REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISC. APPLICATION NO. 166 OF 2019

P GIRLS SECONDARY SCHOOL.........................1ST APPLICANT

SAMUEL CHEPCHIENG.......................................2ND APPLICANT

VERSUS

AYC (Minor, suing through his mother and Next of Friend

GJT)..RESPONDENT

RULING

[1] The Notice of Motion dated **5th July, 2021** was filed by the applicants under **Articles 47 and 159 of the Constitution of Kenya**; **Sections 1, 1A, 1B, 3, 3A** and **80 of the Civil Procedure Act, Chapter 21** of the **Laws of Kenya,** as well as **Order 42 Rule 8** and **Order 45 Rule 1** of the **Civil Procedure Rules, 2010**. The applicants thereby prayed for orders, *inter alia*, that: -

> **[a] That the order made on 19-11-2020 directing the 1st applicant to deposit security of the Kshs. 5,000,000/= in an interest-bearing account within 3 months be vacated, set aside, discharged and or reviewed forthwith and substituted with a declaration that the requirement for furnishing security for due performance of any decree does not extend to the 1st applicant which is a public body.**
>
> **[b] That in the alternative to the above, the sum of Kshs. 5,000,000/= as directed n the order of 19-11-2020 be reviewed downwards to Kshs. 2, 000,000/= payable within 60 days of making of the order and the same be deposited in court.**
>
> **[c] That upon grant of the prayers above, the leave to file Appeal out of time granted to the applicants on 19-11-2020 be extended and the applicant be granted a further 30 days within which to file the appeal.**
>
> **[d] The costs of this application be provided for.**

[2] The Motion is supported by the grounds presented on its body and in the Affidavit of **Lona Jemutai Tanui**, the Principal of **P Girls Secondary School**, the 1st Applicant herein. She deposed that on the **19th November, 2020** the court granted the applicants an order of stay of execution on condition that the applicants deposit security of **Kshs. 5,000,000/=** in a joint interest account in the name of the counsel for the parties herein within three months; but that, the 1st applicant being a public school, has been unable to comply with that condition. **Ms. Tanui** explained that the 1st applicant is a public body and is dependent on the funding it receives from the government and from subsidized school fees paid by parents. It was therefore her averment that the school was unable to raise the security of **Kshs. 5,000,000/=** as ordered by the court on the **19th November, 2021**.

[3] Ms. Tanui further stated that, the 1st applicant being a public institution, is exempted from the requirement of depositing security for the due performance of a decree under **Order 42 Rule 6 (2) of the Civil Procedure Rules**; and therefore that it was erroneous for the Court to direct the 1st applicant to deposit security. She explained, at paragraph 10 of the Supporting Affidavit, that the proceedings the subject of the instant application were brought against the 1st applicant by virtue of the **Basic Education Act**, the **Interpretation of General Provisions Act** and **Government Proceedings Act;** and therefore ought to be construed as proceedings against the Government. She therefore asserted that the safeguards under **Order 42 Rule 8** of the **Civil Procedure Rules** extend to the 1st applicant herein. It was consequently the applicants' case that the order requiring the 1st applicant to deposit security as a condition for the order granted of stay of execution was made in error.

[4] The applicants also averred, through **Ms. Tanui**, that the school is financially constrained. They prayed therefore that, in the unlikely event that the court finds that **Order 42 Rule 8** of the **Civil Procedure Rules** does not extend to public schools such as the 1st applicant, then the 1st applicant be allowed to pay furnish security in the sum of **Kshs. 2,000,000/=,** payable within **60 days**, for the due performance of the decree pending the disposal of the intended Appeal.

[5] Ms. Tanui drew the attention of the Court to the fact that the respondent, through *Hegeons Auctioneers,* was in the process of executing the decree against the 1st applicant; having already issued and served a Proclamation Notice dated the **29th June, 2021,** indicating the intention to attach the school bus, school van, assorted school furniture and any other asset that belonged to the school. Hence, the applicants expressed their trepidation that their appeal will be rendered moot and of no legal importance. It was further the assertion of the applicants that they stand to suffer substantial loss if the impugned decree is executed as there is no guarantee that the respondent will be able to make a refund should the intended appeal succeed.

[6] Further to the foregoing, **Ms. Tanui** pointed out that the respondent has already been paid part of the decretal sum by the insurance company; and therefore that no prejudice will be suffered by him in the interim period pending the hearing and determination of the appeal; and that conversely, the proposed attachment will not only adversely affect the operations of the 1st applicant, but will also impinge on the rights and interests of over 600 students that are depending on it for quality basic education. Thus, the Applicants urged the court to grant the prayers sought in view of the prevailing circumstances, including the discovery of new facts; and to balance the scales of justice and advance public interest.

[7] The respondent opposed the application vide a Notice of Preliminary Objection dated **7th July 2021** and contended that: -

> **[a] THAT the issue herein is res judicata having been heard and all issues determined by way of the ruling of this court dated 19th November 2020.**
>
> **[b] THAT there is no appeal filed and served herein that would form the basis of the application for stay of execution.**
>
> **[c] THAT there has been inordinate delay of over seven months in the filing the intended appeal.**
>
> **[d] THAT there has been failure to comply with the order to deposit security of Kshs. 5,000,000/= seven months since the order in issue was made.**
>
> **[e] THAT the application for review is inordinately late.**
>
> **[f] THAT the orders sought to be reviewed have been overtaken by events as the timelines under which:**
>
> > **[i] The Appeal was to be filed has expired;**
> >
> > **[ii] Deposit of security was to be made has expired.**
>
> **[g] THAT the entire application is an abuse of the court process as the order in issue has lived its full life and cannot be extended or reviewed.**
>
> **[h] THAT the leave to appeal was not conditional at all except for the time limit of 30 days.**
>
> **[i] THAT the only cogent reason why there is no appeal is that there are no good grounds for appeal.**
>
> **[j] THAT there must be an end to litigation.**
>
> **[k] THAT part payment of Kshs. 3,000,000/= is an admission of liability and obligation to pay the decretal sum as per the judgment which sums stands at Kshs. 28, 104, 808/= and continues to attract interest at the rate of 14% per annum and confirms that there is no cogent reason to file appeal herein.**
>
> **[l] THAT public bodies and private bodies are governed by the same law in litigation and must all obey court orders.**
>
> **[m] THAT if the ruling of 9th November 2020 was legally wrong then the same could only have been appealed and not be the subject of review.**
>
> **[n] THAT the attached assets are not tools of trade, but luxuries.**
>
> **[o] THAT a school cannot be construed to mean the Government of Kenya.**

[8] Directions were then given on the **13th July 2021** for the application dated **5th July, 2021** and Notice of Preliminary Objection dated **7th July 2021,** to be canvassed simultaneously by way of written submissions. Thus, **Mr. Wabwire** for the applicant filed his written submissions on the **27th July, 2021** urging the Court to dismiss the respondent's preliminary objection as the issues raised therein are factual in nature and would require evidence in proof thereof. Counsel referred the Court to the cases of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Limited** (1969) EA. 696; **Oraro vs. Mbaja** [2005] 1 KLR 141 and **Aviation & Allied Workers Union Kenya**

vs. Kenya Airways Ltd & 3 Others [2015] eKLR, among other authorities, to support his argument that that a preliminary objection must be premised on pure points of law with the potential of disposing of the suit without the need to go for trial.

[9] On the merits of the application, **Mr. Wabwire** relied on **Section 80** of the **Civil Procedure Act** and **Order 45(1) Civil Procedure Rules** and posited that the applicants had met the conditions set out therein**.** According to him applicants had proved discovery of new important matter or evidence as well as mistake or error apparent on the face of the record; in addition to demonstrating that the application had been made without unreasonable delay. He also took the view that, should the Court find that the respondent's preliminary objection does not meet the required threshold, then it would follow that the application for review is unopposed.

[10] Hence, in terms of discovery of new and important evidence, counsel reiterated the applicants' assertion that the instant applicant has been necessitated by the discovery of new evidence; namely, the payment by CIC Insurance of part of the decretals sum to the tune of **Kshs. 3,000,000/=.** Counsel submitted that it was only around **28th May, 2021**, that an email was sent to them by **CIC General Insurance Co. Ltd** indicating that the Respondent had already been paid **Kshs. 3,000,000/=** some time in **2019**, which information was concealed from both the court and Applicant.

[11] Mr. Wabwire urged the Court to take an adverse view of the fact that despite having been paid, the respondent proceeded to cause fresh warrants of attachment to issue on the **24th June, 2021** without any amendment to reflect that they had already received **Kshs. 3,000,000/=.** He added that this discovery is so grave to the applicants that it has technically curtailed their efforts to meet the condition for deposit of security; as they were relying on the same source of funds.

[12] As for the mistake or error apparent on the face of the record, counsel drew attention to the provisions of **Order 42 Rule 8 of the Civil Procedure Rules** and the case of **Muyodi vs. Industrial and Commercial Development Corporation & Another** [2006] 1 EA 243, and submitted that, in making the impugned order, the Court appeared not to have taken that provision in mind. He submitted that the 1st applicant is a public body within the import of the **Interpretation and General Provisions Act, Basic education Act**, and **Government Proceedings Act**; and therefore is exempt from the requirement under **Order 42 Rule 6 (2)** of the **Civil Procedure Rules**. He relied on the case of **Teachers Service Commission v Benson Kuria Mwangi** [2020] eKLR wherein the court held that a public institution is not required to deposit security by virtue **of Order 42 Rule 8 of the Civil Procedure Rules**.

[13] On the ground of any other sufficient reason, **Mr. Wabwire** made reference to the prevailing global situation, spawned by the Corona Virus Pandemic and its effect on learning institutions within the country. He therefore submitted that since the applicant was equally impacted by the global pandemic, a justification has been made for review of the conditions for stay pending appeal.

[14] In the alternative to the foregoing arguments, and in the event that the Court finds that the 1st applicant is not "government" for purposes of **Rule 8** aforementioned, **Mr. Wabwire** prayed that the condition as to security be revised downwards. He consequently proposed that the applicants be allowed to furnish security in the sum of **Kshs. 2,000,000/=** within 60 days for the due performance of the decree, pending the disposal of the intended Appeal; this being the balance of the initial **Kshs. 5,000,000/=** after taking into account the Kshs. 3,000,000/= already paid to the respondent. He pointed out that the 1st applicant is not a profit making venture but depends on tax payers and the Government of Kenya to meet its financial obligations.

[15] While conceding that there was delay in filing the appeal, counsel nevertheless pointed out that the applicants have already complied and filed an appeal, being **Eldoret High Court Civil Appeal No. E072 of 2021** which they will be seeking to have admitted out of time. Counsel added that the delay in filing of the appeal was occasioned by lack of typed proceedings and judgment; which had not been availed to the applicants as at **23rd July, 2021;** as well as confusion due to change of advocates; which factors ought not to be visited on the applicants.

[16] Counsel further conceded the applicants were aware that they were to comply with the requirement to deposit security within three months from **19th November, 2020;** and that the period lapsed around **March, 2021**. He urged the Court to find plausible, the applicants explanation that that the 1st applicant was engaged in negotiations with respondent; and that new evidence was discovered that protracted the matter, as the applicants awaited the supporting documents. He pointed out that the supporting documents were not supplied until **25th June, 2021** and relied on **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet** [2018] eKLR**,** where **Hon. Mohammed, JA**. held that the law only requires that the delay be satisfactorily explained.

[17] Consequently, counsel for the applicants urged the court to grant the orders sought as they have fully complied with the requirements of **Section 80** of the **Civil Procedure Act** as read with **Order 45 Rule 1 of the Civil Procedure Rules**.

[18] On behalf of the respondent, written submissions were filed herein by **Dr. Chebii** on **1st September 2021**. He reiterated the grounds set out in the respondent's Notice of Preliminary Objection dated **7th July 2021** and opposed the application on the ground of *res judicata*. He relied on **Judicial Hints on Civil Procedure**, (1984) 44 Vol. 1 by **Richard Kuloba** and the case of **Mandavia vs. Rattan Singh** [1965] EA 118 and submitted that the issues raised in the instant application have already been determined with finality by this court vide its Ruling dated **19th November, 2020.**

[19] It was further the respondent's submission that stay of execution can only be granted where there is an appeal; and that since there is no appeal that has been filed in connection with the impugned judgment of the lower court, it would be inappropriate to grant stay of execution. Counsel pointed out that it has been two years of non-compliance, since the court issued its orders and therefore the application amounts to nothing more than an abuse of the court process. Reliance was placed the case of **Paul Gachau v Stanley Gicharu Karau,** Civil Application, NAI 2 of 1979 wherein the court stated that the jurisdiction to extend time is only available when good and sufficient reasons are shown for the delay.

[20] Dr. Chebii also made reference to the fact that part of the decree has been paid by **CIC General Insurance Co. Ltd** and urged the

Court to conclude therefrom that proposed appeal is unwarranted. He relied on **Hamilton Harrison and Mathews vs. Cyril Herbert Mayers & Hald Margaret Mayers,** Civil Application No. 3 of 1971 and **Richard Nchapi Leiyangu vs. IEBC & 2 Others** [2014] eKLR for the proposition that the discretion of the Court ought not to be exercised in favour of a party who deliberately seeks to obstruct or delay the course of justice. Consequently, **Dr. Chebii** prayed that the application dated **5th July 2021** be dismissed with costs.

[21] I have given due consideration to the respective submissions filed herein by the parties. Before getting into the merits of the application dated **5th July 2021**, it is imperative to pay attention to the Notice of Preliminary Objection dated **7th July 2021** and ascertain whether it raises such issues of law as would be sufficient to dispose of the application *in limine*. Thus, in **Mukisa Biscuits Manufacturers Ltd vs. West End Distributors Ltd** it was held that a preliminary objection consists of:

> **"…a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration."**

[22] Needless to say therefore that a Preliminary Objection ought not to be raised where reliance is placed on disputed facts which are yet to be proved; or where, to arrive at its determination on the preliminary points raised, the Court must embark on an inquiry to ascertain the underlying facts. As was aptly stated by **Sir Newbold, P. in the Mukisa Biscuits Case:**

> **"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually raised on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."**

[23] With that in mind, I have considered the grounds set out in the Notice of Preliminary Objection dated **7th July 2021**. Other than the 1st ground, all the other 16 grounds are premised either on disputed facts or require further investigation by the Court. For instance, it is in dispute whether or not an appeal has been filed; and therefore Grounds 2, 8, 9 and 10 are not well suited for disposal as preliminary points. There are grounds that, in themselves allude to the question whether sufficient cause has made by the applicants for review. In this category fall Grounds 3, 5, 6, 7, 11 and 12. Likewise, whether or not part payment of the decretal sum has been made by CIC as adverted to in Paragraph 13 of the Notice of Preliminary Objection cannot be conclusively determined in the absence of proof of such payment.

[24] I am therefore in complete agreement with what Hon. Ojwang, J. (as he then was) stated in Oraro vs. Mbaja [2005] 1 KLR 141, namely, that:

> ***"…The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point…Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."***

[25] It is plain therefore that, in respect of the Notice of Preliminary Objection, the only issue that presents itself for determination is the question whether the application dated **5th July 2021** is *res judicata*. Needless to mention that *res judicata* is a plea that goes to the jurisdiction of the Court, and which, if successfully raised, has the potential of disposing of the entire suit; for **Section 7** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya,** does provide that:

> **"No Court shall try any suit or issue in which the matter in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title…and has been heard and finally decided by such Court."**

[26] It is now trite that the doctrine of *res judicata* is applicable not just to substantive suits, but also to applications. The Court of Appeal had occasion to make this pronouncement in **Uhuru Highway Development Ltd vs. Central Bank of Kenya & 2 Others,** Civil Appeal No. 36 of 1996, thus:

> **"There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature in India and our Civil Procedure Act. That is to say, there must be an end to applications of a similar nature; that is to say further, wider principles of *res judicata* apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation..."**

[27] That said, the question to pose is whether, in the circumstances hereof, it can be said that the instant application is *res judicata*. In an explication of this provision, in **Bernard Mugo Ndegwa Vs James Nderitu Githae and 2 Others** [2010] eKLR the Court distilled the applicable considerations to be as follows:

[a] The matter in issue must be identical in both suits.

[b] The parties in the suit must be substantially the same.

[c] There is concurrence of jurisdiction of the Court.

[d] That the subject matter is the same and finally,

[e] That there is a final determination as far as the previous decision is concerned.

[28] Although **Dr. Chebii** submitted that all issues raised herein have been exhaustively considered and determined by the Court in its Ruling dated **19th November, 2020,** counsel for the applicant of the conviction that this application was necessitated by factors that arose subsequent to that Ruling. He stressed the point that the instant application is for review of the Ruling dated **19th November, 2020** brought under **Section 80 of the Civil Procedure Act** and **Order 45 of the Civil Procedure Rules;** while the initial application culminating in the Ruling dated **19th November, 2020** sought stay of execution under **Order 42 Rule 6 (2) of the Civil Procedure Rules.** To that extent I am persuaded to agree that the doctrine of *res judicata* is inapplicable.

[29] Moreover, the application is premised on the ground that there is an error apparent in the Ruling dated **19th November 2020** which argument could not, by any stretch of imagination have arisen before the delivery of that Ruling. The mere fact that the current application raises, as a peripheral issue, the question as to why the orders of **19th November 2020** were not complied with within the timelines set by the Court is no reason to conclude that the instant application is *res judicata.* I, consequently, find no merit in that argument, with the result that the respondent's Preliminary Objection lacks merit and is hereby dismissed.

[30] On the merits, the application dated **5th July 2021** raises two pertinent issues, namely:

> **[a] whether the applicants have made out a good case to warrant the review or setting aside of the orders issued on 19th November, 2020, by which the applicants were ordered to furnish security in the sum of Kshs. 5,000,000/= within three months; and,**
>
> **[b] Whether, on the facts, the applicants are entitled to further extension of time to file their intended appeal.**

[31] For purposes of review, **Section 80** of the **Civil Procedure Act** provides that:

> **"Any person who considers himself aggrieved: -**
>
> **(a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**
>
> **(b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."**

[32] On the other hand, **Order 45** of the **Civil Procedure Rules** is more detailed in terms of the conditions that applicants for review must satisfy. It provides as follows:

> **"45 (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 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 review of judgment to the court which passed the decree or made the order without unreasonable delay."**

[33] It is imperative therefore that credible proof of any of the three grounds aforestated be given to trigger the exercise of the Court's discretion; that is to say:

> **[a] That there has been discovery of new and important matter or evidence which after due diligence, was not within the applicant's knowledge or could not be produced at that time; or,**
>
> **[b] That there is some mistake or error apparent on the face of the record; or**
>
> **[c] Any other sufficient reason to warrant review.**

[34] In each case, the applicant must also demonstrate that the application for review has been brought without unreasonable delay. (see **Otieno, Ragot & Company Advocates v National Bank of Kenya Limited** [2020] eKLR).

[35] The applicants' review application was premised on the grounds that they have only recently discovered that the respondent has been paid **Kshs. 3,000,000/=** by the Applicants' insurer, **CIC General Insurance Co. Ltd**. They claim that they were all along dependent on the said **Kshs. 3,000,000/=** to form part of its security; and therefore that they now have no fall back option. This information about the payment

is said to have reached the applicants' counsel only on **28th May 2021,** or thereabouts; and in proof thereof a copy of the Claims Payment Requisition Voucher was annexed to the Supporting Affidavit as **Annexure LJT 3.**

[36] It is noteworthy however that the issue of payment was raised before the disposal of the earlier application and that the Court, at paragraph 9 of its Ruling dated **19th November 2020** made reference to the allegations. As the insured, the 1st applicant cannot now say that the payment was a matter it could not, upon the exercise of due diligence, ascertain. It is also significant that the document marked **Annexure LJT3** is dated **19th September 2019**; and that, it is only a requisition as opposed to proof of payment. I am therefore far from convinced that the alleged payment is a new matter that could not have been brought to the attention of the Court before the Ruling of **19th November 2020.**

[37] The second limb of the application is the contention by the applicants that there is an error apparent on the face of the ruling dated **19th November 2020**. As was observed in **Muyodi vs. Industrial and Commercial Development Corporation & Another** (supra):

> **"…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."**

[38] In this case, the alleged error is in respect of the order by the Court commanding the 1st applicant to furnish security in the sum of **Kshs. 5,000,000/=** within three months for the due performance of the decree. The applicants' contention is that the Court thereby failed to address itself to the provisions of **Order 42 Rule 8 of the Civil Procedure Rules;** granted that the Applicant a public institution and thus exempt from the requirement to provide security. Indeed, **Order 42 Rule 8 of the Civil Procedure Rules** provides that:

> **"No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity."**

[39] I have carefully perused the record with a view of ascertaining whether the parties' pleading had any indication that the 1st defendant is a public body as is now claimed. The record reveals that the Notice of Motion by which these proceedings were initiated, was drawn and filed by **M/s Kitiwa & Partners Advocates**; and that the copy of the Draft Memorandum of Appeal annexed thereto was also drawn by the same firm of advocates. A perusal of the Notice of Motion dated **23rd September 2019** shows that the applicants were represented before the lower court by the firm of **Mose, Mose & Milimo Advocates**, on the instructions of **CIC Insurance Company Ltd.**

[40] It was therefore not obvious enough that the 1st applicant is a public school. Indeed, their defence was not undertaken by the Government for purposes of **Rule 8** aforementioned. It is also significant that, although **Mr. Wabwire** took over the conduct of this matter on **23 October 2019**, he did not raise the issue in his submissions dated **28th July 2020**. In fact, in his submissions in respect of the application for stay dated **23rd September 2019**, **Mr. Wabwire** indicated that the 1st applicant was willing to provide security and to abide by whatever conditions the Court would deem fit to impose.

[41] Needless to say that not all girls' secondary schools are public schools. In the premises, a conscious decision having been made by the Court on security, the only option available was for the applicants to file an appeal if they were unhappy with the ruling in question, as appears to be the case. Indeed, in **National Bank of Kenya Limited vs. Ndungu Njau [1997] eKLR** the Court of Appeal made it clear that:

> **"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 ground for review."**

[42] It is trite therefore that a point which may be a good ground of appeal may not necessarily be a good ground for review. Similarly, an erroneous view of the evidence or the applicable law, which is what has been raised herein, are not good grounds for review, though they may be good grounds for an appeal. The rationale for this is plain, it would put the Judge in an awkward position of having to sit on appeal on own decision. Accordingly, in the **the National Bank of Kenya Case** (supra) the Court of Appeal observed that:

> **"...the learned Judge ... 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."**

[43] With regard to the 3rd aspect of **"any other sufficient reason",** counsel for the applicants made reference to the global Corona Virus pandemic and its effects on schools in particular. Counsel urged the Court to find that, as a result, the 1st applicant has faltered in its collection of fees; and therefore that, despite its best efforts to raise the security as set by the Court, it was unable to comply. There is no disputing that averment; noting that no affidavit in rebuttal was filed by the respondent. Indeed**,** the Supreme Court acknowledged the Covid 19 situation to be a plausible excuse for non-compliance within the prescribed timelines in **William Olotch vs. Pan Africa Insurance Co. Limited** [2020] eKLR. It held that:

> **[3] UPON considering the written submissions on record for the Applicant and the Respondent dated 29th June 2020 and 14th July 2020, respectively, wherein the Applicant contends that the delay in filing the application for review to this Court was inadvertent, and was caused by the adverse effects posed by the Covid 19 pandemic, including restrictions on travel imposed by the Government and coupled with the challenges in accessing reliable internet; and**

The Respondent in opposing the application submits that the explanation advanced by the Applicant is not plausible; that the reasons for the delay are not satisfactory, and, that the application lacks merit, is an abuse of the processes of this Court and does not disclose any substantial grounds for the Court to exercise its discretion; and

[4] HAVING considered the application, the Grounds of Opposition and the submissions filed by the respective parties, by a unanimous decision of this Bench, we find that … ***the Applicant has a reasonable and cogent explanation and adduced sufficient reasons for the inadvertent delay in filing his application for review of the Court of Appeal decision on certification in*** **Civil Application No. SUPP 15 of 2019…"**

[44] Another valid point made by the applicant, for purposes of "any other sufficient reason", is the applicants' assertion that **CIC Insurance Co. Ltd** has settled over half of the decretal sum; which assertion has not been refuted. Moreover, counsel for the applicant explained that as the Attorney General has now taken over the matter on behalf of the 1st applicant, it would not be feasible for it to put funds into a joint interest earning account with counsel for the respondent. Instead he proposed that an order be made for the funds to be deposited in court instead. Roundly considered, I am convinced that there are sufficient reasons for reducing the security amount and for consequential orders.

[45] The last consideration is whether the application was brought without unreasonable delay. Counsel for the applicants relied on the explanation that it took long for them to obtain proof of payment from **CIC Insurance Co. Ltd**; during which time the parties were simultaneously engaged in negotiations. Granted my findings herein above, particularly with regard to the Covid 19 situation in the country, I am convinced that the explanation for the delay is plausible. As was aptly captured in **Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet** [2018] eKLR:

"The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."

[46] And on whether, in the circumstances, the applicants deserve further extension of time to file their intended appeal, counsel intimated that the appeal has already been filed as **Eldoret Civil Appeal No. E072 of 2021.** That being the case, it would only be proper and fitting and the application for admission out of time be canvassed in the appeal itself. This position was well explicated by **Hon. Emukule, J.** in **Gerald M'limbine vs. Joseph Kangangi** [2008] eKLR, thus:

My understanding of the proviso to section 79G is that an applicant seeking "an appeal to be admitted out of time" must in effect file such an appeal, and at the same time seek the court's leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court's process under section 79B which says:

"79B Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree part of a decree or order appealed against he may notwithstanding section 79C, reject the appeal summarily"

It seems to me therefore that it is not open to the court to exercise its discretion under the proviso to section 79G of the Civil Procedure Act except upon the existence and perusal of the appeal to be "admitted" not to be "filed out of time." Admission presupposes that the appeal has been filed and will be "admitted" for hearing after a judge has established under Section 79B that there is "sufficient" ground for interfering with the decree part of a decree or order appealed against."

To allow the Applicant's Motion would be to defeat entirely the requirements of Section 79B of the Civil Procedure Act and indeed Section 79G itself upon which the Applicant relies – the requirement for a Certificate of Delay in the preparation and delivery to the appellant of a copy of a decree or order. The Applicant's motion is bereft of such explanation or certificate. Default by the Applicants former advocate would then have seen properly anchored on such certificate.

[47] In the result, the orders that commend themselves to me, and which I hereby grant, are as hereunder:

[a] That the respondent's Preliminary Objection dated **7th July 2021** be and is hereby dismissed.

[b] The applicants' application for review dated **5th July 2021** be and is hereby allowed;

[c] The Ruling and Orders of the Court dated **19th November 2020** as to security be and are hereby reviewed and vacated. The same be and is hereby replaced with an order that security be furnished in the sum of **Kshs. 2,000,000/=** to be deposited in court within 60 days from the date hereof.

[d] Each party to bear own costs of the application and the Preliminary Objection.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 28TH DAY OF FEBRUARY 2022.

OLGA SEWE

JUDGE