REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

ELC CIVIL CASE NO.47 OF 2010

TAMARIND MEADOWS LIMITED……..… PLAINTIFF

VERSUS

ATHI FARM DEVELOPMENT LIMITED AND 4 OTHERS....…… DEFENDANT

R U L I N G

1. The plaintiff filed a notice of motion application dated 24th July 2012, seeking orders that the ruling delivered and dated 6th July 2012 by **Asike Makhandia J.** (as he then was) dismissing the Plaintiff's notice of motion dated 1st November 2011 be reviewed and set aside and that costs be provided for.
2. The application is premised on the grounds that the defendant on record has never complied with section 32 of the Advocates Act. In dismissing the application the court held that, it would not be fair to start computing time on the basis of date on the practicing certificate. Rather it should be receipts of payments for the renewal of the annual practicing certificate that should be focused on. The Plaintiff should have provided those receipts yet it produced them as exhibits at page 9, 12 and 15. The Defendant never alleged to any moment that the receipts were not on record. There is therefore an error apparent on the face record that warrants the review of the ruling. The receipts show that the advocate never took out year 2003 practicing certificate and could not therefore have complied with section 32 of the Advocates Act. The 2004 practicing certificate was his first paid on 5th March 2004. The 2005 practicing certificate was paid on 1st April, 2005 and the 2006 was paid on 1st March, 2006.
3. In their response the respondents deponed a replying affidavit to the effect that: this court lacks the jurisdiction to review the ruling save for the formal order arising therefrom. The court found that **George Mugoye Mbeya** had not breached section 32 of the Advocates. There is no error apparent on the face of the record as the court found that **Mugoye** had been in a salaried employment for period in excess of twenty four months in compliance and fulfillment of the requirements of section 32 of the advocates Act contrary to the allegations by the plaintiff, this can only be disturbed in the event of appeal. The issues raised were conclusively dealt with by the judge even without direct reference to the receipts.
4. This application is an abuse of the court process for reasons that:- the applicant is guilty of inordinate delay in prosecuting the application which was filed back in 2012 but was not served to the defendant until they protested vide the annexed correspondences. The defendant was served for hearing date on 27th November but they were not herd and the matter was again listed for hearing on 24th January 2013 but it was not heard. On 24th January 2013, the matter came up for hearing but being land matter it was not heard. The Plaintiff never sought to inform the court about the pending application that ought to be disposed of before the main suit is set down for

hearing.

ISSUES FOR DETERMINATION

1. Whether this court has the jurisdiction to review the Ruling

2. If so, whether the judge erred by filing to consider the evidenced

dduced by the plaintiff in concluding on the matter at hand.

ANALYSIS OF LAW AND FACTS

5. The defendants have questioned the jurisdiction of this court in dealing with review of another Judge's Ruling. The argument is two limbed. In the first, they argue whilst referring to section 80 and Order 45 Rule 1 of the Civil Procedure Act and rules, that the law on review is restrictive as it only allows review of decree or order but not a ruling. They argue further that the applicant herein has neither exhibited nor extracted the formal order sought to be reviewed. Subsequently, the application is fatally defective and should be struck out.
6. On the second limb, they argue that the court lacks jurisdiction in that the review cannot apply in this matter because in their view the issues raised by the applicant are not appropriate for review but appeal. They aver that the judge considered all the arguments and evidence that was before him and he dismissed the Plaintiff's application dated 1st November, 2011. The Plaintiff has not placed any new material that was not before the learned judge when he considered the application.
7. Firstly, when jurisdiction is questioned by any party, the court is required to address the question first before it proceeds. The *locus classicus* on jurisdiction is the celebrated case of:

Owners of the Motor Vessel "Lillian S. -vs- Caltex"-

> ***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'***

8. The question arising here therefore is whether this court has the jurisdiction to review a Ruling by another judge especially where an order or decree has not been extracted or exhibited. In my view it is not requisite for the decree or order to be extracted, this is merely procedural and a ruling or judgment can therefore be reviewed. In the case **Jan Bolden Nielsen V Herman Philipus Steyn & 2 Others** ***[2013] eKLR*** the Court held that**:**

> ***"In my view the operative words in those provisions are 'may apply for a review of judgment to the court which passed the decree or made the order'. What is to be reviewed is not the decree or order but the judgment. In this regard, judgment will extend to include a ruling. I say so because, whilst Section 2 of the Civil Procedure Act has defined both the terms "decree" and "judgment", it has not done so for the terms "order" and "ruling". I have also looked at the provisions of Order 21 of the Civil Procedure Rules, the same also provides for "Judgment" and "decree" but has not done so for the terms "ruling" or "order". The conclusion I come to is that in using the term Judgment in Section 80 and Order 45 of the Rules, the same was meant to connote both a decision that finally determines the rights of the parties in a given proceeding. Of course a proceeding includes an application. My view is informed by the use of both the terms "decree" and "order" as the matters that should aggrieve the applicant thereby triggering the making of an application for review. Accordingly, I hold that Section 80 and Order 45 of the Act and rules, respectively permit a court, in an appropriate application, to review a judgment or ruling."***

9. In another case of **Julia Wagacii Njunge & another –vs- Housing Finance Company Limited & another** ***[2005] eKLR,*** the court held that:

"It is evident from the above rules that a party may apply for a review of judgment. There is no prerequisite that an order or decree must be extracted from such a judgment before an application for review can be made." In the case *of* **Kenya Airways Limited v Mwaniki Gichohi & Another H.C. (Milimani Commercial Courts) Civil Case No. 423 of 2002, the** ***issue as to whether a party could seek review of an order which was not extracted and annexed to the motion for review was not arbitrated upon by the court as the prayer was abandoned. The issue was therefore not conclusively determined and the case has therefore no binding precedence. I am not persuaded therefore that the order or decree must be extracted from the judgment before an application for review can be made."***

10. Looking at the law on Review, section 80 of the Civil Procedure Act provides that:

"Any person who considers himself aggrieved –

a. ***By 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.

11. Order 45, rule 1 of the Civil Procedure Rules provides that:

(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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

12. It is important that a court considers the application for review by bearing in mind the aforementioned provisions of Section 80 and Order 45 Rule 1 which must be satisfied. The defendant intimates that the review cannot apply in this matter because in their view the issues raised by the Applicant are not appropriate for review but appeal. They aver that the judge considered all the arguments and evidence that was before him and he dismissed the Plaintiff's application dated 1st November 2011. The plaintiff has not placed any new material that was not before the learned judge when he considered the application.
13. According to Order 45, one of the reasons that necessitate a review and one that the Plaintiff has relied on is error apparent on the face of record. The question therefore is what an error apparent

on the face record means? The Court of Appeal in the case of **Anthony Gachara Ayub v Francis Mahinda Thinwa [2014] eKLR** defined an **"error apparent of the face record" whilst referring to the case of *Draft and Develop Engineers Limited – v- National Water Conservation and Pipeline Corporation*, *Civil Case No. 11 of 2011***, where they stated that the High Court correctly stated thus:

> ***"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 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 a 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 apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal"***.

14. In this case, it is not a matter of a wrong view but an omission on the part of the court to consider the receipts. The learned judge argued that had the receipts proving payment to the Law Society of Kenya been attached, then he would have considered them but the same were not attached. This he stated on page 13 of the Ruling that:

> ***"In those circumstances, I do not think it would be fair to start computing time on the basis of the date of practising certificate. Rather it should be the receipts of the payment for the renewal of annual practicing certificate that should be focused on. The plaintiff should have provided those receipts."***

15. The application filed by the Plaintiffs indeed had the receipts attached together with copies of declaration and practicing certificate of the years in contention. This in my view was an omission on the part of the court and thus an error apparent on the face record, which does not require an argument to be advanced. It is an error on consideration of the evidence laid bare in a court of law.
16. If the review sought was on a point of error in application of the law or on conclusion of law, but in this case, it is an error on matter of fact that the receipts are said to have been in the file, but were not considered when considering the evidence. In the Court of Appeal case of: **National Bank of Kenya Limited vs. Ndungu Njau *(Civil Appeal No. 211 of 1996 (unreported)*** the Court held:

> ***"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. More 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 ground for review."***
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> ***"... the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it."***

17. In another case of **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR,** the Court of

Appeal held that:

> ***"The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 (now Order 45 in 2010 Civil Procedure Rules) relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the court is deemed to be alive to."***

18. The receipts in this case as stated above were matter of fact and not conclusion on the law. However, it is worth noting that in the application before ***Makhandia J.*** (as he then was), the Plaintiff produced the annexures TML-1 to TML-3, which it referred to as '**true copies of the declaration and practicing certificate...**' but it did not categorically point out that these annexures included the receipts though the same appear to have been attached. This might explain why the judge overlooked the same.

    See also the case of ***Tausi Assurance Company Limited vs. NIC Bank Limited [2014] eKLR (anexxed)***

19. On the issue of inordinate delay, it is common knowledge that land matters were delayed due to the directive by the Chief Justice that they be heard in an Environmental and Land Court, which was established in September 2014 in Machakos. This cannot be considered to be inordinate delay as argued by the defendant.
20. In conclusion, the court is of the opinion and thus rules that, the Judge may have overlooked the receipts as they were not annexures noted in the affidavit though they appear to have been on the record. No explanation has been offered as to why they were not annexures. The advocate canvassing the application for the Applicant did not exercise due diligence and thus ignored such an important aspect of the case. We cannot fault the learned judge in ignoring the same papers as they were not annexures and thus the aggrieved party ought to have appealed but not seek review. The learned Judge was entitled to ignore them if they were not annexures and that was his discretion which this court cannot review. In any case the Applicant has not shown the prejudice he is likely to suffer by refusal to grant orders sought.
21. The court thus makes the following orders.

1. Application dated 24th July 2012 is dismissed.
2. Costs in the cause.

Dated and **Delivered** at **Machakos,** this **27th** day of **February, 2015.**

CHARLES KARIUKI

JUDGE