



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**HCCC NO. 580 OF 2015**

**EMPRO ELECTRICAL & MECHANICAL ENGINEERS LTD.....PLAINTIFF**

**VERSUS**

**FIRST COMMUNITY BANK.....1<sup>ST</sup> DEFENDANT**

**P.M. GACHIE T/A REGENT AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**KENYA PIPELINE COMPANY LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. On 22<sup>nd</sup> April, 2016 Justice C. Kariuki delivered a Ruling in which the Judge dismissed the Plaintiffs Amended Notice of Motion dated 18<sup>th</sup> December 2015 with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
2. In dismissing that Application the Judge found, in the main, that:-
  - (i) The loan from the 1<sup>st</sup> Defendant to the Plaintiff was not disputed.
  - (ii) There was default in repayment of the loan and the same was not denied.
  - (iii) The process of sale of the immovable properties was yet to commence via issuance of Statutory Notice and sale thereafter.
3. Through a Notice of Motion dated 13<sup>th</sup> May, 2016 I am invited to Review and set aside the said Ruling or Order of the Court. The Application is expressed as brought Under Order 45 Rules 1,2,3 and 5 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 80 of the Civil Procedure Act. That Application is resisted by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who filed Grounds of Opposition dated 24<sup>th</sup> May 2016.
4. Counsel for the litigating parties made oral arguments in support of their respective positions.
5. The Applicant has asked this Court to find that the Learned Judge committed an error of law on the face of the record as he failed to consider its side of the story.

6. The Applicant urged that as the 3<sup>rd</sup> Defendant (Kenya Pipeline Company) had not made payment in respect to its contract between it and the Plaintiff, there was no default on the part of the Plaintiff and the process of recovery was premature.

7. The decision in the case of INDEPENDENT ELECTRAL AND BOUNDARIES COMMISSION & ANOTHER VS. STEPHEN MUTINDA MULE & 3 OTHERS was cited to me for the often stated proposition that parties are bound by their pleadings. The relevance of this to the matter at hand was not shown to me and on my own was not readily able to see any.

8. Order 45 Rule 1 on Review of Decrees or Orders provides as follows;-

“(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 of 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”.

While a matter of law can give rise to an error on the face of the Record, such error must be so evident or manifest that it stares one in the face. An example that comes to mind is when a Court applies a repealed statute. A mere error or wrong view of the Law cannot be an error apparent on the face of the record (see for instance Nyamogo and Nyamogo Vs. Kogo[2001]EA 174).

9. This Court has in paragraph 2 of this decision highlighted the reasons given by the Learned Judge for reaching his decision. One of which is as follows;

*“From the record before the Court, the loan is not disputed and the default is not denied. The issues raised are problems of Plaintiff and Kenya Pipeline Contract and payment thereof. In relying on the case of KAVJU Supra, in such circumstances the exercise of The Statutory Power of Sale cannot be stopped”*

The learned Judge made a finding that the repayment of the loan was not conditional upon the Plaintiff receiving payment from Kenya Pipeline Company Limited. It has not been demonstrated by the Applicant that this finding or indeed any other finding of the learned Judge was so erroneous and unreasonable as to warrant Review. To be fair to the Judge, the Applicant has failed to demonstrate that the decision of the Judge was erroneous in any way. If the Plaintiff thinks that the Learned Judge either got it wrong or did not sufficiently deal with the matter, then it should have placed this before the Court of Appeal for its consideration. The solution was not to reargue the matter by way of a Review.

10. This Court is unable to find any merit in the Application of 13<sup>th</sup> May 2016 and it is hereby dismissed with costs.

**READ, DELIVERED AND DATED AT NAIROBI THIS 22<sup>nd</sup> DAY OF JULY, 2016.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Kiget for Applicant

Odero for Defendant

Alex court clerk