



REPUBLIC OF KENYA



KENYA LAW

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**Kihara W. K v Housing Finance Bank & another (Civil Case E109 of 2019)
[2022] KEHC 11959 (KLR) (Commercial and Tax) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11959 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E109 OF 2019
WA OKWANY, J
JULY 28, 2022**

BETWEEN

WAWERU KIHARA W. K PLAINTIFF

AND

HOUSING FINANCE BANK 1ST DEFENDANT

LEGACY AUCTIONEERING AGENCIES 2ND DEFENDANT

RULING

1. On July 1, 2021, this court delivered a ruling on the plaintiff's application dated July 1, 2020. Aggrieved by the said ruling, the defendants filed the application dated August 31, 2021 seeking the following orders:-
 - 1) Spent.
 - 2) That this honourable court be pleased to vary, review and/or set aside the ruling delivered by the honourable W A Okwany J, on the July 1, 2021 allowing the plaintiff's application dated July 1, 2020 and granting a temporary injunction restraining the applicants from auctioning the plaintiff's property known as Kiambaa/Ruaka/1022 pending the hearing and determination of the main suit.
 - 3) That the 1st defendant be at liberty to issue a 14 days courtesy notice and thereafter sell the property by way of public auction in exercise of its statutory power of sale.
 - 4) That the costs of this application be provided for.
2. The application is supported by the affidavit of the 1st defendant's legal manager Christine Wahome and premised on the following grounds:-



- a) That the ruling of the court dated July 1, 2021 contains an error apparent on the face of the record necessitating this application for review.
 - b) That the plaintiff filed an application dated July 1, 2020 seeking to reinstate the injunction application dated April 2, 2019 to permit the full adjudication of the same and for orders of temporary injunction restraining the defendants from auctioning the plaintiff's property pending the hearing and determination of the suit.
 - c) That the application was canvassed by way of written submissions and a ruling was delivered on July 1, 2021 by honourable W A Okwany J allowing the plaintiff's application and granting a temporary order of injunction restraining the defendants from auctioning the plaintiff's property pending the hearing and determination of the suit.
 - d) That the honourable court erred in finding that the parties herein had proceeded to fully canvass the application for injunctive orders which were similar to the orders sought in the application dated April 2, 2019 hence it was pointless to reinstate the earlier application of April 2, 2019.
 - e) That the honourable court erred in proceeding suo moto to determine the application for injunction in the absence of a consent from the parties agreeing to the reinstatement of the application dated April 2, 2019.
 - f) That the honourable court erred in failing to consider from the outset the merits of the plaintiff's application for reinstatement of the application dated April 2, 2019 which had been dismissed since July 18, 2019.
 - g) That the honourable court failed to appreciate the fact that the orders of reinstatement took precedence in the plaintiff's application dated July 1, 2020 and ought to have been determined in the first instance without delving into the merits of the application for injunction.
 - h) That substantial loss/ prejudice will result to the applicants unless the orders sought are granted.
 - i) That no undue prejudice will be occasioned to the plaintiff if the orders sought are granted and it is reasonable, fair and in the interest of justice in all the circumstances of this suit that the orders prayed for are granted.
 - j) That this application has been made without unreasonable and/or undue delay.
 - k) That this application ought to be granted in the interest of equity and justice.
3. The 1st respondent opposed the application through the grounds of opposition dated September 15, 2021 citing the following grounds:-
- 1) The applicants have brought an application for review under order 45 rule 1 and 2 of the *Civil Procedure Rules* 2010 and section 80 of the *Civil Procedure Act*.
 - 2) The application by the applicants defeats the mandatory requirements for review under section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules* 2010.
 - 3) According to the applicant, the court made a mistake or error apparent on the face of the record by proceeding to determine an application for injunction without first delving into the issue of reinstatement of the plaintiff/respondent's application.



- 4) The applicant argues that the court proceeded suo moto to determine the application for injunction in the absence of a consent from the parties agreeing to reinstatement of the application dated April 2, 2019.
 - 5) The applicant challenges the lady justice's appreciation of facts and the law. A question of an error to the appreciation of facts and the law does not form grounds for review as stipulated under section 80 of the [Civil Procedure Act](#) and order 45 rule 1 of the [Civil Procedure Rules](#) 2010.
 - 6) The applicant's application challenges the exercises of judicial discretion by the honourable court a question that falls within the ambit of an appeal and not review.
 - 7) The applicant has not demonstrated the error that is in the ruling that they require reviewed that is evident on the face of the ruling.
 - 8) Further, the applicants have unexplainably delayed in bringing this application for review and have not advanced any reason for their delay. As per order 40 rule 1 (b) an application for review ought to be made to the court which passed the order without unreasonable delay. The ruling having been made on the July 1, 2021, there is no explanation whatsoever why it took the applicant two months to apply for review of the ruling. As such, the current application is an afterthought and a time-wasting academic exercise which ought to be struck out with costs.
 - 9) The applicant is therefore inviting this honourable court to assume an appellate jurisdiction over its own decision an invitation we invite this honourable court to resist.
 - 10) The applicants have also sought for an order to be allowed to issue a 14 days courtesy notice and thereafter sell the property by way of public auction in the exercise of the statutory power of sale. The application is predicted to be premised under order section 63(e) of the [Civil Procedure Act](#). The applicants' application is misconceived and inappropriate.
 - 11) An interlocutory order cannot be sought in an application for review such as the one before court and as such the applicant's application is misconceived, bad in law, fatally defective a non-starter, has no limbs to stand on, completely unsustainable and should be struck out and/or dismissed.
 - 12) The applicant's application should therefore be dismissed with costs.
4. The motion was canvassed through written submissions. The applicant submitted that the honourable court erred in finding that the parties had fully proceeded to canvass the application for injunctive orders which were similar to the orders sought in the application dated April 2, 2019. It was submitted that the fact that the court had proceeded to consider the merits of the application for injunction whilst the same was not fully canvassed by the parties amounted to an error on the face of record.
 5. It was submitted that the application for reinstatement of the application dated April 2, 2019 ought to have been determined in the first instance without delving into the merits of the application for injunction. It was further submitted that there was an error of omission in failing to consider the merits of the orders of reinstatement and an error of commission when the court found that the parties had proceeded to fully canvass the application for injunction thereby considering the same. It was the applicant's case that there were sufficient reasons to warrant the granting of orders of review, in that, the defendant would stand to suffer substantial loss and prejudice.
 6. The respondent submitted that the applicants' sentiments were based on his dissatisfaction with the manner in which this court exercised its discretionary powers to hear and determine the application for



injunction and reinstatement. It was further submitted that the applicants were challenging the courts findings and the merits of the decision thus inviting the court to sit on appeal over its own decision. It was further submitted that prayer 3 is an attempt, by the applicant, to reopen the application for injunction and to re-litigate the same.

7. I have carefully considered the application and the rival arguments made by parties. The main issue for determination is whether application meets the threshold for an order for review. The courts power to review its judgment or ruling is exercised within the framework of section 80 of the [Civil Procedure Act](#) and order 45 rule 1 of the [Civil Procedure Rules](#).
8. Section 80 of the [Civil Procedure Act](#) provides as follows:-
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.”
9. Order 45(1) of the [Civil Procedure Rules](#) sets out the requirements for an application for review as follows:-
“ 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 from which no appeal 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”.
10. In the present case, the applicants seek orders to review the orders dated July 1, 2021 on the ground that there was an error apparent on the face of record. According to the applicants, the court erred in finding that the parties had proceeded to fully canvass the application for injunctive orders. It was the applicant’s case that the orders for reinstatement of the application dated April 2, 2019 ought to have been determined in the first instance without delving into the merits of the application for injunction.
11. The respondent on the other hand argued that the question of an error to the appreciation of facts and the law did not form grounds for review under section 80 of the [Civil Procedure Act](#) and order 45 rule 1 of the [Civil Procedure Rule](#) 2010. The respondent observed that the application challenged the courts discretion and fell under an appeal and not review.
12. The Court of Appeal had the following to say in an application for review in the case of [National Bank of Kenya Ltd v Ndungu Njau](#) [1997] eKLR.

“ A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-



evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

13. Further 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 v 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 is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

14. More recently in *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR, the court held as follows:-

“Review is impermissible without a glaring omission, evident mistake or similar ominous error. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review...The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of order 45 rule 1 of the Civil Procedure Rules and section 80 of the Act. To put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.”

15. Guided by the jurisprudence discussed in the above cited cases, I note that the court rendered itself in the impugned ruling as follows: -

“The applicant seeks orders to reinstate the application dated April 2, 2019 to permit its full adjudication. The applicant also seeks orders to restrain the respondent from auctioning the suit property which are the same orders sought in the application dated April 2, 2019. Parties however proceeded to fully canvass the application for injunction and in the circumstances, I am of the view that it would be pointless to reinstate the earlier application of April 2, 2019



when similar prayers have already been canvassed herein I will therefore proceed to consider the merits of the application for injunction so as to save judicial time.”

16. In view of the foregoing, the court was presented with an application dated July 1, 2020 which sought for reinstatement of the application dated April 2, 2019 and the same application also sought for injunctive orders. The court dismissed the prayer for reinstatement and allowed the injunction in favour of the applicant. In doing so this court observed that the prayers in both applications were the same thus there was therefore no need to reinstate the earlier application.
17. Based on the foregoing position, I find that there was no error apparent on the face of the record. The court exercised its discretion to determine the applications at the same time in the interest of justice. I find that allowing the orders sought in this application will be akin to this court sitting on appeal on its own ruling which is not permissible in law.
18. In conclusion, I find that the reasons advanced, by the applicant, for seeking an order of review are not satisfactory. My finding that this is not a proper case for the court to grant the review sought. For the above reasons, I dismiss the application dated August 31, 2021 with no orders as costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF JULY 2022.

W. A. OKWANY

JUDGE

In the presence of:-

Mr. Amuyunza for Respondent.

No appearance for Applicants.

Mr. Kibaara for Defendants/applicants.

Court Assistant- Sylvia

