REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO. 8 OF 2018

JOSEPH MUTHURI (Suing on behalf of United Sacco

Formerly Ntiminyakiru Rural Sacco Ltd).....APPLICANT

VERSUS

CO-OPERATIVE BANK & 14 OTHERS...RESPONDENT

V. M. NGUNJIRI.....INTERESTED PARTY

RULING

1. On 11th December 2019, the Court upheld a preliminary objection dated 27th September 2019 filed by the Interested Party with the effect of dismissing the Applicant's application dated 12th September 2019 seeking orders of inhibition against the Interested Party. The Court found that no leave had been granted for the joinder of the Interested Party and furthermore, the Interested Party was not a necessary party in the proceedings as there is no nexus between him and the subject matter of the suit.

2. Aggrieved by this ruling, the Applicant, by his application dated 8th January 2020 seeks for a review of the ruling. He seeks the following prayers: -

> **i. This Hon. Court be pleased to exercise its discretionary powers judiciary and set aside its ruling of 11th December 2019 quo moto to aid justice, avoid injustice and disaster.**
>
> **ii. Further, the Interested Party be substituted herein the application dated 12th September 2019 as enjoined interested party in the above case in the interest of justice by virtue of Order 1 Rule 1 and Order 1 Rule 2 of the Civil Procedure Rules, 2010.**

3. As can be observed, the nature of the prayers as drafted is wanting but this Court understands that the Applicant wants to have the Court set aside its Ruling allowing the Interested Party's preliminary objection and thereby finding that the Interested Party was not a proper party to these proceedings. The Applicant wants the Interested Party to be enjoined to the proceedings.

Applicant's Case

4. The application is premised on the grounds that there is an error apparent on the face of the court ruling of 11th December 2019 without *viva voce*; that the authority quoted by Mativo J is not equivalent to the above case for lack of possession of the suit property contended by the Plaintiff; that unless the Interested Party is reinstated, the Plaintiff will suffer irreparable loss and damages; that unless the Interested Party is reinstated from altering and renovating the suit commercial plot, he will continue with the aforesaid events.

5. He further avers that the effect of the Court's ruling of 11th December 2019 contravenes Article 159 of the Constitution which provides that nothing can prevent the Court from dispensing justice; that the Interested Party is properly enjoined to the proceedings; that at all times, the Respondents and the Interested Party have been served with photocopies of the annexures; that the inclusion of the Interested Party in the proceedings is necessary because of the occupation of the commercial premises of the Applicant on Plot No. Meru Municipal Block II/268

6. In response to the Interested Party's and the Respondent's assertions, the Applicant filed a replying affidavit sworn on 2nd June 2021 and an answer to grounds of opposition of even date where he contends that the Interested Party/Respondent has renovated the suit commercial premises NTIMIINYAKIRU SACCO Plot No. Meru Municipal Block II/268 by abetting coabition and by corruption. He claims that the dismissal of his application to restrain the Interested Party from any action of renovating the premises was arrived at by fraud, collusion or perjury and corruption contrary to Section 1 of the Civil Procedure Act and Article 159 (2) (d) of the Constitution. He further urges that there

is circumstantial evidence of occupation of the suit property by the Interested Party and Respondent and that unless the Interested Party is restrained from making further renovations, he will continue to suffer irreparable loss and damages. He urges that the Interested Party acquired sub-lease for non-payment by corruption.

1st and 2nd Respondent's Case

7. The application is opposed by the 1st and 2nd Respondents who filed grounds of opposition dated 12th April 2021. They urge that the Court lacks jurisdiction to set aside its own orders unless moved through an application for review and none has been made in this case thus the Court is *functus officio* in the matter; that in any case, the parameters for review under Order 45 Rule 1 of the Civil Procedure Rules have not been established; that prayer 2 of the application is unintelligible thus unjusticiable; that in the event the Applicant seeks joinder of the Interested Party to the suit, the same is *res judicata* as this Court already made a finding that there was no nexus between the suit and the proposed Interested Party.

Interested Party's Case

8. The application is opposed by the Interested Party who filed grounds of opposition dated 3rd March 2021. He urges that the application is misconceived, incompetent and legally untenable; that the Court lacks jurisdiction to entertain the application for review of its orders to the extent that the application manifests a collateral challenge on the correctness of court's ruling; the application violates the doctrine of finality of Court orders and is thus contrary to public interest; the application seeks to re-argue matters which are otherwise *res judicata*; the application is premised on wrong provisions of the law and does not meet threshold for review.

Determination

9. The Applicant's prayers and contents of his application dated 8th January 202 are to some extent unintelligible. Needless to say, the Applicant would have greatly benefited from the representation by Counsel. The door of justice is however not closed to a litigant by his inability to secure Counsel. This Court has analyzed his application and what is clear is that he is disturbed by some supposed acts of renovation of the suit properties, which acts he claims are the doing of the Interested Party who is in occupation of the property. He had previously sought for a restraining order against the said Interested Party but was unsuccessful following determination of a preliminary objection by which the Court found that the said Interested Party was not a necessary party to the proceedings and further, the Applicant had not sought leave of the Court before enjoining the Interested Party to the proceedings. From his pleadings and documents, what he brings out is his contention that it is the Interested Party who is in occupation of the suit property.

10. The Respondent's and the Interested Party's opposition to the Applicant's application is hinged on the legal points that the application is anchored on the wrong provisions of the law and that it offends the principles of finality of court decisions and it is otherwise *res judicata*.

Bringing an application on the wrong provisions of law

11. This Court has observed that the application has been brought under the provisions of Order 1 Rule 1, Order 1 Rule 2 of the Civil Procedure Rules and Article 159 of the Constitution of Kenya. These may not entirely be the proper provisions of law to seek a prayer for setting aside and/or review of the Court's ruling claiming that there is an error on the face of the record. The correct provision of law to bring such an application is Order 45 Rule 1 of the Civil Procedure Rules. This Court has however previously held that failure to cite the correct provisions of law is not such a fatal omission or mistake that would render the application a non-starter. See ***Meru Misc Civil Application No. E007 of 2021 Purity Kagendo Anampiu & Another vs Nellie Mugambi & Another***. See also ***Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs) Civil Appeal No. 212 of 2015 [2019] eKLR.***

Whether the Applicant has satisfied grounds for review

12. Another key issue is on whether the application meets the threshold for grant of review as per the provisions of Order 45 of the Civil Procedure Rules which provides as follows: -

> **[Order 45, Rule 1] Application for review of decree or order**
>
> **(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;**
>
> **b. By a decree or order from which no appeal is hereby allowed;**
>
> **and who from the discovery of new and important mater 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, of for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

13. The Applicant claims that there was an error on the face of the Court's ruling of 11th December 2019 which was arrived at without *viva voce* evidence. He also claims that the circumstantial evidence proves that the Interested Party is in occupation of the suit property. These appear to be more of contestations of the Court's finding on a point of law and facts as opposed to an error on the face of the record and/or discovery of new evidence. The essence of an error on the face of the record was discussed at length in the Court of Appeal case of ***National***

Bank of Kenya vs Ndungu Njau, Civil Application No. 211 of 1996 (1997) eKLR where R. O. Kwach, A. M. Akiwumi & G. S. Pall JJA held as follows: -

> **"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. <u>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".</u>**
>
> [emphasis added]

14. In the present case, this Court does not find that there was an error on the face of the record. Failure to consider requisite procedural steps such as adducing of *viva voce* evidence or failure to appreciate circumstantial evidence are errors of law and fact, which may be good grounds for appeal but are not errors apparent on the face of record. The latter, errors apparent on the face of the record must be self-evident, not requiring elaborate arguments. This Court thus agrees with the submissions made by the Interested Party and the Respondent that the Applicant is asking the Court to sit an appeal against its own decision, which action is not permissible in law.

15. In any case, this Court has analyzed the Ruling the subject of the instant application at length and respectfully finds that the Court arrived at a sound decision to dismiss the Applicant's application for injunction based on the ground that the Interested Party was not a necessary party to the proceedings and further, that no leave had been sought to enjoin the Interested Party. These were indeed findings of law and fact. The Court considered that there was nothing to show that the Interested Party had any interest in the suit property.

Res Judicata and Doctrine of Finality

16. In the present application, the Applicant has raised a similar issue urging that the inclusion of the Interested Party to these proceedings is necessary by virtue of his occupation of the suit premises. In essence, the Applicant seeks to challenge the correctness of the Court's Ruling in urging why the Court ought to have allowed the joinder of the Interested Party. To this extent, his application not only proves to be *res judicata* in that the Court already dealt with the issue of the place of the Interested Party in these proceedings, but it also offends the principle of finality of court decisions. Only an appeal on the merits may re-open the matter.

<u>CONCLUSION</u>

17. The applicant attempts to re-open cases by introducing new merit based and contested facts before the same court thereby inviting the Court to conduct a re-trial. By urging the issues of circumstantial evidence of occupation of the suit premises by the Interested Party, the Applicant is introducing new merit based claims on a matter that has already been finally decided. This is not permissible. See the Court of Appeal decision of ***Telkom Kenya Limited Vs John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited) 2014 eKLR*** and the Supreme Court decision of ***Raila Odinga & 2 Others Vs Independent Electoral and Boundaries Commission & 3 Others 2013 eKLR***.

18. The upshot of the foregoing is that this Court does not find merit in the application before the Court. The same does not meet the threshold for grant of review and it is an attempt to re-open litigation through the back door, contrary to the doctrine of finality. This Court cannot sit on appeal against its own decision.

<u>ORDERS</u>

19. Accordingly, for the reasons set above, this Court makes the following orders:-

i. The Applicant's application dated 8th January 2020 is hereby dismissed.

ii. The Respondent and the Interested Party shall have the costs of the application.

Order accordingly.

DATED AND DELIVERED ON THIS 24TH DAY OF AUGUST, 2021.

EDWARD M. MURIITHI

<u>JUDGE</u>

<u>Appearances</u>

M/S Gichunge Muthuri & Co. Advocates for the Appellants

M/S Oundo, Muriuki & Co. Advocates for the 1st and 2nd Respondents

M/S Laichena, Mugambi & Ayieko Advocates, LLP, for the Interested Party.