REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL MISC. APPLICATION NO. 43 OF 2019

MUTUNGA MANZI.....1ST APPLICANT

BENSON KYALO MUTETI.....2ND APPLICANT

VERSUS

KILYUNGI MANZE MUSYOKI & SYOMBUA KILYUNGI

(Suing on their own behalf and as Administrators of the Estate of the late

PETER MUTUMWA KILYUNGI – DECEASED)..RESPONDENTS

R U L I N G

1. By a Notice of Motion dated **7th October, 2019,** filed herein on **8th October, 2019** the Applicants seek orders thus:

i. ……

ii. That this Honourable Court be pleased to review the Ruling entered against the Defendants/Applicants by this Honourable court on the **1st October, 2019.**

iii. That the error apparent on the face of record be rectified and the Defendants be ordered to pay **Kshs. 1,500,000/=** into the Plaintiffs' advocate account and **Kshs. 1,500,000/=** in Court.

iv. …….

v. That the costs of this application be in the cause.

2. The application is premised on grounds that: by a Ruling of the Court delivered on **1st October, 2019** the Applicants were required to deposit half the decretal amount into the Respondents' advocate's account and the other half in Court within 14 days; the entire Judgment in the Lower Court was for **Kshs. 5,034,575/=;** per the **Insurance Act, Cap 405.** The Insurance Company can only pay upto a maximum of **Kshs. 3,000,000/=;** it was an oversight of the advocate who prepared submissions to state that half the decretal amount can be deposited in Court and the other half into the Plaintiffs' advocate's account, yet the sum will be against company policy.

3. That the insured will not be in a position to raise such a huge amount of money in a short time and also because it was the Insurance Company that instructed them (lawyers) to act in the matter; and that a mistake of an advocate in preparing submissions should not be visited on a client.

4. The application is opposed by the Respondents. It is argued at the outset that the affidavit sworn in support of the application should be struck out because the deponent did not have the capacity to swear the affidavit and seek orders sought as no authorization had been given and adduced to that effect.

5. That the deponent swore the Supporting Affidavit presumably on the basis of the principle of subrogation which does not apply and it was not outrightly stated.

6. On the merits of the application, it is urged that the threshold for granting the orders sought have not been satisfied and the conduct of the

Applicants is unworthy of the grant of the discretionary orders sought.

7. That in the affidavit sworn by one **Kelvin Ngure,** in support of the Applicants' Notice of Motion, it was deposed that they were willing to remit half the decretal amount to the Respondents' advocate and the other half to be deposited in Court or in a joint earning account, wishes that the Ruling of **1st October, 2019** emulated and that if orders sought are not granted the Applicants will suffer irreparable damage.

8. The application was canvassed by way of written submissions.

9. The basis of the Applicants' argument is that per **Section 5(b)** of the **Insurance Act, Cap 405** the insurer is supposed to pay a claim on behalf of the insured with a maximum limit of **Kshs. Three Million.** In that regard they relied on the case of **Law Society of Kenya vs. Attorney General & 3 Others (2016) eKLR.**

10. On their part the Respondents called for striking out of the application that did not comply with **Order 19 Rule 4** of the **Civil Procedure Rules.** That the order was granted following the Applicants' proposal and they could not deviate from their pleadings contending that the proposal was a mistake of an advocate. That it was not sufficient to blame counsel on record without any explanation as to the action taken by the litigant. In this regard they relied on the case of **Rajesh Rughani vs. Fifty Investments Limited & Another (2016) eKLR.**

11. I have considered rival submissions of both Counsels for the Applicants and Respondents.

12. The application is for review sought pursuant to the provisions of **Order 45** of the **Civil Procedure Rules.**

13. **Order 45 Rule 1(1)(a)** and **(b)** of the **Civil Procedure Rules** provides thus:

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

14. It is alleged that there is an error on the face of record that requires rectification. In the case of **Nyamogo & Nyamogo vs. Kugo (2001) EA 174** the Court of Appeal stated 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 factors 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 has to be established by along 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."**

15. To determine whether there is any error apparent on the record, it is imperative to consider the background of the matter that led to the impugned order. The Applicants approached the Court seeking an order to appeal out of time simultaneously with an application for stay of execution. **Kelvin Ngure,** a Deputy Manager claims, at Directline Assurance Company Limited swore an affidavit in support of the application. At paragraph 8 of the affidavit he averred thus:

> **"That the Applicants are ready, able and willing to furnish such reasonable security as this Honourable Court may deem fit. The Applicants are ready and willing to deposit the whole decretal amount in Court or joint interest earning account."**

16. In the submissions of Applicants to the application it was stated that:

> **"The Applicants have temporary stay at the moment but are ready to do what is required of them and pay half the decretal amount in Court or in a joint interest earning account pending the hearing and determination of the intended appeal. The other half can be paid into the Plaintiff's Advocate's account."**

17. It is now alleged that stating so was an oversight on the part of the advocate. I have not seen an affidavit sworn by either of the alleged advocates or the deponent of the affidavit that supported the application expressing the alleged error that may have occurred.

18. At the point of swearing the affidavit, it was within the knowledge of the insurer that it was only entitled to pay a claim up to **Kshs. 3,000,000/=.** By making a proposal as they did, it must have been within their knowledge how the outstanding balance would be paid. No affidavit has been sworn by the insured stating that they will not be in a position to raise the difference within a short time as alleged.

19. From the foregoing, it is apparent that there was no error on the face of the record as envisaged in law. Therefore, the application lacks

merit. Accordingly, it is dismissed with costs to the Respondents.

20. It is so ordered.

Dated, Signed and **Delivered** at **Electronically** via **Skype** this **27th** day of **May, 2020.**

L. N. MUTENDE

JUDGE