20. He deposed that since 3/18/2002 he has been in a monogamous marriage with one Lilian Monique Webster, and has never divorced his wife thus he has never been legally capable of contracting a marriage with the Respondent (annexed and marked copy of certified marriage records); he deposed further that Respondent’s averments in paragraphs 6, 7, 8, 9, 10, 11 and 12 of the Replying Affidavit are just mere distraction from the contents of his application; it was his assertion that the contents of paragraph 13 of the Replying Affidavit are frivolous, baseless and false allegations meant to distract this Honorable Court from the fact that the subject house was placed in the Respondent’s hands and he has never set foot there ever since the court issued restraining orders against him.
21. Paragraph 15 and 16 of the Replying Affidavit are meant to distract this Honorable Court from the fact that the Respondent willfully vacated the house and left it at the mercy of robbers and thugs who have been vandalizing it; he lamented that in response to paragraph 18 of the Replying Affidavit, Respondent ought to know that she was given absolute access to the house to his exclusion hence she is vicariously liable for any sort of damage, loss and vandalism that befell his house.
22. It was his position that he did not breach the court order as he received the photos from neighbors who had been witnessing the ongoing vandalism and acted in good faith when they saw unknown persons ferrying items from the house; he further deposed that photos annexed under paragraph 19 of the replying affidavit are not current photos of the subject house.
23. The matter was canvassed vide written submissions.

Submissions

Defendant’s Submissions To The Application Dated 22nd September, 2022

24. Vide his submissions dated 18th November,2022 and filed on 24th November,2022, the Defendant’s submissions were anchored on the issue of:
 - a. whether this Honorable Court should review the orders dated 28th July,2021 and thereby allow the Defendant/ Applicant to access the subject house erected on Machakos/ Kiandani/ 355 in Manza area, Machakos county, for the purposes of securing the subject house?
25. It was his submissions that the he is the sole owner of the subject house which is constructed on a piece of plot that was allocated to him by his late grandmother, opining that he solely funded the construction of subject house from abroad and the plaintiff did not make any contribution towards its construction.



26. It was the contention of the Defendant/Applicant that during the construction of the subject house the plaintiff was an employee of the Defendant and she was fully compensated for her services which was to oversee the construction of the house as the Defendant was outside the country.
27. He urged further that the construction was concluded in 2016 and remained unoccupied until sometimes in 2020 when the Plaintiff moved into the subject house and began staying there despite od refusal to her request to move in. averring that she was able to move in because she had kept some of the house keys following completion of the construction which she had been employed to oversee.
28. It was the position of the Defendant/ Applicant that they had never been married and they only had a business relationship which was to oversee the construction of the subject house. Averring that as such the subject house cannot be justifiably considered to be a matrimonial home on the basis of employer employee relationship.
29. Averring that the Plaintiff's suit before this court is only geared at creating an unfounded assumption of marriage and use the same to instill an unjustifiable interest in the subject house as the Plaintiff did not table any proof of marriage whatsoever and such she is out to reap where she did not sow.
30. He opined further that that injunctive orders currently in place has made him unable to derive any enjoyment from the subject house as he was restrained from accessing it until the suit is determined. Urging that the subject house which was placed in the use and custody of the plaintiff is now exposed to vandalism and thuggery as demonstrated in the supporting and supplementary affidavit filed with the application now before Court.
31. Contending that it is unjust and unfair to his constitutionally guarded property rights for the subject house to continue being exposed to vandalism as this will result into a massive financial loss and damage to his valued property.
32. He further opined that it is no doubt this Honorable Court has the power to review any orders as long as there is sufficient reason to review the same. Urging that the Plaintiff has confirmed in her replying affidavit that she no longer lives in the said house and that the house is now abandoned having expressed her inability to live in the said house before competent court of law.
33. It was submitted that that the Defendant is only interested in securing his house which he was barred from accessing and the plaintiff who has the access rights has abandoned it thereby exposing it to loss and damage and that this Honorable Court has the jurisdiction to review the orders dated 28th July, 2021 on the basis of the sufficient reasons and/ or grounds as demonstrated in the application dated 22nd September,2022.
34. Submitting finally that the Plaintiff must not be allowed to use the court process to frustrate the defendant by denting his access to his house and exposing the said house to vandalism, loss and damage of items therein. Urging that the application dated 22nd September,2022 be allowed as prayed.

Plaintiff/respondent's Submissions On Applica-tion Dated 22Nd September, 2022.

35. Plaintiff/ Respondent in her submissions dated 13th January,2023 and filed on 16th January,2023 relied on the contents of the replying affidavit and further placed her reliance on Order 40 Rule 1 of the [Civil Procedure Rules](#) 2010 which provides as follows;

Where in any suit it is proved by affidavit or otherwise-

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or



- (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.
36. The Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
37. Reliance was placed on the case of *Ace engineering & Building Contractors Ltd v National Bank of Kenya Limited* (2019) e KLR, the court adopted with approval the principles that should be observed before granting of a temporary injunction which were outlined in the landmark case of *Giella v Cassman Brown* (1973) EA 358 at page 360 where Spry VP held that:
- “... First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”
38. Submitting that for a temporary injunction to be issued the following conditions has to be met;
- a. The applicant must show a *prima facie* case with a probability of success.
 - b. An injunction is granted unless the applicant might otherwise suffer irreparable injury.
 - c. , If the court is in doubt, it will decide an application on the balance of convenience.
39. It was urged that none of the conditions set out above has been met, contending that the intention of the Defendant/ Applicant was bring this application under Order 40 Rule 7 of the *Civil Procedure Rules* 2010 and not Order 40 Rule 1 urging that Order 40 Rule 7 of the *Civil Procedure Rules* 2010.
40. She quoted the case of *Murungi M’Twaruchiu & Another v Equity Bank Ltd & 2 Others* (2012) eKLR, adopted with approval the following decisions which had these to say with regards to vacating of orders;
- Ragui – v – Barclays Bank of Kenya Ltd* (2002) I KLR 647 Hon. Justice Ringera as he was, held: -
- “It is settled law that if an interlocutory injunction has been obtained by means of misrepresentation or concealment of material facts, the same will on the application of the party aggrieved be discharged.
- The injunction was granted because of non-service of the statutory notice of the exercise of the power of sale on the administrators of the estate, which was the true position hence it would not be unjust or inequitable to maintain the interlocutory injunction issued in force.”
41. Similarly, reliance was placed on the case of *Mobile Kitale service Station v Mobil Oil Kenya Limited & Another* (2004) 1 KLR 1,
- “An interlocutory injunction is given on the court’s understanding that the defendant was trampling on the rights of the plaintiff.
- An interlocutory injunction being an equitable remedy would be taken away (discharged) where it is shown the person’s conduct with respect to matters pertinent to the suit does not meet the approval of the Court which granted the orders which is the subject matter.



The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only meant for a specific purpose – to shield the party against violation of his rights or threatened violation of the legal rights of the person seeking it.”

42. Contending further that it can deduced from the mentioned authorities that to set aside the orders, the same ought to have been obtained fraudulently or through concealment of material facts or if the order is being used to intimidate and oppress another party.
43. It was submitted that grounds contained on the face of the application is clear that orders being sought to be vacated were not obtained fraudulently and/ or through concealment of material facts. Urging that the Defendant/ Applicant has not raised the issue of fraud or concealment of material facts in his application.
44. Submitting that Defendant / Applicant even after issuance of the Court Orders dated 28/7/2021 granting the Plaintiff/ Respondent access to their Matrimonial Home which he seeks to vacate he chose not to obey them; averring that the Plaintiff/ Respondent filed an application for contempt of court orders against the Defendant/ Applicant who was found to be in contempt of court orders and was ordered to pay a fine of Kshs 50,000 and Kshs 250,000 for mental anguish. He paid the fines and was ordered to give the Plaintiff/ Respondent keys to their matrimonial home before he left the country.
45. Averring that the Plaintiff/ Respondent was only given one set of keys and kept the other keys and when the Plaintiff/ Respondent went to the matrimonial home she found goons who were armed with machetes who had access in and out of the house under the instructions of the Defendant/ Applicant. Urging that for fear of her life she moved out and left the goons there. Contending that it is not the Plaintiff/ Respondent who is oppressing and/ or intimidating the Defendant / Applicant as it is on record that the Defendant / Applicant does not obey court orders and has been found guilty of disobeying court orders and fined.
46. It was the position of the Plaintiff/ Respondent that the Defendant/ Applicant by seeking to vacate the orders issued on the 28th July,2021 seeks to now legalize his illegal and contemptuous activities, urging that intimidating and oppressing the plaintiff/ Respondent with the blessing of the court and that the Defendant/ Applicant in his submissions seeks for review of the orders issued on the 28/7/2021.
47. Reliance was placed on Order 45 Rule 1 of the [Civil Procedure Rules](#) 2010 contending that the grounds of review orders that have to be proved are;
 1. There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the Applicant at the time the decree was passed or the order was made; or
 2. There was a mistake or error apparent on the face of the record; or
 3. There were other sufficient reasons; and
 4. The application must have been made without undue delay.
48. On the issue of discovery of new and important matter which after the exercise of due diligence was not within the knowledge of the applicant, it was submitted that through reading of the application, it does not bring out any new and important matter that the Defendant/ Applicant has discovered that was not within his knowledge at the time of issuance of the orders.
49. It was further averred that the photos attached by the Defendant/ Applicant as proof of vandalism have been taken inside the house showing that Defendant/ Applicant has agents who have access to



the house despite being told to surrender the keys to the Plaintiff/ Respondent. Urging that from the foregoing there is no new or important matter that has been discovered.

50. Regarding the issue of mistake or error apparent on the face of the record, reliance was made on the case of *Muyodi v Industrial and Commercial Development Corporation & Another* (2006) 1 EA243, the Court of Appeal described an error apparent on the face of the record as follows:

“...In *Nyamogo and Nyamogo Advocates v Kogo* [2001] 1 EA 173 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 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 as 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. This laid principle of law is indeed applicable in the matter before us”

51. It was the contention of the Plaintiff/ Respondent that from the description of what amounts to an error apparent on the face of the record there is no error apparent in this matter warranting the review of the orders issued on the 28/7/2022.
52. As to the issue of the sufficient reasons, it was the position of the Plaintiff/ Respondent that other than allegations of vandalism there are no reasons advanced as to why the orders issued on the 28/7/2021 need to be vacated, contending that vandalism is not a new matter and that initial vandalism was done by the Defendant/ Applicant and his goons as they evicted the Plaintiff/ Respondent from her matrimonial house. Urging that the Plaintiff/ Respondent has never vandalized the matrimonial home and that all along she fought for the protection of the house.
53. On the issue of application being made without undue delay, it was averred that this application has been brought 1 year 2 months later and no explanation has been advanced for the delay. Urging that application dated 22/9/2022 be dismissed with costs to the Plaintiff/ Respondent.

Determination

54. This Court considered the instant application, Replying Affidavit, Further Affidavit and Written Submissions filed by parties through respective Counsel.
55. The issue before the Court is that the Court vacates the Court orders of 28/7/2021 and allows the Applicant /his agent/servant to gain access to the premises and have repairs and restoration of the premises after vandalism of the home as per photographs attached.
56. The pleadings and submissions consist of accusations and counteraccusations by the parties and competing legal interests and claims that can only be verified upon cogent and tangible evidence whose tested veracity is through cross-examination during viva voce evidence hearing.



57. *A.I.N v I.M.M* Originating Summons No. 12 of 2017 (MSA HCT) where the Court observed;

“This Court is a Court of evidence and any decision made by the Court must be based on evidence. It is a settled principle of law that he who alleges must prove. This principle is firmly embedded in Section 107 of the *Evidence Act* which stipulates.

- 1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

The Applicant did desire this Court to make a decision in her favor regarding her legal rights in respect of the 2 properties. She was required in law to place before the Court sufficient material as proof to persuade the Court to grant to her the orders sought. She however failed to discharge the burden of proof that was squarely upon her”

58. At this stage to be granted injunctive orders, the Respondent ought to prove a prima facie case if not the circumstances set out prove that the balance of convenience tilts in the Applicant’s favor. In the circumstances of the case there are allegations and counter allegations by and against each party. It is not possible at this stage in the absence of proof to grant injunctive redress.
59. From the competing assertions by parties; the Applicant claims absolute ownership of the land as ancestral land inherited from his grandmother and claims he built the home single handedly. The Applicant relies on right to property under Article 40 of *the Constitution*. The Applicant asserted he has been in a monogamous marriage and had employed the Respondent and paid her.
60. The Respondent asserts the property is matrimonial home without disclosure of date, type and proof of marriage to the Applicant. The Respondent alleged she was not in the home despite Court orders as her safety was compromised due to vandalism by goons and has left the premises. There is no evidence of any report made to the local administration and/or Police on the issue.
61. Secondly, the Applicant claims vandalism, destruction and disrepair of the home by the Respondent and seeks to have access and entry to the home to preserve, repair and maintain the home to prevent further massive loss of property and funds.
62. On the other hand, the Respondent claims even after the Court’s existing orders on record, she did not have peaceful and quiet enjoyment as she was handed over 1 key to the home and thereafter she was accosted by goons and has suffered seeking refuge from friends’ kindness and support. None of the parties have produced legal documents of ownership of the property matrimonial or not.
63. The totality of these pleadings in the absence of proof, this Court at this stage cannot legally either grant injunction as proposed by the Respondent in the absence of establishing a prima facie case.
64. On the other hand, the Applicant has not proved any of the legal grounds for review under Order 45 Rule 6 CPR 2010, error on the face of record, new information that was not available before and/or any sufficient reason.
65. Therefore, in the circumstances the orders that commend themselves are that the Court Rulings / Orders of 28/7/2021 by Hon. D. K. Kemei J & Ruling of 18/8/2021 by Hon. G. V. Odunga J remain valid orders of the Court.



66. As to ownership/matrimonial home of the land/house subject of the Cause Machakos/Kiandani/355 in Manza Area Machakos County shall be determined upon hearing and determination of the substantive suit/claim interpartes by viva voce evidence. Parties/ Counsel to appear/attend Deputy Registrar MHC Court for Case Management or Court annexed Mediation.

67. The other avenue for redress is to appeal the decisions on record. As was considered in;

68. In the case of *National Bank Of Kenya Limited v Ndungu Njau* [1997] eKLR;

"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.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."

Disposition

1. The instant Application shall be subjected to full hearing of the suit/Plaint or the Parties to appeal the existing Court Ruling /Orders.**
2. Parties/ Counsel to appear/attend Deputy Registrar MHC Court for Case Management or Court annexed Mediation.
3. Costs in the Cause.

RULING DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 31/7/2023 (VIRTUAL/PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

In The Presence Of:

Mr. Munyao H/b Nzili - For The Respondent

Mr. Kimanzi - For The Defendant/applicant

Geoffrey/patrick - Court Assistant(s)

