REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 48 OF 2012

SALAD AWALE……………………………………………..PETITIONER

VERSUS

1. **THE PROVINCIAL POLICE OFFICER, COAST**
2. **THE OFFICER COMMANDING POLICE STATION,**

   CHANGAMWE
3. **THE OFFICER COMMANDING ADMINISTRATION**

   POLICE, CHANGAMWE
4. **THE DISTRICT COMMISSIONER, CHANGAMWE…RESPONDENTS**

R U L I N G

> **"In order to obtain a review an applicant has to show to the satisfaction of court that there has been discovery of new and important matter of evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made…to show that there was a mistake or error apparent on the face of the record or for any sufficient reason"**

1. Before the court for determination is the Notice of Motion by the petitioner dated 30/6/2016. That application seeks orders in the matter that:-

   "**2. THAT this Honorable Court be pleased to review,**

   vary, set aside and/or vacate the Orders and the entire Judgment delivered on the 31st of May 2016 pending interparties hearing and determination of this Review Application.

   3. THAT in the alternative to prayer 2, the Honourable Court be pleased to review, vary and/or stay the 60 day Notice to vacate Plot Number LR MN/VI/3666 that was issued against the Petitioner/Applicant in the Judgment delivered on the 31st of May 2016 pending hearing and determination of this Review Application".

2. The application is premised on grounds that the learned Judge gave to the parties a window to set

aside the judgment and that there have since occurred drastic developments by which the interested party, to whom the judgment adjudged the suit land to lawfully belong, has been given an alternative parcel of land and that the petitioner having been in occupation and user of the suit land for a long period of time, he had in fact carried out development thereupon which were not taken into account but should be taken into account.

3. It is added that the development leading to the allocation of an alternative land to the interested party were not within the knowledge of the petitioner and that if there is not granted an order for review the Applicant will be extremely aggrieved and exposed to undue hardship while the dispute had been settled amicably between the parties concerned. The application was supported by the affidavit of one SALAD AWALE which affidavit reiterated the matters stated on the grounds of the application and then exhibited some 10 documents as evidence to support the prayer for review. The documents included a letter dated 24/6/2016 by the CEO, national Land commission, minutes of the National Commission regarding a meeting held on 12/3/2014 and various correspondence from the various ministries of the Government of the Republic of Kenya all working towards acquisition and allocation of an alternative parcel of land to the Rwandan Government. In fact there is a letter dated 4/2/2015 by the Rwandan Minister for trade and industry accepting the grant and allocating of LR No. MN/VI/8017 and 8022 and stating that they were agreeable to the terms of the grant and had in fact made the requisite payment demanded by the letter by which the Rwandan Government discharged the Kenyan Government from its obligation to offer an alternative land being **CR. 65837 LR No. MN/VI/5132**. The Rwandese government had executed a surrender of parcel no. **MN/VI/3666/** in exchange thereof. There were in addition exhibited a letter of allotment and a letter from the National Land Commission dated 9/3/2016 stating that the process of allocating **LR No. MN/VI/5132** to the interested party had been completed and the process of regularization of the allocation of **LR No. MN/VI/3666** to the petitioner commenced after the same was approved.

4. After being served with the Replying affidavit and with the leave of the court, the petitioner filed a further affidavit by the same deponent. A reading of that further Affidavit leaves no doubt that the sole purpose and object was to reiterate the fact that the petition was contesting legality of eviction rather than the determination of the competing interests as to title and to answer to the Replying Affidavit filed by the interested party. The further affidavit exhibits among other a letter by the Attorney General of the Republic of Kenya in person dated15th September 2016, may be to underscore the seriousness with which the office viewed the matter, a letter by the National Land Commission dated 24th September 2016 indicating that the interested party has a duly registered title no. MN/VI/5132 being a resultant title after the amalgamation of MN/VI/8017 and 8022 following surrender by the petitioner and enclosing correspondence to show that the alternative land had indeed been allocated and registered in the interested parties favour, a letter by the National Land Commission stating that competing titles by other claimants had been revoked for having been irregularly issued, a memo by the Attorney to the Solicitor General Communicating the conditions that a petition was decided on matters not pleaded and prayers not sought and that the dispute was resolved during the pendency of the petition.

5. That letter in particular says there was need for Attorney General's office to write to the Ministry of Foreign Affairs to confirm the letter by the National Land Commission so that different agencies of the Government involved in the dispute including the Judiciary do not contradict each other. There is then yet another letter by the Attorney General himself Prof. Githu Muigai, dated 4/10/2016 requesting that the process of eviction of the petitioner be stayed pending determination of this application and to enable the Ministry of Foreign Affairs convene an urgent meeting before the 25/10/2016 when this matter was scheduled for mention so that the Government takes a common position on the dispute.

6. In the two affidavit one reads that while the matter was pending determination and even after, there was a process of seeking to settle the dispute by the relevant Governance Agencies spearheaded by the Ministry of Foreign Affairs, and to be facilitated by the Ministry of Land Housing and Urban Development and the National Land Commission with legal counsel from the office of the Attorney General and deliberately seeking to settle the dispute in a design that was apparently aimed at availing to the Rwandan Government, as a foreign friendly nation, an alternative land and letting petitioner retain the suit land on the basis that it had being on the kind for a long time, some letters say 20 years, and had

carried out massive investments and improvement over the same.

7. The respondent did oppose the application by the Grounds of opposition dated 14/7/2016 which essentially contended that the Application did not lie as an appeal had been filed to the Court of Appeal, being CACA No. 32 of 2016, that no pre-requisites of review had been met, that the applicant was abusing court, that the matter ought to have gone before the judge who delivered the judgment and lastly that the matter was touchy and sensitive as it involved the interest of a foreign friendly state and fellow member of East African Community and the Commonwealth as Kenya is. The respondent did not however file any affidavit to controvert the matters canvassed in the two affidavits or even attempt to explain some of the letters in the hands of the Attorney General himself who was the advocate on record for the respondent and the concerned Government Agencies all stating that were had been a settlement of the dispute.

8. The interested party on his part filed a Replying Affidavit by one Amb. James Kimonyo. That affidavit underscores the fact that **some** of the documents exhibited to show discovery of new matters were indeed uttered to court way back on 26/5/2015 before the trial court and that title no. MN/V1/5132 was indeed allotted and registered in favour of the interested party but the same was found to have been not clean as another party, stranger to these proceedings, Bamboo Twist Ltd did inform the interested party that they had a claim to the land and had actually two suits pending determination at the Environment and Land Court in Mombasa.

9. To the interested party therefore there were no new matter of evidence which could not be availed to the court with due diligence neither was there an error apparent on the face of the record or indeed any other legal ground for review.

Issues for determination

10. Having read the papers filed the submissions filed and authorities cited, there are only two issues presenting themselves to determination by the court:-

> **i) Is there an error apparent on the face of the record to merit the judgment dated 31/5/2016 being reviewed.**
>
> **ii) Is there disclosed a new and important matter or evidence, which after due exercise of diligence, was not within his knowledge or could not be produced by him at the time the decree was passed**.

11. I propose to deal with the two issues seriatim, noting that both are independent of each other and the failure or success on one ground does not necessary affect the other.

12. However, before then there is the preliminary question raised by the Interested Party that the petitioner/applicant having filed an appeal to the court of appeal has no right to bring an application for review. I understand the rule coded under section 80 and Order 45 Rule 1 to express abhorrence to the practice and prospects of litigating the same matter before the trial court and the court appealed to in a concurrent or consecutive manner. This is because, invariably, even though based on different considerations and paradigm, the end result of a review may very well take care of matter canvassed on appeal. I therefore interpret the law to only prohibit the concurrent or consecutive adjudication before two courts of the same matter. That would present a very untidy and messy prospects of getting two different and conflicting determinations; one on review and another on appeal.

13. Therefore the rule to me only prohibit concurrent and consecutive preference of the two processes and seeking both to be determined on the merits. However where one starts one process, say appeal and then considers it inappropriate, drops it by withdrawal and pursues another like in this case a review, the dictate of substantial justice as opposed to an adoration of procedural technicalities must be preferred. It would however be different a consideration if the appeal had been heard and determined on the merits.

14. In this matter it was contended by the petitioner/ Applicant and Conceded by the other parties, that the appeal to the Court of Appeal Court of Appeal, No. 32 of 2016 was withdrawn. If that be the case then there are no prospects of concurrent or consecutive pursuit of the two remedies with the potential to yield two conflicting outcomes and, in the interests of substantial justice enshrined under article 159 (2) d, I do therefore find and hold that the application for review is not bad merely because the petitioner had filed an appeal which was then withdrawn before being heard on the merits.

15. The second preliminary issue that I wish to address is the fact that even though the Respondent did file grounds of opposition, in its written submissions and even orally before court, the respondent did not oppose the application for review and urged the court to allow the same. I have wondered for myself what to take of the Respondent position in the matter and which of the two positions to adopt as taken by the Respondent. I have however found a guide in the decision by the Supreme Court in ***Nicholas Kiptoo Arab Korir Salat vs I.E.B.C & 7 Others [2014] eKLR*** to the effect that a party has a right to withdraw his claim filed before court at anytime. In coming to this conclusion, I consider the grounds of opposition to have been the shield the Respondent mounted against the application for review and that the respondent was at all times entitled to choose either to persist on its shield or just throw it away. Listening to the respondents, as represented by Mr. Githinji, and taking the position that the application for review was merited on the facts disclosed in the letters exchanged to show government position, I take it that the Respondents opted to withdraw their Grounds of opposition and supported the application for review.

16. In the cited case, the Supreme Court said:-

> **"A party's right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate"**.

17. That right to withdraw or just change positions by the Titular Head Of The Bar as leader of all practitioners is even made profound by the constitutional mandate of that office under Articles 156(4) to represent the National Government and appear as a friend of the court where the Government is not a party purposely to protect, promote and uphold the rule of law and defend public interests. With that mandate it must be appreciated that the office of the Attorney General had the task to balance the need to have justice done in the matter while seeking to protect public interest which include but not limited to serving the government's obligations to a friendly and reciprocating foreign nation, the need to protect a citizen's property rights and the need that the law be applied to all without discrimination.

18. In essence the Attorney General despite bring the advocate for the respondents, was at all times expected to answer to its obligation to court to assist the court meets its overriding objective. I hold that obligation stands beholden and a counsel who finds himself conflicted between clients instructions and the obligation to court must yield by meeting the obligation and disregarding the clients instructions provided the law dictate so and provided further it does not amount to committing an impropriety against the client.

19. Having so said, I shall proceed to determine the framed issues from the understanding that the application for review was not opposed by the Respondent but the Interested Party.

<u>Error apparent on the face of the record</u>

20. It is difficult to define with precision and exhaustion what would amount to an error apparent on the face of the record. It is therefore a matter in the discretion of the court to which an application for review is made premised on such ground to judicially make a determination depending on the facts of the case. However there must be made and has been made a distinction between an erroneous decision and an error manifesting itself on the face of the record. An erroneous decision, attracts an appeal while an error apparent of the face of the record must be that which stares at one in the face and which present no prospects of two opinions and does not invite an out drawn long process of reasoning. In **Draft and Develop Engineers Ltd vs National Water Conservation and Pipeline Corporation,** HCC No. 11 of 2011 cited with approval by the Court of Appeal in ***Anthony Gachara Ayub vs Francis Mahinda***

Thinwa [2014] eKLR the court said:-

> **"Where an error on a substantial point of law stares one on the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record is made out".**

21. In this matter, the petitioner contends that it only sought the court determination whether or not the action of the Respondents in seeking to evict it and demolish its development on the land was constitutional but the court then went out of its way to determine the question of who between the petitioner and interested party had a genuine title. I would, without finality, hold the view that the learned judge went beyond the dispute before the court. To that extend the petitioner/applicant hold the view that there was committed an error apparent on the face of the record.

22. To address this complaint, one needs to reproduce what rendition Judge Emukule made in the judgment dated 31/5/2016.

Paragraph 15: **"**The law on civil claims and so in constitutional petitions is

that the parties are bound by their pleadings, and the court cannot go outside the pleadings and introduce its own causes of action or issues for determination. In this Petition/case however, the Petitioner's claim cannot be determined without reference to the ownership of the suit property. The question of ownership has arisen both from the Replying Affidavit of the Fourth Respondent that the suit property did not belong to the Petitioner, and also from the Replying Affidavit on behalf of the interested party that the property belonged to the Interested Party. It also arises from the Petitioner's Further Affidavit (paragraphs 2 and 3 thereof) that the Petitioner is the registered proprietor of the suit property from 1st May, 1986, though the Grant was issued by the Commissioner of Lands on 24th November, 1997, and registered on 2nd December 1997. So the first issue is how is the registered owner of the suit property, the Petitioner or the Interested Party? The second issue would be whether the actions of the Respondents to evict the Petitioner was a breach of his constitutional rights. The other issues of costs and final orders will fall into these two primary issues.

Paragraph 17: This claim of ownership, though not pleaded, must be

weighed against the claim of the Interested Party. The Interested Party claims that it was allocated by the Government of the Republic of Kenya the suit land in reprociting with the Government of the Rwanda granting the Republic of Kenya similar land in Rwanda. All this happened in 1986, and a Grant known as CR Number 30827 was issued, but that the Grant was lost.

Paragraph 28: Having found that the suit land had been alienated to the

Interested Party and the court having in orders issued on 25th May, 2012, restrained the Petitioner from *inter alia* "…**carrying out any further developments thereon in any manner whatsoever pending the hearing of the application inter-partes or as the court may order"**, I find no ground for issuing any mandatory injunction or order of prohibition. Instead, I direct that the Petitioner should vacate the suit land within sixty (60) days from the date hereof". (emphasys provided)

23. It is apparent that the judge found, and appreciated the legal dictate that a court of law can only determine issues as pleaded by the parties and not otherwise and that issues of ownership and title had not been pleaded but proceeded to make the question of ownership and title the fulcrum upon which his decision rotated[1]. That to me would be an error that stares at the court on the face and which the court cannot ignore. However as was said in ***National Bank Ltd vs Ndungu Njau [1997] eKLR.***

> **"It will not be a sufficient ground for review that another judge could have reached a different view of the matter. Nor can it be a ground to review that the court proceeded on an incorrect exposition off the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review**".

24. Therefore, in this case even though I could have reached a different conclusion had I heard the petition, I am directed by stare decisis that I cannot now reach that decision on an application for review. That was and could have been a valid, if not formidable, ground of appeal to the court of Appeal which the petitioner opted not to pursue but it is not a valid ground before me in an application for review. That ground of the application therefore fails on the legal dictates of what constitute an error apparent on the face of the record as to merit review.

Was any new and important matter or evidence revealed?

25. That there were negotiations and concerted efforts by all concerned government departments and agencies to find a solution to this dispute pitting a friendly foreign state with a Kenyan citizen and concerning the title to a landed property is common place. What is in dispute is whether that was new and important matter that could not have been discovered and relied upon by the petitioner when the decision was made. Both sides; the petitioner and the interested party take two different and rival position.

26. To the petitioner, he has since had extensive consultation with various stakeholders including the National Land Commission who have investigated the matter where there have been new development and the petitioners allocation of the land has been regularized and the Government of Rwanda has been given an alternative parcel of land. The interested party on the other hand says that:-

> **"the said documents were uttered way before 26/5/2016 when the judgment was delivered...they do not constitute discovery of new and important matter or evidence…".**

27. The question the court must therefore determine is which of the correspondence and document relied on by the applicant are of material nature to constitute an important matter of evidence that could not have been in the knowledge of the petitioner and could not have been produced, due diligence notwithstanding.

28. I have in the endeavor to prepare this ruling perused the documents filed and the court record. That perusal has revealed to me that the petitioner filed written submissions on 01/11/2012 while those by the Respondent were lodged on 20/3/2013. Thereafter the matter was severally adjourned, for mention to enable parties negotiate but no settlement was reached, till 8/3/2016. It is true that the negotiations commence earlier than the date the last of the submissions was filed. In fact even the letter of allotment was issued on 10/12/2014 well before judgment but after the submissions were filed.

29. However, there were major development that took place well after the submissions were rendered and even after judgment. Some of those developments are revealed in the letters as follows:-

i) Letter dated 1/10/2015 by the Interested Party discharging the Government of the Republic of Kenya to offer alternative land to the interested party following those dated 4/2/2015, 9/2/2015 and 12/2/2015 all adverting to the offer for alternative land and that of 1/10/2015 indicating that it had executed a surrender of the suit parcel of land.

ii) Letter 24/6/2016 by the National Land Commission to the effect that the interested party has a

duly registered title to parcel no. MN/VI/5132 after surrender of MN/VI/3666 to the petitioner. The National Land Commission concludes by stating that each party, the petitioner and the interested party, be left to peacefully enjoy their respective titles in Miritini Mombasa.

iii) Letter dated 15/9/2016 by the Attorney General himself stating categorically that the dispute was settled during the pendency of the matter and calling for a meeting of the stakeholders to deliberate on the question of settlement of the dispute or otherwise reassure and secure the interests of the interested party. That letter must be seen to have been the result of request to the Attorney General and the Solicitor General to address the Ministry of Foreign Affairs.

iv) Letter by Chief Executive Officer National Land Commission dated 8/9/2016 confirming that all titles to third parties claiming the land offered to the interested party had been revoked and that the Chief Land Registrar, Ministry of Land had registered the parcel MN/VI/5132 as grant number CR. 65837 in favour of the interested party.

30. All the above letters and other not highlighted here convey one Message- that the interested party had surrendered its interests over MN/VI/3666 and had been registered at proprietor of MN/VI/5132.

31. These were facts revealed after the judgment and indeed long after the parties tendered written submissions and therefore are to this court important matters or evidence that could not have been availed to the court at the time it rendered its decision. It is thus a clear case for the court to accede to the applicants request for review. In the judgment sought to be reviewed the judge says at page 4 of 14:-

> **"on 28thapril 2016, Ms Abdi asked Mr Anayi to hold her brief on account that she was on maternity leave, and requested another two weeks, and that in any event, the interested party had been allocated another parcel of land and the suit land would remain with the petitioner. There was no evidence of such assertion."**

32. Clearly, as at the time the judge prepared the judgment the facts of allocation and registration in the interested party's favour had not been availed to the court. I also find that the conclusive letters identified above were all written post the judgment and could therefore not have been available to the applicant to produce to court.

33. In ***Narodhco Kenya Ltd vs Loria Michelle Civil Appeal No. 24 of 1989*** the court said:-

> **"There was nothing on record to disprove the defendants allegations to the effect that the said new facts came to its knowledge only after the decree".**

34. However even if that was not absolutely the case, which I hold it is, the power of the court to order review is unfettered and the court has the power to order review for any sufficient reason not necessary for error or mistake apparent on the face of the record or discovery of new and important matter or evidence. I may only add that the power for review is one of those residual powers of the court that it exercises so that injustice is not seen to prevail just because the court had delivered itself and time to appeal has lapsed or one was never pursued. That is the character to be manifested by a court of law, at all times – to do justice and leave no disclosed harm brought to its attention without being remedied.

35. The Court of Appeal in underscoring the court's jurisdiction said in

Wangeshi Kinuthia vs Mutahi Wakabiru CACA No. 80 of 1985:

> **"The current position would then, appear to be that the court has unfettered discretion to review its own decree or orders for any sufficient reason. In our view, it is incumbent upon the judges at the stage of having of an application for review such as was before the judge here, to inquire fully into the correctness of the facts. It would suffice if the court is satisfied that the facts brought up after the events are such as to merit a review of the judgment".**

36. I have said that this is a residual jurisdiction to avoid injustice from being perpetrated or just leaving a dispute unresolved. Here in this matter, there is evidence by the agencies created by the people of Kenya to talk on their behalf on matters land and its tenure together with the office of the Attorney General stating without equivocation that the interested party has been offered and had registered in its favour an alternative parcel of land. If the judgment in place now is left undisturbed, when the interested party has been compensated after surrendering its interests in the suit land, there is a quagmire and confusion which can only be seen as being created by the court vide that judgment. The confusion would be that on paper of the judgment, which is not the register of titles, the interested party is the registered owner of MN/VI/3666 when the official Registrar of Land show the petitioner to be the registered proprietor after its allocation was regularized. That is a situation the court must avoid at all costs. The court cannot insist on a judgment that would make a mockery of decisions of other constitutionally mandated institutions. It is not even a reason to refuse review because it is contended by the interested party that other parties have claimed the land allocated and registered in their favour. That claim has been investigated by the National Land Commission and such titles have been revoked as asserted by that constitutional body. Additionally, the matters are before a competent court of law which will get the time to determine it on the merits.

37. All in all, the court as a state organ is bound by the governments international commitments in the instruments creating such commitment because it an arm of the Government of the Republic of Kenya. It is equally bound to protect and promote the values of the constitution including the human rights and fundamental freedoms and the rule of law. I have in mind the right to property under Article 40 of the constitution which I consider would stand violated because the question of ownership and title to the land have not been properly litigated.

38. Lastly, if for any reason the letters adverted to above and which have formed the basis of this order for review could one day turn out to have been a ploy to mislead the court, then such agencies must be reminded of their duty if not to court but to the constitution to execute their mandate by integrity, transparency and accountability. I hold them accountable that they owe it to the Republic of Kenya that a foreign friendly state is not mistreated or just mislead into surrendering its property rights over MN/VI/3666 by trickery. It is the duty of the Government when represented by the Ministry of foreign affairs and international cooperation, the office of the Attorney General and the Ministry concerned with land registration and the National Land Commission to ensure that the interested party gets the land it was allocated in consideration of it surrendering MN/VI/3666. In coming to this conclusion and making these remarks it is not lost to me the Government of the Republic of Kenya is equipped with instruments and authority to ensure that court orders declaring interests and rights are complied with and fully executed.

Disposition & conclusion

39. The judgment delivered on 31/5/2016 by the court is reviewed to the extent that the order dismissing the petition dated 7/5/2012 is set aside and in its place substituted an order allowing it. In summary it is hereby ordered:-

> **a. A declaration is hereby made that the Respondents' decision to capriciously evict the Petitioner and demolish developments on Plot number, LR/MN/VI/3666 situate at Miritini Changamwe before a lawful acquisition and compensation is unconstitutional and in breach of Article 10, 27, 40, 45 and 47 of the Constitution of Kenya.**
>
> **b. A mandatory injunction is hereby issued mprohibiting and restraining the Respondents, their Seniors or juniors, from in any manner interfering, evicting, demolishing and or assisting any party in the eviction and or demolition of the Petitioner's developments on plot no. LR/MN/VI/3666 situate at Miritini Changamwe".**

40. Considering the national and public interests involved and disclosed,

I order that each party bear own costs.

Dated and delivered at Mombasa this 22nd day of March 2018.

P.J.O. OTIENO

JUDGE

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[1] **I.E.B.C vs Stephen M. Mule [2014] eKLR**