



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC NO. E052 OF 2021**

**YOUNG CHUL CHOI.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**KENYA RAILWAYS CORPORATION.....DEFENDANT/RESPONDENT**

**RULING**

**INTRODUCTION**

1. On the 11<sup>th</sup> November 2021, this court rendered a Ruling pertaining to and/or concerning an Application dated the 11<sup>th</sup> February 2021, in respect of which the court proceeded to and granted an order of Temporary injunction against the Defendant, whether by itself, its agents, its servants from claiming under it from harassing, intimidating, trespassing and/or in any way interfering with the peaceful possession of all that Land known as L.R No. 1/1086(*Original number 1/210/2*) pending the hearing and determination of the suit.
2. Following the delivery of the said Ruling, the defendant herein proceeded to and filed another Application dated the 8<sup>th</sup> December 2021, and in respect of which the Defendant/Applicant now seeks to have the court Review and set aside the ruling and/or decision that was rendered on the 11<sup>th</sup> November 2021.
3. Pursuant to the Application dated 8<sup>th</sup> December 2021, the Defendant/Applicant contends that it is not the Defendant/Applicant who has trespassed onto and/or in possession of the suit property, either in the manner claimed by the Plaintiff or at all.
4. To the contrary, the Defendant/Applicant avers that the suit property is currently a scene of investigations being carried out and/or undertaken by the Directorate of Criminal Investigations, who is separate and distinct from the Defendant/Applicant.
5. On the other hand, the Defendant/applicant has further averred that the suit property is also under investigations by the Ethics and Anti-corruption Commission and therefore the Plaintiff/Respondent is not entitled to possession and/or occupation thereof.
6. Based on the foregoing, the Defendant/Applicant contends that basis has been laid to warrant the review and/or setting aside of the orders of Temporary, injunction that were rendered on the 11<sup>th</sup> November 2021.
7. On his part, the Plaintiff has opposed the subject Application vide Replying Affidavit sworn on the 8<sup>th</sup> February 2022 and in respect of which same has contended that the suit property was lawfully acquired and thereafter transferred and registered in his name.
8. On the other hand, the Plaintiff has also contended that the allegations that the suit property, is under Investigations by the Directorate of criminal investigations and the Ethics and Anti-Corruption Commission, were ventilated vide the Replying Affidavit which was filed in opposition to the Application for injunction. For clarity, the said Replying Affidavit was sworn on the 18<sup>th</sup> May 2021.
9. Notwithstanding the foregoing, the Plaintiff/Respondent has also averred that the issues being raised in the subject Application were issues which were alive in the previous Application for Temporary injunction and were deliberately considered and addressed by the court.
10. In a nutshell, the Plaintiff/Respondent has contended the subject Application, constitutes and/or amounts to the abuse of the Due process of the court.

**SUBMISSIONS BY THE PARTIES:**

11. The subject Application came up for hearing on the 14<sup>th</sup> February 2022, whereupon the court directed that same be canvassed and disposed of by way of Oral submissions.

12. Pursuant to and in line with the directions given by the court, the Parties herein tendered their oral submissions for and in opposition for the Application for Review.

13. On the part of the Defendant/Applicant, it was contended that the suit property is not under the possession and/or occupation by agents of the Defendant/Applicant, but that same is currently under occupation and possession by the Directorate of criminal investigations.

14. On the other hand, counsel for the Defendant/Applicant also submitted that the suit property is also under investigations by the Ethics and Anti-corruption Commission and because of the foregoing, there is need to review, vary and/or set aside the order of temporary injunction which was issued against the Defendant herein on the basis of interference with the suit property.

15. Besides, counsel further submitted that the court has jurisdiction to re-visit the issue of injunction and to review same. For clarity, counsel contended that the court would not be sitting on an Appeal on own decision.

16. Finally, counsel put emphasis on the decision in the case of **Republic v Advocates Disciplinary Tribunal Ex-parte Apollo Mboya (2019) Eklr** and in this regard, Counsel invited the Honourable Court to take note of same and to hold that the Defendant had established sufficient basis to warrant Review.

17. On her part, counsel for the Plaintiff/Respondent submitted that the issues being raised by the Defendant/Applicant were issues alluded to in the Replying Affidavit in opposition for the Application for temporary injunction and were therefore duly considered by the court during and in the course of the ruling rendered on the 11<sup>th</sup> November 2021.

18. Secondly, counsel for the Plaintiff submitted that the Defendant/Applicant had not indicated what new and important evidence has been discovered, which was not in the custody and/or possession of the Defendant/Applicant at the time of the delivery of the impugned ruling.

19. Finally, counsel for the Plaintiff/Respondent has submitted that the issues that are being raised herein were conspicuously raised in opposition to the Application for temporary injunction and that same were duly considered by the court.

20. Owing to the foregoing, counsel has therefore stated that the court has no jurisdiction to address and/or deal with the subject Application and that to do so, would amount to sitting on appeal in respect of own decision.

21. In support of the foregoing submissions, counsel for the Plaintiff/Respondent relied in the decision in the case of **Origo & Another v Mungai (2005) eKLR**. Besides, counsel also placed reliance in the decision in the case **Nyamogo & Nyamogo Advocates v Kogo (2001) eKLR**.

22. Based on the foregoing, counsel for the Plaintiff, implored the court to find and hold that the Application was misconceived, legally untenable and or otherwise an abuse of the Due process of the court.

### **ISSUES FOR DETERMINATION**

23. Having reviewed the Notice of Motion Application dated the 8<sup>th</sup> December 2021, the Affidavit in support thereof, as well as the Replying Affidavit sworn on 8<sup>th</sup> February 2022, and having similarly considered oral submissions that were made by the Parties, I am on the considered view that only two issues arise and are germane for determination;

*I. Whether the Court has Jurisdiction to entertain the subject Application.*

*II. Whether there has been Discovery of New and Important evidence, which was not within the knowledge of the Defendant/Applicant at the time of the delivery of the impugned Ruling.*

### **ANALYSIS AND DETERMINATION:**

#### **ISSUE NUMBER 1**

##### **Whether the Court has Jurisdiction to entertain the subject Application.**

24. On the 11<sup>th</sup> November 2021, this court delivered a ruling concerning the grant of an order of Temporary injunction, pertaining to and/or concerning the suit property.

25. Whilst considering the Application for temporary injunction, the court addressed it's mind to the various issues and/or allegations, which were contained in the Replying Affidavit filed by and/or on behalf of the Defendant/Applicant herein.

26. For clarity, part of the issues that were alluded to in the said Replying Affidavit included the allegation that the suit property is under the occupation of the Directorate of criminal investigations, who was said to be investigating suspected criminal activities, being carried out and/or undertaken within the suit premise.

27. On the other hand, the court also addressed its mind to another aspect which was contained and alluded to in the same Replying Affidavit and this was to the effect that the manner in which the suit property was acquired was also the subject of investigations by the Ethics and Anti-Corruption Commission.

28. Having reviewed all the aforesaid issues, the court came to the conclusion that the said State agencies, whose mandate involves investigations can be able to carry out their investigations and thereafter make their recommendations as pertains to prosecution and/or recovery proceedings, if any and where appropriate.

29. Nevertheless, having found and held that the Defendant herein was the one who had trespassed onto the suit property and indeed the one hiding behind the back of the Directorate of criminal investigations, the court proceeded to and granted the orders of temporary injunction.

30. Having granted the orders of temporary injunction, upon hearing both sides, the Defendant/Applicant is now back and same is seeking that the court be pleased to review the orders of temporary injunction, which was issued after due consideration of all the factual and evidential issues that were placed before the court.

31. Clearly, what the Defendant/Applicant is inviting the court to do is to sit on appeal on own decision and thereby have a second bite on the Issue.

32. In my humble view, having made a considered decision, I do not have reciptory jurisdiction to have a second bite on the same issue. To my mind such kind of an action and/or invitation, constitutes seating on appeal on own decision albeit disguised as review.

33. In support of the foregoing observation, I adopt the decision in the case of **Bellevue Development Company Ltd v Francis Gikonyo & 7 others [2018] eKLR**, where the court observed as hereunder;

*“I agree with the judicial policy that is variously set out by the authorities relied by the 2nd respondent-Peter Ng’ang’a Muiruri v Credit Bank Ltd & Anor, Court of Appeal Civil Appeal No. 203 of 2006 and Ventaglio International SA and Anor v. The Registrar of Companies and Anor, Nairobi HC Constitutional Petition No. 410 of 2012 (per Lenaola, J) that the High Court’s Constitutional Division, indeed any other Division, cannot supervise any other superior court of concurrent jurisdiction or superior jurisdiction. The supervisory jurisdiction is over subordinate courts under Article 165(6) of the Constitution. **I also consider that it is an abuse of the court process for a litigant to seek to obtain through a constitutional petition or indeed any to other court process before the same court of concurrent jurisdiction a different decision from one already rendered by the court in other proceedings over the same matter.** The aggrieved party must be content with the devices of appeal or review of the decision already delivered by the court but cannot be permitted to re-agitate the matter through a constitutional petition or other originating proceedings. See Beta Healthcare International Ltd v Commissioner of Customs, and 2 Others. Nairobi HC Petition No. 125 of 2010 (per Majanja, J.)”*

## **ISSUE NUMBER 2**

**Whether there has been Discovery of New and Important evidence, which was not within the knowledge of the Defendant/Applicant at the time of the delivery of the impugned Ruling.**

34. The Defendant/Applicant herein has filed the Application herein to review and same seeks to re-agitate the same issues which were already ventilated before the court.

35. Nevertheless, the Defendant/Applicant herein has not pointed out any mistake and/or error, which was committed by the court to warrant a review, predicated on the basis of error or mistake.

36. To the contrary, what I hear the Defendant as saying is; that despite the Affidavit Evidence and the allegations that it is not the Defendant who is in occupation over the suit property, but the Directorate of criminal investigations, the Court nevertheless proceeded and granted the orders of injunction.

37. In short, the Defendant/Applicant is simply saying that the court took an Erroneous position, notwithstanding the evidence that was placed before the court and therefore the exposition of the law on the part of the court is misleading and/or incorrect.

38. Based on the foregoing, the Defendant/Applicant now seeks to attract and/or accrue an Order of Review, so as to achieve the setting aside of a contentious decision which granted the temporary injunction.

39. In my humble view, an error in appreciation, understanding and/or exposition of the law, in the manner being canvased by the Defendant/Applicant, does not warrant a review. For clarity, the issues being ventilated ought to have formed the basis of an appeal and not otherwise.

40. In support of the foregoing observation, I invoke and rely in the holding in the case of **National Bank Of Kenya Limited v Ndungu Njau [1997] eKLR**, where the court of appeal stated as hereunder;

***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. 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.***

*In the instant case the matters in dispute had been fully canvassed before 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.*

**FINAL DISPOSITION:**

41. Having dealt with the issues under reference, I come to the conclusion that the subject Application, though disguised as an Application for Review, but same is calculated to invite the court to have a second bite on the issue of Injunction, by sitting on an Appeal on Own decision.

42. Nonetheless, the Application herein is misconceived, legally untenable and otherwise amounts to an abuse of the Due process of the court. Consequently, same is devoid of merits and is hereby dismissed.

43. Costs of the Application be and are hereby awarded to the Plaintiff/Respondent.

44. It is so Ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>th</sup> DAY OF FEBRUARY 2022.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

In the Presence of;

**June Nafula            Court Assistant**